TNDAGC

DUI NEWS

ISSUE 79
July 2022

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

INSIDE THIS ISSUE:

Legislative Update	1-3
Recent Decisions	4-5
Delta 8 - THC	6
Face Masks Unfair?	7
Upcoming Training	8
DUI Tracker Report	9
Vehicular Homicides	10-11
Speedy Prob. Violation	12

TN DISTRICT ATTORNEYS GENERAL CONFERENCE,

Guy R. Jones, Executive Director
226 Anne Dallas Dudley Blvd.,
Ste 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.

2022 LEGISLATIVE UPDATE

Every legislative session brings forth legislative changes impacting driver license eligibility, impaired driving, traffic safety, and law enforcement. This year was no different. Only some of the most impactful acts in those areas are noted here:

Public Chapter 694, which became effective on March 18, 2022, requires law enforcement officers "specifically assigned to the traffic division of a local law enforcement agency" to undergo training on "the proper testing procedures for use in investigating cases of suspected driving under the influence". Also, starting on January 1, 2023, the above training must be completed as part of the required annual in-service training to maintain law enforcement certification by the POST commission.

Public Chapter 710, effective on July 1, 2022, will permit a person convicted of speeding, to complete a driving course, within 90 days of that conviction, to have the points charged for that conviction removed. A maximum number of five (5) points for every one (1) speeding offense for each course completed and only once in a four-year period.

Public Chapter 788, deleted T.C.A. §55-12-129(g)(5) which prohibited an entry into an installment payment plan after a default under a previous payment plan. This permits those who default under a prior plan, another opportunity to keep their driver's license.

Public Chapter 792, effective July 1, 2022, increases the maximum fine to $200 for not stopping for a school bus stop sign.

Public Chapter 820, requires the Department of Safety to produce informational material on how to react to law enforcement when being pulled over, including how to recognize and verify law enforcement and how to proceed to a safer location if wanted.

Public Chapter 878, deletes the requirement that a minor makes satisfactory academic progress in order to obtain and keep a driver's license.

Public Chapter 910, known as Nicholas's Law, becomes effective July 1, 2022. Boating under the influence priors "must be treated the same as a prior for DUI, when determining if someone is a repeat or multiple offender when they are convicted of DUI per T.C.A. §55-10-401. Also, DUI priors "must be treated the same as a prior conviction for boating under the influence" when determining if someone is a repeat or multiple offender when he/she is convicted of BUI per T.C.A. §69-9-217(a). (Continued on page 2)

2022 LEGISLATIVE UPDATE (Continued)

Public Chapter 952, is the "Transparency in Sentencing For Victims Act," which requires the court to state the reason for the sentence and the estimated number of years and months the defendant will serve before becoming eligible for release.

Public Chapter 964, the act will take effect on July 1, 2022, while part will take effect on January 1, 2023. The act adds a requirement of ignition interlock for implied consent refusal and prior conviction within five years for Reckless Endangerment or DUI and the original offense charged was DUI. Provides that if a person is ordered to install and use an ignition interlock, then the restriction must be a condition of probation or supervision for the entire period of the restriction. It also changes "shall" to "must" in several parts of TCA 55-10-417 and it removes the 6 month period from subsection (k). Other changes include, a court must establish a specific calibration setting of .02% BAC at which the functioning interlock device will prevent the motor vehicle from being started. It changes the calculation of time for consecutive interlock usage period; prohibits the removing or causing removal of the device, failing to appear at ignition interlock device provider when required for calibration, monitoring, or inspection of the device, and tampering with or circumventing the device; requires that the person maintain the device in working order for the usage period; provides that failure to comply will result in the usage period starting over. It also specifies what a person shall not do in during the 120-day usage period; and provides what the person and provider must do at the end of usage period. Lastly, it provides a waiver for those with documented physical imitations.

Public Chapter 988, Known as "Truth in Sentencing," was passed without the signature of Governor Lee, and it applies to selected offenses committed on or after July 1, 2022, including Vehicular Homicide by Intoxication and Aggravated Vehicular Homicide. There will now be no release eligibility, and the offender will have to serve 100% of the sentence imposed by the court "undiminished by any sentence reduction credits the person may be eligible to earn." The earned credits "may be used for the purpose of increased privileges, reduced security classification, or any purpose other than the reduction of the sentence imposed by the court." This also applies to convictions for Murder, Esp. Agg. Kidnapping, Esp. Agg. Robbery, Carjacking and Esp. Agg. Burglary. In addition, other offenses such as Voluntary Manslaughter, Vehicular Homicide, Reckless Homicide, Criminally Negligent Homicide and other listed crimes will have no release eligibility, or credit reduction beyond 15%.

Public Chapter 992, establishes a third-party skills testing program to be administered by the TDOSHS. Entry-level drivers may now train with third-party providers that are approved by the Federal Motor Carrier Safety Admin. and listed on their registry. The FMCSA will also house drug and alcohol testing **records.**

Public Chapter 1022, Creates the new traffic offense of aggravated reckless driving. Effective July 1, 2022, it will be a Class A Misd. for a person to commit the offense of reckless driving as defined in § 55-10-205, **and** to intentionally or knowingly impedes traffic upon a public street, highway, alley, parking lot, or driveway, or on the premises of a shopping center, trailer park, apartment house complex, or any other premises accessible to motor vehicles that are generally frequented by the public at large. (Continued on page 3)

2022 LEGISLATIVE UPDATE (Continued)

Public Chapter 1056, known as "Ethan's, Hailey's and Bentley's Law," is perhaps the most widely discussed sentencing change for vehicular homicide by intoxication and aggravated vehicular homicide. This act provides that a person convicted of either of the above offenses, wherein a deceased victim is the parent of a minor child, they must pay restitution in the form of **child maintenance** to each of the victim's children until each child reaches eighteen (18) years of age and has graduated from high school, or the class of which the child is a member, when the child reached eighteen (18) years of age, has graduated from high school. Other provisions of this act include a list of non-exclusive factors the court can use to make the determination as to the amount that is reasonable and necessary for the child maintenance, how the payments are made and remitted, and the impact of civil actions (before and after sentencing) on the amount of child maintenance ordered at sentencing. It takes effect on May 25, 2022 and applies to offenses committed on or after that date.

Public Chapter 1084, creates an "Electronic Monitoring Indigency Fund Task Force" to study and make recommendations on the future of the electronic monitoring indigency fund. The first meeting shall occur no later than June 15, 2022 and any findings and recommendations shall be reported no later than September 30, 2022.

Public Chapter 1134, requires the use of ignition interlock devices as a condition of bail to be imposed on any defendant charged with DUI or related offenses and the offense involved the use of alcohol, unless the court determines that such a requirement would not be in the best interest of justice or public safety; if the offense resulted in a collision with property damage; a minor was present in the vehicle at the time; the driver's license was previously suspended for an implied consent violation; or the defendant had certain prior convictions (i.e., reckless driving, reckless endangerment, driving under the influence, vehicular assault, aggravated vehicular assault, vehicular homicide, or aggravated vehicular homicide), then an ignition interlock device shall be required as a condition of bail. The act provides that the defendant is to demonstrate compliance with the conditions within ten (10) days of his/her release from jail. Further, if the court doesn't require the ignition interlock device, then the court has to include in its order written findings on why the requirement is not in the best interest of justice or public safety. Of course, the electronic monitoring indigency fund can be utilized for those who are indigent.

Public Chapter 1135, creates a new Schedule II drug and subsection under TCA 39-17-408. Tianeptine or any salt sulphate, free acid; or any compound, derivative, precursor, or other preparation thereof (substantially chemically equivalent). Takes effect July 1, 2022. This drug can be found in over-the-counter products like ZaZa Red and it can be impairing for drivers involved in DUI cases.

Cops In Court - THP Cadets

The DUI Training Staff presented the Cops in Court seminar to the latest class of THP Cadets on June 8, 2022. Future Cops in Court seminars will be conducted throughout Tennessee. Please look for an opportunity near you.

RECENT DECISIONS

State v. Amanda L. Moore, 2022 Tenn. Crim. App. LEXIS 164 (Blood obtained for medical purposes)

Ms. Moore was observed driving in and out of her lane of travel on November 25, 2016. Her driving was so erratic, many witnesses called 911. After entering a "confusing" intersection, Ms. Moore drove into oncoming traffic for two to three miles. Eventually, Ms. Moore struck a Dodge Durango "head-on," injuring two victims. Officer Tenpenny of the Westmoreland Police Department arrived on scene and was able to attend to Ms. Moore. Officer Tenpenny is also a paramedic. A smell of vomit and a faint distinct odor of an alcoholic beverage was noticed. A blood draw was conducted by the hospital and Ms. Moore's BAC was .176%. A judicial subpoena was obtained for Ms. Moore's medical records. A jury convicted Ms. Moore of two counts of vehicular assault, One count of DUI and one count of Reckless Endangerment. She was sentenced to four years to serve.

On appeal, Ms. Moore complained about the blood sample drawn by the hospital, being used against her in a criminal trial. The Court of Criminal Appeals affirmed that blood samples obtained for medical purposes are not taken as a result of state action and therefore, are not subject to the exclusionary rule. See *State v. Sanders*, 452 S.W.3d 300, 311 (Tenn. 2014); *State v. John William McCoy,* 1991 Tenn. Crim. App. LEXIS 196. Also, there is no right to an additional sample of blood per TCA 55-10-408(e) unless the sample was obtained at the request of a law enforcement officer, per TCA 55-10-406(e)(1)(A). The judgments of the court were affirmed.

State v. Sean Matthew Houser, 2022 Tenn. Crim. App. LEXIS 181 (Certified Questions)

Mr. Houser was approached on August 10, 2019 after his vehicle hit a curb, causing a flat rear tire. Trooper Reed, of the THP, smelled the odor of an intoxicating beverage and he observed multiple "clues" of impairment during the performance of SFSTs. An open container of alcohol was found in a cooler on the passenger-side floorboard. After Trooper Reed read the implied consent form, Mr. Houser consented to a test, signing the implied consent form. After the trial court denied Mr. Houser's motion to suppress, he pled guilty to DUI per se, and he reserved two certified questions of law regarding the motion to suppress and whether his consent was both knowing and voluntary.

Our Supreme Court explicitly provided prerequisites for reserving a certified question of law under Rule 37(b)(2) as stated in *State v. Preston,* 759 S.W.2d 647, 650 (Tenn. 1988). A failure to do so will result in the CCA's dismissal of the appeal. See *State v. Robert Glenn Hasaflook,* 2013 Tenn. Crim. App. LEXIS 772 (citing *State v. Troy Lynn Woodlee,* 2010 Tenn. Crim. App. LEXIS 9). The CCA found that Mr. Houser's certified questions were too broad and did not clearly identify the "scope and limits of the legal issue." See *State v. Long,* 159 S.W.3d 885, 887 (Tenn. Crim. App. 2004). At the motion to suppress, defense counsel argued that Mr. Houser did not specifically consent to a blood test because he did not like needles, but the certified question just generally objected to the denial of the motion to suppress and a general finding that the consent was knowing and voluntary. The appeal was dismissed due to the overly-broad certified questions.

State v. Jacady Dwight Terry, 2022 Tenn. Crim. App. LEXIS 194 (MVHO)

On April 20, 2017, Officer James Wall of the Monroe County Sheriff's Office observed Mr. Terry fail to stop at two different stop signs while traveling on Countryside Lane in Monroe County, TN. There were two passengers in the vehicle, including the owner of the vehicle. Mr. Terry was determined to not have a valid driver's license, but since the passenger/owner did, she was allowed to drive the vehicle away. While later investigating Mr. Terry's driving status, Officer Wall determined that Mr. Terry was a MVHO per TCA 55-10-603. Mr. Terry was later indicted for violating the MVHO Act. Mr. Terry was convicted by a jury, of a violation of MVHO and he was sentenced on June 17, 2019, to five years as a Range III, persistent offender.

After, denial of a motion for new trial, Mr. Terry appealed the judgments... (Continued on page 5)

RECENT DECISIONS (Continued)

of the trial court. The Court of Criminal Appeals determined that a defendant cannot collaterally attack a MVHO order. *See Davis v. State,* 793 S.W.2d 650, 651 (Tenn. Crim. App. 1990); *Everhart v. State,* 563 S.W.2d 795, 797-98 (Tenn. Crim. App. 1978). The CCA also ruled that a MVHO violation does not impute a mental state and therefore, is a strict liability offense. (The CCA pointed out that DUI is also a strict liability offense. *See State v. Lawrence,* 849 S.W.2d 650, 761, 765-66 (Tenn. 1993); and *State v. Turner, 9*53 S.W.2d 213, 215-16 (Tenn. Crim. App. 1996)). Finally, the CCA determined that the "Criminal Savings Statute" per TCA 39-11-112 did not apply because Mr. Terry was convicted and sentenced before repeal of the MVHO Act became effective on July 1, 2019. *State v. Keese,* 591 S.W.3d 75, 84 (Tenn. 2019) states, "a criminal defendant, whose sentence is final prior to the effective date, cannot benefit from a statutory amendment that provides for a lesser punishment." The judgements of the trial court were affirmed.

State v. Vincent Edward Crowson, Jr., 2022 Tenn. Crim. App. LEXIS 242 (Ferguson/Miranda)

On February 18, 2018, THP Trooper Langley pulled over Mr. Crowson, after confirming he was driving a stolen vehicle. Mr. Crowson was under the influence of heroin and he had a pistol on him at the time. Mr. Crowson filed a *Ferguson* motion, because the THP dashboard video from the pursuit, before the traffic stop, had been deleted. (*State v. Ferguson,* 2 S.W.3d 912, 915 (Tenn. 1999)) When the video was initially saved to the server, it was "broken up into three different sections," based on the size of the media file. Two of the video files were corrupted and could not be recovered. Mr. Crowson also filed motions to suppress. After a bench trial, Mr. Crowson was convicted of DUI 2nd offense, DOSL 2nd, possession of a weapon while under the influence, and felon in possession of a firearm. He was sentenced to 20-years to serve in TDOC.

The Court of Criminal Appeals first addressed the *Ferguson* issue. The CCA determined that the State had a duty to preserve the dashcam video and they took the necessary steps to do so, but due to reasons beyond the State's control, portions of the video were corrupted. Since Mr. Crowson failed to show the State failed in its duty to preserve the video, failed to demonstrate negligence on behalf of the State, and failed to adequately explain the significance of the lost video, the defendant is not entitled to relief on this issue.

The CCA next addressed an issue regarding Miranda. Miranda, 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. Dailey,* 273 S.W.3d 94, 102 (Tenn. 2009)(quoting *Miranda*, 384 U.S. at 478). A non-exhaustive list of factors to be used in determining custody can be found in *State v. Anderson,* 937 S.W.2d 851, 855 (Tenn. 1996). "The defendant bears the initial burden of proving custody for the purposes of *Miranda* before the burden shifts to the State to prove the voluntariness of the statement." *State v. Moran*, 621 S.W.3d 249, 258 (Tenn. Crim. App. 2020). Mr. Crowson's main objection was that he made the statements while sitting in the back of the Trooper's vehicle. "Courts have repeatedly held that an officer may handcuff a suspect or place him in a police car for safety purposes, and that [a]n officer may ask questions that are necessary to ensure the officer's safety or that of the public without violating the *Miranda* rights of a person in custody." *See United States v. Wright*, 220 Fed. Appx. 417, 420 (6th Cir. 2007) (noting that merely placing a suspect in the back of a police car does not constitute custody for the purposes of Miranda); *State v. Yokley*, 2011 Tenn. Crim. App. LEXIS 357 (Tenn. Crim. App. May 20, 2011). Mr. Crowson failed to meet his burden to show that he was in custody. Therefore, his statements made during the traffic stop, of using heroin while driving, were allowed to be used against him.

Mr. Crowson also appealed the sufficiency of the evidence. Trooper Langley testified that he observed many signs of intoxication consistent with heroin use and Mr. Crowson admitted to using heroin while driving. "This court has previously held that sufficient evidence existed for a DUI conviction when the trial court only relied on the arresting officer's testimony that the defendant was driving under the influence." *State v. Simpson*, Tenn. Crim. App. LEXIS 372, (Tenn. Crim. App. Aug. 9, 2021). From these facts, a rational trier of fact could have found the defendant guilty. The judgments of the trial court were affirmed.

DELTA-8 THC (AN FDA UPDATE)

Imagine this scenario, you stop at your local gas station-convenience store, to purchase gasoline (painful with gas prices so high) and you look over and see Delta-8 products displayed near the register. There are a variety of items to choose from. There are gummies, tinctures, vapes, etc. sitting there for sale. Now ask yourself, what do you know about Delta-8 and the products containing it? If you are like most people, not much. To remedy this gap in information, the Food and Drug Administration (FDA) has released a consumer update entitled "5 Things to Know about Delta-8 Tetrahydrocannabinol – Delta-8 THC."

First and foremost, the update points out that delta-8 products "have not been evaluated or approved by the FDA for safe use." As such, these products do not have procedures in place that would minimize variability in formulation and labeling. What does that mean? Well that means that you may get one formula packaged as product A one time, and a different formula packaged as product A the next time, with no quality control to assure that it contains what the package says it does, regarding THC content. Also, the claims made by the manufacturers of the products as to the therapeutic benefits, have not been substantiated by independent, scientific research. Marketing claims boast of health benefits for which there is no evidence, only statements, making use of the products a "crap shoot" and potentially dangerous.

Have you heard of some "adverse" effects of these products? Well, the FDA outlines 104 adverse event reports and 2,362 calls to poison control centers about delta-8 product exposure, both intentional and unintentional. The adverse events experienced included: vomiting, hallucinations, tremor, anxiety, dizziness, confusion, and loss of consciousness. Some events required hospital admission. In one pediatric case, the outcome noted in the FDA update, was death.

What about the effects of Delta-8 THC? Just like Delta-9 THC, Delta-8 THC has psychoactive and intoxicating effects. While people are looking for alternatives to traditional medicine or similar effects to what is legalized in one part of the country, but not here, they are using Delta-8 as a substitute, which is not very predictable for many of the reasons stated above. The result of this substitute use is introduction of higher levels of Delta-8 THC than they would be exposed to in the "natural" (raw) hemp product. This exposure, as well as exposure to naïve users, is a high that the user may not anticipate, making the user dangerous to himself/herself and others, especially when driving vehicles or while operating machinery.

The methods of Delta-8 THC extraction from hemp vary and conversion of other natural cannabinoids in hemp to Delta-8 THC also vary. Because of this, the use of Delta-8 THC products may also mean introduction of unknown substances into the body. These substances could potentially cause health risks. Since the substances are unknown, the adverse risks of these substances, both short and long term, are also unknown.

Finally, Delta-8 THC products, due to all the things listed above, need to be kept away from children and pets. Unfortunately, a number of these products are marketed in a way that entices or encourages use by children. Flavored gummies, food products, and sweets are just some of the items that children and pets are susceptible to consuming without much thought. With no age requirements to purchase, there are no limits to how and where children and pets may get access to these products, without adult intervention.

So, the next time you go to the gas station or convenience store, look around and take notice of those Delta-8 THC products. The products you see may very well be the products putting your friends and loved ones at risk for injury, sickness or worse.

STATE V. DANIELS (ARE FACE MASKS UNFAIR?)

The Court of Criminal Appeals has recently issued a ruling regarding the constitutionality of certain Covid-19 courtroom restrictions, as required during the pandemic, and their affect on a defendant's right to a fair trial. In *State v. Neal Scott Daniels,* 2022 Tenn. Crim. App. LEXIS 300, Mr. Daniels complained that his right to "confrontation" was denied when he was required to wear a face mask during trial; his right to the "effective assistance of counsel" was denied when his trial counsel and the jurors were required to wear face masks during the trial; and a denial of his motion to continue the trial, due to the Covid-19 restrictions, prevented his right to a fair trial. The underlying charges involved DUI, DUI per se, simple possession of marijuana, driving on a revoked driver's license, failure to provide evidence of financial responsibility, DUI 4th offense and DUI per se 4th offense.

On May 14, 2017, Mr. Daniels crashed his motorcycle into a guardrail in Knox County, Tennessee. Arriving deputies smelled a heavy smell of alcohol and burnt marijuana coming from the injured Mr. Daniels. A bag containing marijuana was found in a pocket, on his cargo pants. "Multiple" unopened cans of beer were found in compartments on his motorcycle. The marijuana was sealed into an envelope and placed in a secured narcotics locker, in the sally port at the City County Building. The envelope was later transported to TBI for testing. A search warrant was obtained for a blood sample, which indicated a BAC of 0.117%. Mr. Daniels was charged by indictment, on April 10, 2018, and a series of trial dates, through no fault of the parties, were set and reset. On March 13, 2020, the Tennessee Supreme Court suspended all court proceedings, including jury trials. When jury trials were recommenced, the TN Supreme Court required face coverings and social distancing. On July 14, 2020, Mr. Daniels indicated that a motion to continue, to preserve Constitutional issues and concerns with the pandemic, would be filed. The trial court indicated that a plexiglass barrier would be installed so that witnesses would not be required to wear masks while testifying. "Everybody else will be required to wear a mask." Mr. Daniels filed his motion to continue, due to the restrictions preventing his right to confrontation, preventing his right to have his assistance of counsel to assess and build a rapport with masked jurors, and the overall fear regarding everyone's health. The motion was denied., The trial court stated that the crucial government function of jury trials could not be indefinitely postponed. Mr. Daniels was convicted of all counts, after a jury trial, and he appealed .

The CCA stated, "[T]he decision to deny a continuance will be reversed by this Court "only if it appears that the trial court abused its discretion to the prejudice of the defendant." *State v. Odom*, 137 S.W.3d 572, 589 (citing *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995)). "An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." *Hines*, 919 S.W.2d at 579 (citing *State v. Wooden*, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983)). Mr. Daniels never showed an inability to prepare a defense or an unavailability of witnesses, but merely an inability for his counsel to be more engaged with the jurors and an inability of the witnesses being forced to view the defendant's face. Mr. Daniels was not able to present any evidence of actual prejudice or that the result would have been any different. Therefore, the denial of the continuance, by the court, did not deny Mr. Daniels a fair trial.

Although the witnesses testified maskless, while behind a plexiglass barrier, Mr. Daniels complained that requiring him to wear a mask, prevented his right to face and confront his accusers (face to face). "The Confrontation Clause is designed 'to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *State v. McCoy*, 459 S.W.3d 1, 13 (Tenn. 2014). However, the "right to confrontation is not absolute and must occasionally give way to considerations of public policy and necessities of the case." *State v. Rimmer,* 623 S.W.3d 235, 282 (Tenn. 2020). Merely requiring the defendant to cover his nose and mouth during a pandemic does not violate the Confrontation Clause. Likewise, merely requiring his counsel and the jurors to wear face masks did not violate the defendant's effective assistance of counsel. Mr. Daniels provided no authorities that the requirement of a face covering, vastly altered the trial or the effectiveness of his counsel. All other appeals of Mr. Daniels were also denied and the judgements of the trial court were affirmed.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

DUI Prosecutor's Academy - July 26-28, 2022, Franklin, TN
This three-day trial advocacy course is designed to develop the courtroom skills of DUI prosecutors in all aspects of prosecuting impaired driving cases. The agenda includes a brief overview of the alcohol and drug toxicology involved in DUI cases; how to understand and present impairment evidence; and, how to develop and improve courtroom skills and strategies.

Tennessee Lifesavers Conference– August 17-19, 2022 Franklin, TN
The Tennessee Highway Safety Office is presenting the TN Lifesavers Conference at the Marriott in Franklin. There will be many classes on Impaired Driving, including Pre-Conference DRE in-service classes.

Cops in Court - October 19, 2022, Nashville, TN (THP Cadets)
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

DA Conference: DUI Breakout - October 25-28, 2022, Murfreesboro, TN
Every year our DUI breakout session provides approximately three hours of education and training, covering current DUI topics and legal updates. This year we will feature classes on 2022 legal updates and common DUI issues that are faced by our DUI prosecutors.

Victims of DUI - December TBA, 2022 Nashville, TN
Every year the Traffic Safety Resource Prosecutors provide a day of training, for DUI prosecutors and victim/ witness coordinators that corresponds with MADD's "Night of Remembrance" activities. These classes emphasize addressing the special needs of the victims of impaired drivers.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
August 1-2, 2022, Jacksboro, TN
September 12-13, 2022, Murfreesboro, TN

DUI Detection & Standardized Field Sobriety Testing
August 29-31, 2022, Jonesborough, TN
September 12-15, 2022, Springfield, TN (Spanish Emphasis)
September 12-16, 2022, Knoxville, TN (Instructor Class)
September 19-21, 2022, Lafayette, TN

Drug Recognition Expert School (DRE)
July 18, 2022, Algood, TN (In-Service)
July 19, 2022, Columbia, TN (In-Service)
July 20, 2022, Murfreesboro, TN (In-Service)
July 22, 2022, Jackson, TN (In-Service)
July 28, 2022, Hixson, TN (In-Service)
August 1-11, 2022, Knoxville, TN
August 17, 2022, Franklin, TN (Pre-Conference)
September 26 - October 6, 2022, Jackson, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from April 1, 2022, through June 30, 2022, and reflect the DUI Tracker conviction report for all judicial districts in the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from April 1, 2022, through June 30, 2022, since the last quarter were 1,849. This number is up from the previous quarter by 1,556 cases. DUI cases have dramatically increased the last few years and due to past Covid shutdowns, a large number of cases are now being prosecuted. The total number of guilty dispositions during this same period of April 1, 2022 through June 30, 2022 were 1,374. The total number of dismissed cases were 123. Across the State of Tennessee, this equates to 74.31% of all arrests for DUI made, were actually convicted as charged. This percentage is slightly higher than the last quarter, ending on March 31, 2022. Only 10.17% of the DUI cases during this current quarter were dismissed or nolle prossed. Also, during this same period of time, only 230 of the total DUI cases disposed of, were to different or lesser charges. Therefore, only 12.44% of the total cases were disposed of to a charge other than the original charge.

Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from April 1, 2022 through June 30, 2022. During this period, there were a total of 333 fatalities, involving 307 crashes, which is an increase from the previous quarter. Out of the total of 333 fatalities, 62 fatalities involved the presence of alcohol, signifying that 18.6% of all fatalities this quarter had some involvement with alcohol. Further, there were a total of 35 fatalities involving the presence of drugs, signifying that 10.5% of all fatalities this quarter involved some form of drugs. Therefore, over 29% of all fatalities this quarter involved some form of alcohol and/or drug involvement.

The year-to-date total number of fatalities on Tennessee roads and highways is 613. This is down by 37 from the 650 fatalities incurred last year at this same time. This decrease in alcohol and drug related fatalities is finally headed in the right direction. We must stop the pointless death and injuries caused by the preventable crime of impaired driving.

Cops in Court - Knoxville

The DUI Training Department held a Cops in Court seminar at the Knox County Sheriff's Training Center on June 3, 2022. Officers from all over Eastern Tennessee were able to discover how to better Communicate, while testifying in court and how to organize their investigations and their reports to achieve a judicious outcome. Even if an investigation is properly conducted, the evidence needs to be properly conveyed to the judge, jury and other court litigants, for the case to be fairly and accurately adjudicated.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Noah Cassidy Higgins, 2022 Tenn. Crim. App. LEXIS 186

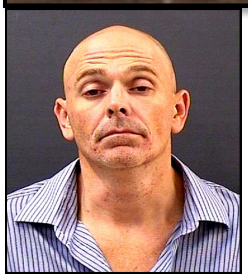
62 year-old Kelly Duggan was riding her bicycle within a designated bike lane on Crockett Road, in Brentwood, TN, when she was struck from behind by a Nissan Maxima being driven by 22 year-old Noah Higgins. Mrs. Duggan died at the scene, from her injuries. This crash occurred around dusk and there was moisture on the roadway. Crockett Road is a two-lane, undulating road, with a 35 mile-per-hour speed limit. Mr. Higgins told Officer Phelan, at the scene, that he had disengaged his traction control on the vehicle because, 'he like[d] to hear the wheels spin a little." Another officer on the scene heard Mr. Higgins say, "he wanted to open [the car] up and hear the exhaust roar." A downloaded search of the "event data recorder" indicated that Mr. Higgin's Maxima was traveling at 87 miles per hour, seconds before the crash. The data recorder also indicated that the defendant overcorrected the steering wheel and the car vaulted into the air and barrel rolled, crushing Kelly Duggan.

Mr. Higgins pled guilty to Vehicular Homicide by Recklessness, a Class C felony, with a sentencing hearing to determine the manner of service. Although Mr. Higgins had no prior criminal history, he had many speeding tickets and a recent crash on his driving history. He testified at the sentencing hearing that he had disabled his car's traction control because it "could help with fuel [economy.]" The court did not find this statement credible. The trial court denied judicial diversion and sentenced Mr., Higgins to five years to serve in TDOC. The defendant appealed.

When deciding the appropriateness of diversion, the trial court must weigh the relevant common-law factors found in *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998), and *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996), against each other and place an explanation of its ruling on the record. *See State v. King,* 432 S.W.3d 316, 326 (Tenn. 2014). The trial court, in this case, considered all of the *Parker* and *Electroplating* factors, identifying the specific factors it felt relevant and placed on the record its reasons for denying judicial diversion. The Court of Criminal Appeals upheld the denial of judicial diversion.

The CCA next looked at the trial court's denial of probation and its use of enhancing and mitigating factors. The court's review is under an abuse of discretion standard, accompanied by a presumption of reasonableness. *State v. Caudle,* 388 S.W.3d 273, 278-79 (Tenn. 2012). If a court denies probation solely based upon the seriousness of the offense, the trial court must find that the circumstances of the offense, "as committed, must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring probation." *See, State v. Hartley*, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991). However, the trial court also found the defendant not amenable for correction. The CCA affirmed the denial of probation and the reasonableness of the trial court's sentence. The judgments of the trial court were affirmed. (Continue on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW



Christopher C. Solomon v. State, 2022 Tenn. Crim. App. LEXIS 220

On October 15, 2016, at around 1:30 pm, Chris Solomon was driving his silver Lexis, 30-40 mph, down a residential street when he struck two pedestrians, killing Bobby Pyles and severely injuring Dineen Cottrell. After striking the two, who were walking home from a nearby yard sale, the defendant continued to drive down the street until he eventually passed out. During a police interview, Mr. Solomon continued to fall asleep, even falling out of his chair at one point. The toxicology report indicated that the defendant had Xanax, Adderall and benzoylecgonine (an active metabolite of cocaine) in his system. Mr. Solomon pled guilty to one count of aggravated vehicular homicide, one count of aggravated vehicular assault and one count of leaving the scene of an accident resulting in death, with no agreement as to sentencing.

During the sentencing hearing, the trial judge, noted that Mr. Solomon had been to a drug and rehabilitation facility twice and had completed Sumner County's DUI court for repeat offenders. The trial judge, who also presides over the DUI court program, was "very discouraged" that the petitioner killed someone and "almost killed a second person" after completing the program. Mr. Solomon's criminal history included four DUI convictions since 2008, as well as convictions for theft, possession of marijuana, false reporting and many probation violations. At the end of the hearing, He was sentenced to serve the maximum sentence for each count and each count was run consecutive for an effective sentence of 33 years in TDOC custody. Mr. Solomon later filed a pro se petition for post-conviction relief, contending that he received ineffective assistance of counsel, for not seeking the trial judge's recusal for the sentencing hearing. Following the denial of his petition, by the same trial judge from the sentencing hearing, Mr. Solomon filed an appeal to the Court of Criminal Appeals. Mr. Solomon did not seek recusal of the trial judge at the post-conviction hearing.

The CCA stated, "the right to assistance of counsel inherently guarantees that counsel's assistance is "effective." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Dellinger v. State,* 279 S.W.3d 282, 293 (Tenn. 2009). To prove that counsel was ineffective, a petitioner must show that (1) counsel performed deficiently and (2) such deficient performance prejudiced the defense. *Id.* at 687. Because a petitioner must establish both deficiency and prejudice to prove ineffective assistance of counsel, a court need not address both prongs where the petitioner has failed to establish one of them. *See Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697). Although it is possible that a judge may obtain knowledge of ex parte information from presiding over a DUI court, which may require recusal, Mr. Solomon never alleged, on appeal, that the trial judge possessed any such ex parte information. Therefore, the trial judge's mere participation on the DUI court, years earlier, did not require recusal in this case. *See* RJC 2.9, comment [4]; *State v. Watson,* 507 S.W.3d 191,197 (Tenn. Crim. App. 2016). Likewise, "the Petitioner has not offered any basis on which the trial judge's statement could be reasonably construed as indicating a lack of impartiality." Therefore, counsel was not deficient for failing to seek a recusal. Judgements affirmed.

SPEEDY TRIAL FOR PROBATION VIOLATIONS

The Tennessee Court of Criminal Appeals found that a defendant's right to a speedy trial, under the Sixth Amendment, was violated when an outstanding probation violation was served 15 years after it was filed, in *State v. Ernest G. McBrien*, 2022 Tenn. Crim. App. LEXIS 152 (April 6, 2022). In this case, the defendant's original criminal charges in Madison County, Tennessee, were resolved on March 26, 2001, and the judgments were entered on April 4, 2001, resulting in an effective six-year sentence, "suspended to community corrections after 60 days of service," with special conditions. The defendant subsequently relocated to Memphis and his community corrections sentence was transferred to Shelby County, Tennessee, in October of 2020. One month later, the trial court entered a second order transferring the defendant from community corrections to probation, to be supervised by the Board of Probation and Parole for the State of Tennessee.

One year later, a probation violation report was filed, and a probation violation warrant was issued on October 3, 2005. Even though the defendant had been incarcerated on several occasions in Shelby County, Tennessee in 2010, 2013, and 2015, the probation violation warrant was not served until 2020 and an amended violation report was filed indicating these occasions, but it alleged that the defendant had "absconded in 2005", and an amended probation violation warrant was issued on December 21, 2020. Arguing that his speedy trial rights were violated, the defendant filed a motion to dismiss. The trial court denied the defendant's motion, revoked the defendant's probation, and reinstated the six-year sentence to serve. The defendant appealed.

The Criminal Court of Appeals (CCA) used the factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972) as adopted in *State v. Simmons*, 54 S.W.3d 755 (Tenn. 2001) to assess the denial of the defendant's claim that the trial court erred in failing to dismiss the violation of probation for a speedy trial violation. The factors include: "the length of the delay, the reasons for the delay, the defendant's assertion of the right to a speedy trial, and the prejudice resulting from the delay." An abuse of discretion standard is used to review a trial court's decision regarding whether the defendant's right to a speedy trial was violated. See *McBrien* at *8, citing *State v. Hudgins,* 188 S.W.3d 663, 667 (Tenn. Crim. App. 2005) (citing *State v. Jefferson*, 938 S.W.2d 1, 14 (Tenn. Crim. App. 1996)).

Looking at the factors, the CCA noted that the 15-year delay between the issuance and service of the violation of probation weighed in favor of the defendant. The second factor, the reason for the delay, was also found to favor the defendant, as the CCA concluded that the record indicated that Madison County had been contacted regarding holds or detainers by Shelby County and the probation officer had asked for the Madison County Sheriff's Department to enter the warrant into NCIC, but the department failed to do it. Also, "absconding" had not been proven. The defendant asserted his right a little over one month from the time he was served, giving the third factor strong weight in favor of the defendant. Finally, the last factor, the defendant was ordered to serve six-years on a sentence that would have expired in 2011, which prejudiced the defendant, giving this factor weight in favor of the defendant. Based on all the factors, the CCA concluded that the defendant's right to a speedy trial was violated and the trial court abused its discretion in denying the defendant's motion to dismiss the warrant and the additional amended warrant.

Tennessee District Attorneys General Conference

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

Terry E. Wood (615) 253-6734
Linda D. Walls (615) 945-2040
Cheyenne Johnson (615) 253-5684