



# DUI NEWS

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## STATE V. CRASS (Defining *Ferguson*)

The Court of Criminal Appeals recently addressed several *Ferguson* issues in their ruling in *State v. Tony Dale Crass*, 2022 Tenn. Crim. App. LEXIS 500 (Tenn. Crim. App. Nov. 22, 2022). On January 3, 2019, THP Trooper Joey Story was returning home from work when he observed a white pickup truck on Highway 96 cross over “the fog line.” His patrol car was equipped with a Mobile Video System (MVS) that continuously records and deletes until the system is activated, at which time the recording is preserved, including the 30 seconds prior to activation. The system can be activated by emergency lights or a button. Trooper Story testified that he pushed the button within 30 seconds of observing the truck cross the fog line. He then watched the truck cross the fog line three more times, before the driver turned into a driveway and then turned off the truck lights. Trooper Story then passed the driveway, turned around and then activated his emergency lights. Unfortunately, the MVS did not activate until the emergency lights were turned on. Therefore, none of the truck’s driving was recorded. The activation button on the MVS malfunctioned. THP has since replaced the “old and dated” MVS. Mr. Crass filed a motion to suppress based upon a *Ferguson* violation. The trial court granted the motion to suppress and dismissed the indictment based upon the State’s failure to preserve recorded evidence. The recorded evidence was destroyed by “the unreliability of the obsolete video recording equipment,” which was due to policy choices made by the Tennessee Department of Safety and Homeland Security.

The CCA gave a case summary of *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999) and its progeny. *Ferguson* requires the trial court to first determine whether the State has a duty to preserve the evidence. “[T]he State’s duty to preserve evidence is limited to constitutionally material evidence described as ‘evidence that might be expected to play a significant role in the suspect’s defense.’” *State v. Merriman*, 410 S.W.3d 779, 785 (Tenn. 2013). To meet this constitutional materiality standard, “the evidence must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* If a duty to preserve the evidence exists, then the next step is to determine if the State breached that duty. If the State did breach that duty, then the court must decide the consequences of the breach, which requires an analysis of several factors. *Ferguson*, at 917. Only then can the trial court impose an appropriate remedy. All of this is reviewed *de novo* by the appellate court. *Merriman*, at 790.

The first issue addressed by the CCA is *Ferguson*’s application to pretrial motions to dismiss the indictment. Although it can be applied pretrial, the court cautioned that an analysis and balancing of the *Ferguson* factors should be thorough as the results are not predetermined. *State v. Bartlett*, No. E2009-01795-CCA-R3-CD, 2011 WL 13165164, at \*1 (Tenn. Crim. App. Oct. 24, 2011). However, the CCA then determined that a *Ferguson* ... (Continued on page 12)



## RECENT DECISIONS

### **State v. Ernest Seard, 2022 Tenn. Crim. App. LEXIS 470 (Certified question without a plea agreement)**

On September 28, 2019, Mr. Seard was stopped after an officer observed reckless driving on Beale Street in Memphis. Officers testified that Mr. Seard was parked illegally, and when asked to leave, he reversed recklessly and then spun out, leaving at a high rate of speed. Mr. Seard was stopped after he returned to the area. Officers smelled alcohol as he was removed from his vehicle. Mr. Seard was later indicted for DUI per se and DUI by intoxication. Following a denial of a defense motion to suppress the evidence obtained from the traffic stop, Mr. Seard attempted to plead guilty to the DUI per se count with a certified question of law attached, per Rule 37(b)(2)(D). The State objected to the certified question, due to lack of notice, so the plea, with the certified question, was accepted by the trial court, but without the consent of the State per Rule 37(b)(2)(D). On October 7, 2021, the trial court sentenced Mr. Seard and dismissed the DUI by intoxication count.

The Court of Criminal Appeals determined that, according to the record, it is clear that there was no agreement between the parties. However, if a defendant wishes to plead guilty without the agreement of the State, then the defendant must plead guilty to all of the charges in the indictment. Here, the trial court dismissed count two. Although a trial court can dismiss a count upon a finding of a legal basis, the State has the sole discretion and authority to nolle prosequi a count. *See State v. D'Anna*, 506 S.W.2d 200, 202 (Tenn. Crim. App. 1973). Therefore count two was reinstated and the matter is remanded for further proceedings.

However, the CCA continued to also address the certified question presented. The requirements set forth in *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988), “which are now clearly stated in Rule 37, are ‘explicit and unambiguous.’” *State v. Armstrong*, 126 S.W.3d 908, 912 (Tenn. 2003). All certified questions must identify clearly the scope and limits of the legal issue reserved, including the arguments relied upon by the Defendant and the constitutional issues presented. The certified question submitted by Mr. Seard made no mention of the arguments offered during his motion to suppress. *See State v. Casey Treat*, No. E2010-02330-CCA-R3-CD, 2011 WL 5620804, at \*5 (Tenn. Crim. App., Nov. 18, 2010); *State v. Bradley Hawks*, No. W2008-02657-CCA-R3-CD, 2010 WL 597066, at \*5 (Tenn. Crim. App. 2010). Therefore, the certified question was ruled to be “overly broad.”

### **State v. Jeffrey L. Crowe, 2022 Tenn. Crim. App. LEXIS 472 (Vehicle as a deadly weapon)**

On February 10, 2019, Mr. Crowe drove into the back of a vehicle that was stopped at a red light on Nolensville Road in Nashville. The victim, Mr. Zakhoy, was taken to the hospital and later released with hand and neck pain, which required further physical therapy. Arriving officers observed many signs of impairment from Mr. Crowe and he was “extremely irritated”. SFSTs were not attempted due to Mr. Crowe’s aggressive behavior. A blood sample was obtained by search warrant and the BAC was .307. Trazadone was also present in the blood sample.

During a bench trial, a witness for the defense testified that she saw Mr. Crowe chug an almost full bottle of Fireball, after the crash, in an effort “to hide evidence”. The witness was “on medication” at the time of the crash and she did not “remember this hardly well at all”. The judge found Mr. Crowe guilty of reckless aggravated assault with a deadly weapon, DUI 2nd offense, DUI per se 2nd offense and resisting arrest.

In a bench trial, the trial judge is the trier of fact and must resolve all questions regarding the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). The trial judge’s verdict carries the same weight as a jury verdict. *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978): *see also State v. Holder*, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999). Mr. Crowe appealed based upon insufficient evidence to support the convictions. Specifically, that he did not use or display a deadly weapon and that he was not under the influence at the time of the crash. On appeal, the State is entitled to the ... (Continued on page 3)

## RECENT DECISIONS (Continued)

strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983).

The CCA stated, “In this case, ‘[d]eadly weapon’ means ... [a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” TCA § 39-11-106(a)(5). Mr. Crowe argued that there was no proof that he intentionally used his vehicle as a deadly weapon. (Citing *State v. McGouey*, 229 S.W.3d 668, 672 (Tenn. 2007). The CCA pointed out that in considering (a)(5)(B), the correct standard is not determining the actual intent to cause death or serious bodily injury with the vehicle, but rather if the defendant used or intended to use the vehicle *in a manner capable of* causing death or serious bodily injury. TCA § 39-11-106(a)(5)(B) (emphasis added); *see State v. Leslie A. Pryor*, No. M2005-01429-CCA-R3-CD, 2006 WL 2563438, at \*6 (Tenn. Crim. App. Aug. 31, 2006) (“The defendant misapprehends the law when he argues that if he did not intentionally use the truck to harm anyone, it cannot be considered a deadly weapon.”). The judgments of the trial court were affirmed.

### **State v. Thomas Adam Blackwell. 2022 Tenn. Crim. App. LEXIS 494 (Revocation of Probation)**

On September 13, 2018, Mr. Blackwell was convicted of many counts of theft, forgery and aggravated burglary, to which he was sentenced as a Range I offender to an effective sentence of seven years to be served on community corrections. He was also ordered to attend drug court as part of his alternative sentence. On July 8, 2019, after being violated for failure to comply with drug court (The drug court violations dated back to January 2019), Mr. Blackwell was sentenced to 365 days in the Sumner County Detention Center. However, the jail sentence would be suspended if he attended a twelve-week inpatient rehabilitation program at Homeward Bound. After completing the rehabilitation program, Mr. Blackwell was released back on community corrections on December 5, 2019.

On December 14, 2019, Mr. Blackwell was arrested for DUI and he plead guilty to DUI 4th offense, as a Range II multiple offender, with the manner of service to be determined after a sentencing hearing. A violation of community corrections was also filed and a joint sentencing hearing was held on August 7, 2020. At the sentencing hearing, Officer Ronan testified that on December 14, 2019, he found Mr. Blackwell asleep in a parked sedan, with the door open and no lights on. The vehicle keys were in the ignition and the vehicle was running. Mr. Blackwell admitted to drinking beer and using heroin. He submitted a blood sample which indicated the presence of methamphetamine, amphetamine, fentanyl and a BAC of .015%.

The trial court sentenced Mr. Blackwell to three years incarceration, as a Range II multiple offender, for the DUI 4th offense. The court then revoked his community corrections and ordered him to serve the balance of the seven-year sentence, consecutive to the three-year DUI sentence. Mr. Blackwell appealed his sentence.

Although there are a few differences, a community corrections sentence “closely resembles that of probation.” *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). Therefore, the Court of Criminal Appeals applied the recent Tennessee Supreme Court decision of *State v. Dagnan*, 641 S.W.3d 751, 753 (Tenn. 2022), which describes the analysis and findings needed when determining if a revocation of probation is appropriate. The two-step consideration for probation revocation hearings outlined in *Dagnan*, also applies to revocation of community corrections hearings. *State v. Gibbs*, No. M2021-00933-CCA-R3-CD, 2022 WL 1146294, at \*3 (Tenn. Crim. App. Apr. 19, 2022). The first step is to determine if there is sufficient evidence, whether to revoke the probation. Since Mr. Blackwell plead guilty to a new crime, the first step was satisfied. The second step is whether the trial court gave additional reasons or findings for the sentence., which it did not do in this case. However, the CCA found sufficient evidence in the record to conduct a *de novo* review. Due to Mr. Blackwell’s extensive criminal record, his multiple incarcerations and his high risk for continued alcohol and drug use, the CCA determined that there was substantial evidence to commence the execution of the judgment originally entered. The judgments of the trial court were affirmed.



## DUI RESTITUTION - CHILD MAINTENANCE

We share the roadways. Since there are multiple roadway users, there are rules in place to provide for the safety of all those users. Whether you choose to drive a car, ride a bike, or walk, each user has a duty and a responsibility to follow the rules. From speed enforcement or a failure to turn on headlights as required to not having a properly displayed registration plate, officers are charged with making sure that the rules are enforced. It is during these duties that officers generally encounter individuals driving under the influence. Other encounters may be the result of assisting motorists or investigating crashes that have resulted in property damage, injury, or death. Whatever the reason for the encounter, it is essential that officers thoroughly investigate and prepare their cases for trial.

Officers are the initial contact a victim or witness has with the criminal justice system. Talking with witnesses and victims of crime is part of the investigation and preparation process. These conversations are necessary for the effective presentation of the case from the time charges are initiated until the case is resolved. It is important for the victim and the witness to understand that each is a crucial part of the criminal justice process from the outset. Whether the criminal charge is for driving under the influence or a vehicular homicide, the victims and witnesses need to be made aware of his/her rights and responsibilities.

In 1998, Tennessee voters ratified an amendment to the Tennessee Constitution that became Article I, Section 35. This amendment provides:

To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights:

1. The right to confer with the prosecution.
2. The right to be free from intimidation, harassment, and abuse throughout the criminal justice system.
3. The right to be present at all proceedings where the defendant has the right to be present.
4. The right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly.
5. The right to be informed of all proceedings, and of the release, transfer or escape of the accused or convicted person.
6. The right to a speedy trial or disposition and a prompt and final conclusion of the case after the conviction or sentence.
7. *The right to restitution from the offender.*
8. The right to be informed of each of the rights established for victims.

The general assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.

Pursuant to this amendment, the Tennessee General Assembly has enacted several laws designed to define and protect victims' rights provided in the Tennessee Constitution. These laws, located in Title 40, Chapter 38 of the Tennessee Code, provide for notification, communication, and education regarding the rights, duties, and responsibilities of members of the criminal justice system to the victims and witnesses of crimes. These laws include the provision that all victims of crime, upon their request, have the right to be informed of the methods by which the victim may obtain restitution directly from the defendant and information about receiving assistance in obtaining restitution.<sup>1</sup> To effectively provide this information to the victims of driving under the influence related offenses, one needs to look at the numerous statutes related to restitution.

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1. T.C.A. § 40-38-103(a)(1)(H) has this specific provision. The statute also provides for education regarding the steps and procedures involved in the criminal justice system, victim notification throughout the process, and assistance (compensation, travel, etc.).

(Continued on page 5)



## DUI RESTITUTION (Continued)

The prohibition against and basic sentencing provisions of driving under the influence is in Title 55, Chapter 10, Part 4 of the Tennessee Code. Section 401 defines the offense. Sections 402, 403, and 404 provide for the penalties, fines, restitution, and driving prohibitions upon conviction of the offense. T.C.A. § 55-10-403(d), specifically provides for restitution as part of the disposition of driving under the influence cases as a condition of probation. This section reads:

The payment of restitution to *any person suffering physical injury or personal losses*<sup>2</sup> as the result of such offense, if such person is economically capable<sup>3</sup> of making such restitution, shall be imposed as a condition of probation under § 55-10-410.<sup>4</sup>

The Tennessee Criminal Sentencing Reform Act of 1989 also addresses restitution to victims in criminal cases, which includes driving under the influence related crimes of vehicular assault, aggravated vehicular assault, vehicular homicide by intoxication, and aggravated vehicular homicide. For those victims, in consideration of the financial resources and future ability to pay of the defendant, the sentencing court can order restitution, pursuant to T.C.A. § 40-35-304.

Not only are the victim or the victim's beneficiaries eligible to receive restitution for pecuniary loss, but the minor children of victims of vehicular homicide by intoxication and aggravated vehicular homicide can receive restitution in the form of child maintenance under *Ethan's, Hailey's, and Bentley's Law*, signed by Governor Lee on May 25, 2022, and immediately became effective for all offenses that occurred on or after May 25, 2022. The law, codified as T.C.A. § 39-13-219, reads:

- (a) Notwithstanding any law to the contrary, if a defendant is convicted of a violation of § 39-13-213 (a)(2) or § 39-13-218 and the deceased victim of the offense was the parent or a minor child, then the sentencing court *shall order* the defendant to 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 last of which the child is a member when the child reached eighteen (18) years of age has graduated from high school.

2. T.C.A. § 55-8-101 contains the definitions for Chapter 10, Parts 1-5 of Title 55. Neither physical injury nor personal loss is defined within the statute. It is notable that physical injury is damage to one's body while personal loss may be damages suffered by a person because of the action, which is a broader term.

3. "Economically capable" is a phrase that is not specifically defined. It is important to note that the inability to pay restitution is not a basis for denying alternative sentencing. *See State v. Millsaps*, 920 S.W.2d 267 (Tenn. Crim. App. 1995). It is likely, though not specifically stated, that the phrase is equivalent to a consideration of a defendant's "financial resources and future ability to pay or perform" language found in Title 40.

4. T.C.A. § 55-10-410 reads, in pertinent part: "(a) In addition to incarceration, fines and license ramifications the sentencing judge has the discretion to impose any conditions of probation which are reasonably related to the offense, but shall impose the following conditions, . . . (3) Restitution as provided in § 55-10-403(d)."

5. *See* T.C.A. § 40-35-304; and T.C.A. § 40-35-104(c)(2), which reads:

The following sentencing alternatives in any appropriate combination are authorized for defendants otherwise eligible under this chapter: (2) Payment of restitution to the victim or victims *either alone or in addition to any other sentence authorized by this subsection (c)*.

The other alternatives listed in subsection (c) includes fines, suspended sentence with probation that includes community service and/or restitution, periodic confinement, continuous confinement in local jail or workhouse in conjunction with probation, continuous confinement in local jail or workhouse, work release, certain continuous confinement sentences in the department of corrections, and community-based alternatives to incarceration.

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## RESTITUTION (Continued)

(b) The court shall determine an amount that is reasonable and necessary for the maintenance of the victim's child after considering all relevant factors, including:

- (1) The financial needs and resources of the child;
- (2) The financial resources and needs of the surviving parent or guardian of the child, including, the state if the child is in the custody of the department of children's services;
- (3) The standard of living to which the child is accustomed;
- (4) The physical and emotional condition of the child and the child's educational needs;
- (5) The child's physical and legal custody arrangements; and
- (6) The reasonable work-related child care expenses of the surviving parent or guardian.

(c) The court shall order that child maintenance payments be made to the clerk of court as trustee for remittance to the child's surviving parent or guardian. The clerk shall remit the payments to the surviving parent or guardian within ten (10) working days of receipt by the clerk. The clerk shall deposit all payments no later than the next working day after receipt.

(d) If a defendant who is ordered to pay child maintenance under this section is incarcerated and unable to pay the required maintenance, then the defendant must have up to one (1) year after the release from incarceration to begin payment, including entering a payment plan to address any arrearage. If a defendant's child maintenance payments are set to terminate but the defendant's obligation is not paid in full, the child maintenance payments shall continue until the entire arrearage is paid.

(e) (1) If the surviving parent or guardian of the child brings a civil action against the defendant *prior* to the sentencing court ordering child maintenance payments as restitution and the surviving parent or guardian obtains a judgment in the civil suit, then no maintenance- shall be ordered under this section.

(2) If the court orders the defendant to make child maintenance payments as restitution under this section and the surviving parent or guardian *subsequently* brings a civil action and obtains a judgment, then the child maintenance order shall be offset by the amount of the judgment awarded in the civil action.

Unlike the other restitution statutes found in Title 55 and Title 40, it appears that the obligation of the defendant to pay restitution in the form of child maintenance is not limited by the defendant's economic capability, financial resources, of the future ability to pay or perform the obligation but instead focuses upon the needs of the minor children of the victim. Also, this statute, unlike the others, contemplates incarceration but does not appear to limit the payment or performance schedule to that beyond the maximum term of probation for the offense as with other forms of restitution. Since sentences for vehicular homicide by intoxication and aggravated vehicular homicide are offenses for which there is no probation available<sup>7</sup> and are to be served at 100% with credits earned not applying to release,<sup>8</sup> restitution payments cannot be made a condition of probation or parole. For this reason, if any restitution is ordered whether in the form of child maintenance or otherwise, victims will have to be informed of the process to convert the order to a civil judgment for collection in these cases. Because those incarcerated are given one year from release to begin making child maintenance payments under T.C.A. § 39-13-219 and the procedure in T.C.A. § 40-35-304(h) provides for filing within a twelve-month period following the expiration of the time of payment or payment schedule, without a set time to pay, i.e. defendant is to pay this amount by this date, it will be difficult to determine just when the conversion process should begin. Therefore, to satisfy the intent of the victims' rights laws, it is important that all of us regularly involved in the criminal justice process strive to assist victims by having the judgment provide for a clear, set time of payment or payment schedule each and every time restitution is ordered.

7. T.C.A. § 40-35-303(a).

8. T.C.A. § 40-35-501(bb).

## A RENEWED CALL FOR RESPONSIBILITY

On December 13, 2022, the National Highway Traffic Safety Administration (NHTSA) kicked off its annual holiday-season impaired-driving campaign to raise awareness about the dangers of driving while impaired by alcohol or drugs. With messages that include, “Drive Sober or Get Pulled Over”, “If You Feel Different, You Drive Different” and “Drive High, Get A DUI” the goal is to encourage drivers to be responsible and have a plan in place for a sober ride. Considering the available data from both the Tennessee Integrated Traffic Analysis Network (TITAN) and a recent NHTSA study, NHTSA’s message could not be more urgent.

According to TITAN, which analyzed crash data from November 1, 2021, to October 31, 2022, the Tennessee Department of Safety and Homeland Security (TDOSHS) found that a total of 7,469 vehicle crashes involved a driver who was driving under the influence.<sup>1</sup> The TDOSHS further found during the same period, 1 in 3 fatal crashes and 1 in 7 serious injury crashes involved a driver who was driving under the influence.<sup>2</sup> In Tennessee, it is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, while: (1) Under the influence of any intoxicant, marijuana, controlled substance, controlled substance analogue, drug, substance affecting the central nervous system, or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess.<sup>3</sup>

In a recent NHTSA study examining the prevalence of alcohol and drugs (over the counter, prescription, and illegal) in the blood of those seriously or fatally injured drivers and other roadway users (pedestrians, passengers, bicyclists, etc.), researchers found that alcohol use was highly prevalent among fatally injured drivers.<sup>4</sup> In 17.7% of the fatally injured driver cases with alcohol present, another drug was also present. The most common drug combined with alcohol in those cases was cannabinoids.<sup>5</sup> For those seriously injured drivers, 54.4% had alcohol or other drugs present in blood samples.

Fatal or serious injury crashes are not the only time in which people are found to be operating under the influence. Each time an individual operates a motor vehicle under the influence is another opportunity for death or serious injury to occur. In 2016, one fatality occurred every fifty (50) minutes in an alcohol impaired driving crash. In 2020, when the COVID-19 limited travel, one fatality occurred every forty-five (45) minutes in an alcohol impaired driving crash. The preliminary numbers for 2021 show an increase in the number of fatalities, but the data has not been analyzed on how much of the increase was related to alcohol impaired drivers. However, given the overall trends indicated by the combined research, this number is likely to remain at, if not increase above, 2020 levels. To illustrate this, I recently participated in the prosecution of a driving under the influence case from 2021.<sup>6</sup> In that case, the operator had a blood alcohol level above 0.08% and THC in a blood sample taken from the vehicle operator a little less than two hours from the time of vehicle operation.<sup>7</sup> Although this case did not involve a crash or injuries (fatal or otherwise), it is important to note that the operator was stopped because the operation of the vehicle was of such a nature that there was the potential of a collision had law enforcement not intervened.<sup>8</sup> Remember, be responsible and encourage others to have a plan for a safe, sober ride home every time.

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1. <https://www.tn.gov/safety/stats/dashboards/dui-crashes.html> last accessed at 2:24 P.M. on 12/19/22.

2. *Id.*

3. T.C.A. § 55-101-401 Driving Under the Influence Prohibited – Alcohol Concentration in Blood or Breath.

4. Berning, A. (2022, December). *Alcohol and drug prevalence among seriously or fatally injured road users* (Traffic Tech Technology Transfer Series. Report No. DOT HS 813 400). NHTSA.

5. Cannabinoids measured were the active THC metabolites of Delta-9 THC or 11-OH-THC.

6. Since this case is still subject to a motion for a new trial or appeal of sentence, this case will only be discussed in generalities and not specifics. The date of the offense in 2021.

7. Although the BAC was above 0.08%, drug testing was requested based upon the facts of the case.

8. A violation of T.C.A. §55-9-406 at a time when headlights are required to be used.



## UPCOMING TRAINING

### THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

#### **Cops in Court - January 18, 2023, THP Training Center, Nashville, TN**

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. 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.

#### **Cops in Court - January 24, 2023, World Outreach Church, Murfreesboro, TN**

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. 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.

#### **Victims of Impaired Driving Seminar - February 27, 2023 (Virtual Seminar)**

The DUI Training Department will provide a virtual training opportunity for prosecutors, victim coordinators and DUI coordinators. This training will deal with victims of impaired drivers and the resources available to them.

#### **20/20 Medical Foundation of Eye Movements & Impairment - March 6-8, 2023, Memphis, TN**

This seminar will be located at the Southern 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 6-8, 2023, Nashville, TN**

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 and a group discussion of current vehicular homicide cases.

#### **Protecting Lives/Saving Futures - July 26-27, 2023, 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.

### TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

#### **Advanced Traffic Crash Investigation**

January 16-27, 2023, Germantown, TN

April 3-14, 2023, Manchester, TN

#### **DUI Detection & Standardized Field Sobriety Testing**

January 23-27, 2023, Memphis, TN (Instructor Class)

March 6-10, 2023, Cookeville, TN (Instructor Class)

April 10-12, 2023, Humboldt, TN



## DUI TRACKER

### DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from October 1, 2022, through December 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 October 1, 2022, through December 31, 2022, since the last quarter were 1,604. This number is down from the previous quarter by 79. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has still slightly increased throughout the last year. Although, DUI disposition trends are usually lower near the end of the year, they are remaining increased for the entire year of 2022. The total number of guilty dispositions during this same period of October 1, 2022 through December 31, 2022 were 1,182. The total number of dismissed cases were 112, and 47 more were nolle prossed. Across the State of Tennessee, this equates to 73.69% of all arrests for DUIs made were actually convicted as charged. This percentage is slightly lower than the last quarter ending on September 30, 2022. Only 6.98% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, 234 of the total DUI cases disposed of were to different or lesser charges. Therefore, 14.59% 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, 2022 through December 31, 2022. During this period, there were a total of 312 fatalities, involving 297 crashes, which is a decrease from the previous quarter, and a decrease over this same time last year. Out of the total of 312 fatalities, 56 fatalities involved the presence of alcohol, signifying that 17.94% of all fatalities this quarter had some involvement with alcohol. This percentage is higher than the previous quarter. Further, there were a total of 34 fatalities involving the presence of drugs, signifying that 10.89% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 1,345. This is down by 19 from the 1,364 fatalities incurred last year at this same time. For most of the year, we experienced a considerable decrease from last year in the number of fatalities on our roads. Unfortunately this decrease has steadily declined throughout the year, coming close to last year's number of fatalities. Let's make impaired driving enforcement a priority for 2023. Impaired driving is preventable. Let's find workable solutions!

### Cops in Court Seminar

On December 8, 2022, the DUI training staff, in partnership with the Tennessee Highway Patrol, Training Center, held a Cops in Court Seminar in Nashville, TN. Cadets participated in the seminar and acquired information about the importance of communication, court procedure and evidence presentation in impaired driving related cases. Another Cops in Court class is scheduled at the THP Training Center on January 18, 2023.



## VEHICULAR HOMICIDE MURDERER'S ROW



### Cartez Horne, Rutherford County, Tennessee

In November, 2022 Cartez Horne plead guilty to Vehicular Homicide by Intoxication and was sentenced to 10 years to serve in TDOC custody. On May 14, 2020, Mr. Horne was traveling eastbound on Interstate 24 in his 2013 Chevy Malibu when he rear-ended a 2013 Volkswagen Jetta being driven by Jorge Orta. This collision occurred in the far right lane of the interstate. It was determined that Mr. Horne was travelling at 104 mph at the time of the collision.

After the initial collision, Mr. Orta's Jetta came to rest in the number three lane, where it was then struck again by a GMC truck travelling 63 mph. Jorge Orta died of his injuries a few days later while being treated at Vanderbilt University Medical Center. While at the scene of the crash, Mr. Horne was making incoherent statements, with slurred speech and bloodshot eyes. Open bottles of Hennessy and a seemingly empty Bud Ice were found near Mr. Horne's driver's door. A DRE, Deputy Austin Watson, was able to preform HGN on the defendant and Deputy Watson observed all six clues, consistent with alcohol impairment. Deputy Watson also observed a lack of convergence, which is consistent with THC impairment. Mr. Horne initially agreed to give a blood sample and THP Trooper Langley obtained a search warrant, but while at the hospital, Mr. Horne fled with his girlfriend who had been waiting for him just outside. Therefore, no blood sample was obtained.

Although no blood sample was obtained and only two SFSTs were performed, the observations of the THP Troopers, the DRE deputy and the THP crash reconstruction team were sufficient to allow the 16th Judicial District Prosecutors to obtain a conviction for Vehicular Homicide by Intoxication and a 10 year sentence to serve. Thanks to ADA Brent Pierce and his colleagues, as they were able to obtain some justice for Jorge Orta, and some relief for his wife and their son.

### DUI Prosecutor of the Year Award

Dale Evans, Assistant District Attorney and DUI prosecutor from the 21st Judicial District was awarded the DUI Prosecutor of the Year Award for 2022. Dale was honored for his strong commitment in working with the victims of impaired drivers. He has recently prosecuted a number of challenging vehicular homicides cases, involving multiple victims. Dale has been prosecuting DUI cases in the 21st Judicial District since 2018. He provides training to local police agencies and he is active on the DUI court team. Dale is the head Mock Trial Coach at Belmont University.



## ALCOHOL and DRUGS - GETTING IT RIGHT IN 2023

A New Year has come, and we are still fighting to curb DUIs and the deaths that come with them. So how do we accomplish something different and get it “Right” this year? During the years of COVID we were forced to use Zoom, wear masks, stay 6 feet apart, and even shield ourselves entirely away from the public, in order to combat the effects of the pandemic. So, what are we doing to rid ourselves of the DUI pandemic? It has been around for years and years. Every day, approximately 32 people in the United States die in impaired-driving crashes. That's one person, every 45 minutes. In 2020, 11,654 people died in alcohol-impaired driving traffic deaths, which was a 14% increase from 2019. These deaths were all preventable.<sup>1</sup>

So how can we as Law Enforcement Officers specifically change any of those statistics? With NHTSA messaging, MADD messaging, or THSO messaging of “Drive Sober or Get Pulled Over”, “Booze It and Loose It”, etc.? I wish I had that answer. I do not, but I wish I did. What I do believe might help is a few tips for all of us to follow. For law enforcement officers, we have to make a diligent effort of: 1) Presenting to our prosecutors a well-written report, which includes, the vehicle in motion, the initial contact with the defendant, the reason we asked them to step out of the vehicle, the full SFST performance (Standard being the key word), any post-arrest information (all the way to the jail, medical facility, other); 2) Making sure the arrest report itself is complete and asking the officer was only a formality; 3) We could also provide a better job of presenting ourselves to the juries, with: honesty, compassion, professionalism, good eye contact, body language, and lastly, what I refer to as “What would you do” kind of mentality. If it, was you on the side of the road with the defendant, “what would you have done in my shoes?” Try confidence, without cockiness.

I wonder how many prosecutors are reading the above information and had this thought? “I wish my officers would do half of those things!” I’m sure you have officers that are great. They know all the listed items above and you look forward to those officers’ names being in the report. However, what about those officers when you see the name a little bit of disgust runs over your mind? Do you work as hard for that DUI case? I ask only because every DUI case is important. Whether the case is rock solid or may have some issues that the defense intends to exploit.

Working at our training center and having the privilege to teach cadets, as one of their first or second legal classes for most of them is an honor. I also find that most of the time the future Trooper is inundated with the task to complete all the training in a 12, 15, and 16-week time frame. They have spent at most two weeks on law and at best 4 hours on breaking down the elements of a crime. (4 hours - being very generous) Think about this for just a moment. You as an attorney completed a bachelor’s degree (4-5 years), took the LSAT, then attended Law School (3-4 years), Studied for the Bar (8-12 weeks), or in my case (10-12 weeks now twice! (yes, I am bitter over that). Then passed the bar and began to practice at the District Attorneys' office, so that you could then “really” begin to practice law. After Years of hard work and dedication, you have finally made it. So how do you “as prosecutors,” think you might help? I again wish I had the right answer, but, I do have a few ideas! Work with the officer to make them better. Take the time to review cases before going to the courtroom with the LEO. Take the time to express what you are thinking and exactly what needs to be stressed. Demand and encourage them to be honest. Show them how the report can be better. Remember, most of them have never studied law as you have. If it’s a jury trial, remind them to look at the jury, and not to focus on you or the defense attorney. We spend as much of our time here at the training center preparing new troopers to be “Right”. However, we all must work together to get it “Right”! There is never a case that is successful by only one person’s actions. It takes us all to get it right! We appreciate you taking the time as prosecutors in showing us where we can improve and make a difference. If you have an idea or an opinion on how to make it work better and to aid in getting it “Right” please reach out to our office. I will do my best to see that it is presented to the decision-makers who have the capabilities to ensure we are getting it “Right”!

1. <https://www.nhtsa.gov/risky-driving/drunk-driving>



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





## STATE V. CRASS (Continued)

violation cannot be asserted in a pretrial motion to suppress evidence based on the lack of reasonable suspicion for a traffic stop. Since the trial court was limited to the “facts and circumstances within the knowledge” of Trooper Story at the time he activated his blue lights. *State v. Smith*, 484 S.W.3d393, 400 (Tenn. 2016). The video was irrelevant to the facts within Trooper Story’s knowledge at the time of the activation of his blue lights.

Also, the CCA went further in their analysis and determined that although the MVS constantly records video and erases it unless it is activated, the video in this case was never captured and saved and therefore, there was no video for the State to lose or destroy. It was immaterial whether or not the Trooper pushed or did not push the activation button, the results were the same. No video was saved. The CCA distinguished *Merriman* from this case because the officer in *Merriman* captured, saved and reviewed the video, which was subsequently lost by the evidence officer.

The CCA further stated that even if it is presumed that the video was captured, saved and subsequently lost or destroyed by the State, that the State had a duty to preserve the video, and that the State breached its duty; we determine that the *Ferguson* factors do not support dismissal of the indictment. The first *Ferguson* factor to consider is the degree of negligence involved on the part of the State in losing or destroying the evidence. *Ferguson*, at 917. The standard stated in *Ferguson* is simple negligence. *Id* at 918. The trial court in this case stated that Trooper Story was “without fault” and the video was lost due to the “consequences of policy choices.” The CCA is unwilling to expand the *Ferguson* “degree of negligence” factor to include decisions based on perceived “social wisdom,” assumed “political practicality,” or potential economic factors. Therefore, this first *Ferguson* “factor weighs heavily against dismissal of the indictment and outweighs the second and third *Ferguson* factors.” (The second and third *Ferguson* factors are: 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and 3. The sufficiency of the other evidence used at trial to support the conviction.) The CCA reversed the ruling of the trial court. The indictment was reinstated and the case was remanded for further proceedings consistent with the opinion of the CCA.



Our State DRE/ARIDE Coordinator, Tony Burnett, was recently recognized at the Middle Tennessee Law Enforcement Liaison Awards Ceremony, for all of his incredible dedication and contributions to Tennessee as the head of the Drug Evaluation and Classification program. Tony started in law enforcement with the Cannon County Sheriff’s Department in 1988. He has served in various law enforcement positions, including Chief of Police for the Town of Woodbury. Tony has been the DRE Coordinator since September of 2014. Unfortunately, Tony has decided to retire and it is with great sadness and lament that we say goodbye.

### Tennessee District Attorneys General Conference

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