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A DUI Search Warrant Includes the Sample and Testing

Daily, I am reminded that whether one speaks, reads, or listens, everything should be addressed and assessed in the context of which it is spoken, read, or heard. Therefore, officers, prosecutors, defense attorneys, and judges must assess the totality of the circumstances in evaluating whether there is probable cause to believe a crime is being or has been committed. Once probable cause is established, Rule 41 of the Tennessee Rules of Criminal Procedure provides that a search warrant may be issued to search for and seize “evidence of a crime”.¹ In driving under the influence cases, evidence of the impairing substance is the breath or blood of the operator. The procedure of how this evidence is obtained, the scope of the tests authorized upon the breath and blood evidence, and the reporting of the results is provided by statute. Both federal and state case law in this area support the issuance of a search warrant for blood tests. For all these reasons, as detailed below and addressed in context of this purpose, only one search warrant is required to legally procure, test, and report the results of blood tests in driving under the influence and related vehicular criminal offenses.

Both the Fourth Amendment of the United States Constitution and article I, section 7 of the Tennessee Constitution guarantee the right of individuals to be free from “unreasonable” searches and seizures. “These constitutional provisions are designed to ‘safeguard the privacy and security of individuals against arbitrary invasions of government officials.’”² Tennessee courts have held that article I, section 7, is “identical in intent and purpose with the Fourth Amendment” and have ruled, federal cases applying the Fourth Amendment “particularly persuasive” in search and seizure questions.³ By the language of the Fourth Amendment, searches conducted pursuant to a warrant issued “upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” are deemed reasonable.⁴

1. Rule 41 (along with statutory provisions in Title 40) governs the issuance of search warrants. In pertinent part, Rule 41 provides, “A magistrate may issue a warrant under this rule to search for and seize any of the following: (1) evidence of a crime; (2) contraband, the fruits of crime, or items otherwise criminally possessed; (3) property designed or intended for use, or that has been used in a crime; (4) a person whose arrest is supported by probable cause; or (5) a person who is unlawfully restrained.

2. *State v. Brock*, 327 S.W.3d 645, 681 (Tenn. Crim. App. 2009) (quoting *State v. Keith*, 978 S.W.2d 861, 865 (Tenn. 1998) and quoting *Camera v. Municipal Court*, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

3. *State v. Willis*, 496 S.W.3d 653, 719 (Tenn.2016); *State v. Hayes*, 188 S.W.3d 505, 511 (Tenn. 2006); *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968).

4. *State v. Scarborough*, 201 S.W.3d 607 (Tenn. 2006) quoting U.S. Const. amend IV.

(Continued on page 2)

A DUI Search Warrant Includes the Sample and Testing (Continued)



When an officer determines probable cause exists to believe that a person has committed the offense of DUI in violation of T.C.A. § 55-10-401, the operator may be arrested, without a warrant, pursuant to T.C.A. § 40-7-103(a) and a test or tests for determining the alcohol or drug content, or both, of the operator may be requested pursuant to T.C.A. § 50-10-406. If an officer does requests the operator to consent to a blood test, and the operator refuses to consent, T.C.A. § 55-10-406 provides that a blood test may be administered pursuant to a search warrant. Tennessee Code Annotated Section 55-10-408, further provides that, “[t]he procurement of a sample of a person’s blood, for the purpose of conducting a test to determine the alcohol content, drug content, or both, of the blood, shall be considered valid, if the sample was collected by a person qualified to do so, as listed in § 55-10-406(e)(2), or a person acting at the direction of a medical examiner or other physician holding an unlimited license to practice medicine in Tennessee under procedures established by the department of health.” Once the blood sample is procured, T.C.A. 55-10-408 further provides for the sample to be directed to an accredited laboratory to be tested for the presence and concentration of alcohol and or drugs. Any test results are then published in a certificate executed by the laboratory.

Thus, the procedures for collection and the scope of the use of the blood evidence collected, is clearly provided, upon establishment of probable cause for driving under the influence or the related offenses of vehicular assault, aggravated vehicular assault, vehicular homicide by intoxication, and aggravated vehicular homicide by the use of an automobile or other motor driven vehicle, Also, the issuance of the search warrant to obtain the blood sample from the operator charged with the offense and its testing, is clearly provided.

Further, to require a second search warrant or language within the original search warrant, outlining the testing of the blood sample, would make all cases decided by both the Tennessee and United States Supreme Court on the issue of blood evidence in impaired driving cases illogical. To illustrate this point, one can look at the historical development of some of the cases in this area. From *Schmerber v. California*, 384 U.S. 757 (1966) to *Missouri v. McNeely*, 569 U.S. 141 (2013) and *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), the United States Supreme Court described the procurement of the sample, as the “blood test”. None of these cases suggested that a second or subsequent warrant was needed for the analysis of the blood evidence, yet each referenced the admissibility of the subsequent testing results. The same is true of Tennessee cases in this area. For example, although pre-*McNeely*, *State v. Cochran*, No. M2006-02175-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 785 (Oct. 1, 2007) still stands for the proposition that the procurement of the blood and analysis are contained within the “blood tests” contemplated within our law. In *Cochran*, the defendant sought to revoke consent to a blood test after his blood was drawn from his body, but before it was analyzed for its content. The defendant argued that although he initially consented to the test and allowed the drawing of his blood, he wished to revoke his consent for the test. He argued that since he revoked his consent for the analysis, before the testing, the test results should be suppressed. In analyzing the defendant’s claim, the criminal court of appeals found that T.C.A. § 55-10-406 (2004) required that the test be administered within two hours following the driver’s arrest, logically the legislative intent was not for the analysis to be conducted within two hours, but that the sample be collected from the driver within two hours of arrest.

Nor does the analytical approach of *Birchfield v. North Dakota*, 579 U.S. 438 (2016), support the need for an additional search warrant to analyze the content of blood evidence in driving under the influence cases. In addressing the three cases consolidated before it, the Court began with the understanding that there is only one search, even though the government in each case is obtaining a biological sample and testing the biological sample for the presence of alcohol or drugs.⁵ Although the Court discussed the privacy interests implicated....

5. See also, *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 616 (1989) (“We have long recognized that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ must be deemed a Fourth Amendment Search). Even with the two-hour statutory limitation removed and the *Birchfield* inspired amendments to the implied consent law in 2019, the legislature still uses the words “blood tests” in T.C.A. § 55-10-406. (Continued on page 3)

A DUI Search Warrant Includes the Sample and Testing (Continued)

by blood or breath tests in its analysis of the parameters of searches incident to arrest, the Court noted that the issuance of a search warrant, protects all those privacy interests. Specifically, search warrants “ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that the evidence will be found.” *Id.* at 469. Accordingly, a search warrant “limits the intrusion on privacy by specifying the scope of the search—that is the area that can be searched and the items that can be sought.” *Id.* This is especially true in Tennessee, where the analysis of blood evidence seized under the search warrant is specifically contemplated and provided for by statute to determine only the alcohol, drug content or both of the blood. Also, it is worth noting that the privacy interest of the operator regarding the sample’s content is safeguarded by T.C.A. § 55-10-408(b) which states that the reports generated provide the name of “the accused, the date, the time, and by whom the specimen was received and examined, and a statement of the alcohol concentration or the presence of drugs in the specimen” and nothing more.⁶

Other States, with similar statutory language, have also concluded that two search warrants are not necessary to procure and then test blood samples in driving under the influence cases. Like Tennessee, Wisconsin courts read Article I, section 11 of the Wisconsin Constitution as providing the same constitutional protections of the Fourth Amendment. In *State v. Randall*, 830 N.W.2d 223 (Wis. 2019), the Supreme Court of Wisconsin concluded that the drawing and testing were not two searches. In reaching this conclusion the court specifically looked at *Birchfield*, and concluded “when *Birchfield* referred to the test, it is apparent from the context that it actually meant the blood draw. (“A blood test also requires less driver participation than a breath test. In order for (sic) a technician to take a blood sample, all that is needed, is for the subject to remain still, either voluntarily or by being immobilized.”)” *Randall* at 230. (Internal Citations Omitted). Further, the Wisconsin court stated, that “nothing in the [*Birchfield*] Court’s analysis, from its premises to its conclusion, suggests the actual testing of the blood sample was a search. Indeed, the Court treated the discovery of the defendant’s blood-alcohol level as a constitutional non-event.” *Id.*

The New Hampshire Supreme Court reached a similar conclusion, finding that the BAC test of the defendant’s blood sample was not a search within the meaning of Part I, Article 19 of the New Hampshire Constitution and that the Fourth Amendment offered “no greater protection than the State Constitution” referring to the holding in *United States v. Jacobsen*, 466 U.S. 109 (1984) that a chemical test was not a search because it could reveal no information in which the defendant had a legitimate expectation of privacy as well as *State v. Randall* and *People v. Woodard*, 909 N.W.2d 299, 310 (Mich. Ct. App. 2017) (“Once police procured a sample of [the] defendant’s blood pursuant to her consent, she had no reasonable expectation of privacy in the [BAC] of that sample.”). Similar case law can be found in Michigan and Texas.⁷ In every case cited, the defendant does not have an expectation of privacy in the alcohol or drug content of the blood sample that has been obtained through a valid search warrant. Therefore, a second search warrant is not required pursuant to the U.S. and Tennessee Constitutions, statutes and case law.

6. The analysis of blood evidence seized under a search warrant for evidence of driving under the influence, is limited to the alcohol and/or drug presence and concentration. Therefore, it is akin to the analysis of green leafy material for the presence of Marijuana where there is probable cause that it is possessed, manufactured, sold or delivered in violation of the law; or for the analysis of a light-blue pill with the marking of M on one side of the pill and the number 30 above the score marking on the back of the pill to determine if is in fact oxycodone as it is purported to be by its markings or another drug such as fentanyl, if probable cause exists that it is being possessed, manufactured, sold, or delivered in violation of the law. Due to the limiting nature of the testing involved, the testing of a blood sample in DUI cases is not analogous to the search of a cellular phone seized incident to arrest and without limitation of the information being searched. Therefore, the holding in *Riley v. California*, 573 U.S. 373 (2014), cited in *Birchfield* in its discussion of privacy interests, held that a search incident to arrest cannot be conducted on a cell phone, and that a search warrant is generally required absent another exception to the warrant requirement.

7. *People v. Woodard*, 321 Mich. App. 377, 909 N.W.2d 299, 310 (Mich. Ct. App. 2017) (No reasonable expectation of privacy in the [BAC] of that sample); and *Jacobson v. State*, 603 S.W.3d 485, 2020 Tex. App. LEXIS 3447, 2020 WL 1949622.



Recent Decisions

State v. Cory Edward Walden, 2023 Tenn. Crim. App. LEXIS 5 (Violation of Probation procedures)

In 2019, Mr. Walden pled guilty to driving after being declared a habitual motor vehicle offender, in two separate cases. He was sentenced to one year in one case and 18 months in the other case. Both sentences were ordered to be served consecutively to each other. Mr. Walden also pled guilty to one count of reckless endangerment in a third case and was sentenced to 6 years supervised probation, consecutively to the other two cases. All the sentences were suspended to supervised probation, for a total effective sentence of eight years and six months. After many probation violations involving new charges and prior unsuccessful attempts to reinstate probation, the trial court revoked Mr. Walden's probation and sentenced him to serve his sentence in full. Mr. Walden appealed his sentence.

In *State v. Dagnan*, 641 S.W.3d 751 (Tenn. 2022), the Tennessee Supreme Court aimed to, "clarify and bring uniformity to the standards and principles applied by the trial courts and appellate courts in probation revocation proceedings" to resolve confusion about the proper procedure for a trial court to follow before revoking a probationary sentence. *Id.* at 753. The *Dagnan* case set up a two step process for the trial court. The first step is for the court to decide whether to revoke probation and the second step is to determine the appropriate consequence upon revocation. (These two distinct discretionary decisions can both be conducted during the same revocation hearing) *Id.* at 757. The standard of review is an abuse of discretion with a presumption of reasonableness, so long as the trial court places sufficient findings and the reasons for its decisions as to the revocation and the consequences on the record. It is not necessary for the findings to be particularly lengthy or detailed, but only sufficient for the appellate court to conduct a meaningful review of the decision. *Id.* at 759. The trial court in this case made a sufficient record and the judgments were affirmed.

State v. David Chad Moss, 2023 Tenn. Crim. App. LEXIS 33 (Insufficient record on appeal, TRAP 27)

It is an unfortunate circumstance when the Court of Criminal Appeals does not reach the merits of the claim, because the party appealing fails to include facts relevant to the issues on appeal, fails to identify the basis in the record for the argument presented, and fails to sufficiently cite applicable law. Merely stating that you want a result, without more, is not sufficient to provide the CCA with an adequate appellate record on which the court can make an informed decision.

Mr. Moss was placed on four years of supervised probation after pleading guilty in Maury County, to three counts of criminal simulation. Within one year, Mr. Moss was arrested in Kentucky for DUI and other charges, to which he plead guilty. At some point, Mr. Moss was released from custody in Kentucky and then transferred back to Tennessee where outstanding warrants for probation violation were executed. After a probation revocation hearing, the trial court revoked Mr. Moss's probation in full and awarded Mr. Moss certain jail credits. Mr. Moss appealed his sentence credits, claiming that he was not properly credited with the time he was incarcerated in Kentucky, after waiving extradition on the revocation warrants.

Tennessee Rule of Appellate Procedure 27(a)(7) requires that the appellant set forth an argument for each issue, along with "the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on." *Tenn. R. App. P. 27(a)(7)*. Similarly, Rule 10(b) of the Rules of this Court states plainly that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." *Tenn. Ct. Crim. App. R. 10(b)*. Where there is failure to provide this Court with an adequate appellate record and failure to prepare a sufficient brief in compliance with the Rules of Appellate Procedure, the issue is waived. *State v. Lucy Killebrew*, 760 S.W.2d 228, 236 (Tenn. Crim. App. 1988). Although Mr. Moss may have had a legitimate claim, his brief was devoid of any reference to the record or facts relied upon. Because of the inadequacy of Mr. Moss's brief, all issues complained of were deemed waived and the appeal was dismissed.

(Continued on page 3)

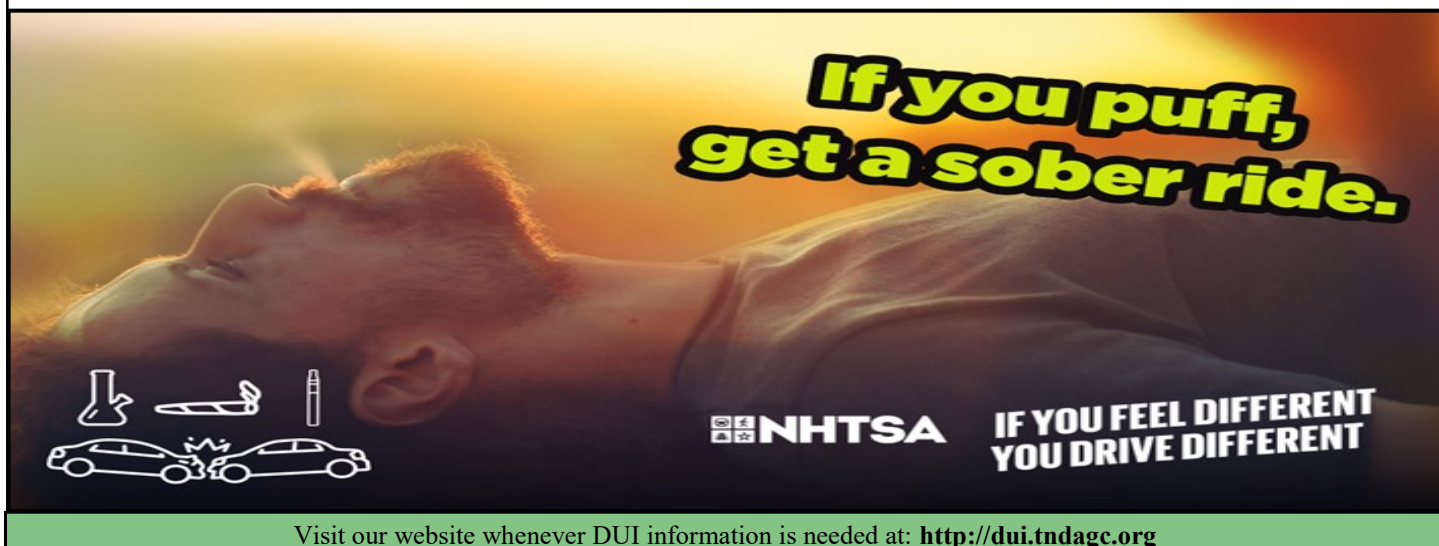
Recent Decisions (Continued)

State v. Michael Nyok Lueth, 2023 Tenn. Crim. App. LEXIS 52 (Foreign speaking defendant)

On November 24, 2019, Officer Cox of the Metro Nashville Police Department arrived at a single car crash with two men standing next to a crashed Lexus. Officer Cox asked Mr. Lueth what happened and Mr. Lueth stated that he was driving the Lexus and he crashed it. Officer Cox smelled the odor of alcohol and noticed that Mr. Lueth was very unsteady on his feet. Mr. Lueth admitted to drinking “three large Budweisers” earlier. The entire conversation was in English. Sergeant Stein, also with MNPD, had Mr. Lueth complete several field sobriety tests. After observing many signs of impairment, Sergeant Stein read the implied consent form to Mr. Lueth. Since English was not Mr. Lueth’s primary language, a search warrant for a blood sample was obtained. All prior conversations were in English, but Sergeant Stein stated that he obtained a search warrant to “safeguard” Mr. Lueth’s rights. Mr. Lueth’s BAC was .30%. Mr. Lueth was convicted at trial for DUI, sixth offense, DUI per se, sixth offense, and driving on a revoked driver’s license. He was sentenced to six years, as a Range II, multiple offender. All counts ran concurrent. Mr. Lueth appealed.

During jury selection, the trial court told prospective jurors that an interpreter was being provided “out of an abundance of caution.” Mr. Lueth complained that the court was commenting on the evidence, since a theory of the defense was that Mr. Lueth could not properly understand the arresting officers. However, not every comment on the evidence made by a judge provides grounds for a new trial. *State v. Hester*, 324 S.W.3d 1, 89 (Tenn. 2010). Also, all the comments made by the judge were deemed to be neutral and impartial, when taken in context. “Moreover, these comments were a proper exercise of the trial court’s discretion during voir dire.” *State v. Cazes*, 875 S.W.2d 253, 262 (Tenn. 1994).

Mr. Lueth also appealed the trial court’s use of a special jury instruction regarding the use of an interpreter and the State’s reliance on the jury instruction during their rebuttal argument. Mr. Lueth objected that a jury instruction which stated, “the fact that a trial participant does not speak English fluently does not [a]ffect the law that applies in this case or the credibility of a witness.” It was argued that this undercut the defense argument that a language barrier negated Mr. Lueth’s admission to driving his Lexus. The CCA pointed out that the jury instruction also said, “However, you may consider what, if any, [e]ffect the language barrier may have had on any communications between the Defendant and the police.” In light of the full jury instruction, the CCA concluded that court’s special jury instruction, regarding the Defendant’s use of an interpreter, was not prejudicially erroneous, and even if it was somehow erroneous, any such error was harmless. In order to determine whether an instructional error is harmless, this court must ask whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Cecil*, 409 S.W.3d 599, 610 (Tenn. 2013). As a whole, the court’s instructions did not negate the Defendant’s theory of defense. The judgments of the trial court were affirmed.





Upcoming Training

Cops in Court - April 12, 2023, THP Training Center (Cadets), 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.

Train The Trainer - April 18-21, 2023, Nashville, TN

This course will provide Prosecutors with specific information on how to effectively train and motivate learners. This information will be useful during jury trials and in actively engaging jurors. The curriculum is designed to be participant centered and instructor lead. Each participant will be actively involved in the training process. Training techniques to deliver interactive presentations will be discussed.

Lethal Weapon/Vehicular Homicide Seminar - June 6-8, 2023, Murfreesboro, 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, qualifying an expert and a group discussion of current vehicular homicide cases.

Cops in Court - June 20, 2023, THP Training Center (Cadets), 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.

Protecting Lives/Saving Futures - July 26-27, 2023, Chattanooga, TN

This course is designed to teach police officers and prosecutors together on all aspects of the detection, investigation and prosecution of impaired drivers. Each participant will learn firsthand, the challenges and difficulties of prosecuting an impaired driver. A wet lab will be involved to assist the learning process.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)

April 24-25, 2023, Springfield, TN

May 17-18, 2023, Lynchburg, TN

June 12-13, 2023, Harriman, TN

June 22-23, 2023, Jonesborough, TN

June 26-27, 2023, Pulaski, TN

August 7-8, 2023, Atoka, TN

DUI Detection & Standardized Field Sobriety Testing

April 10-12, 2023, Humboldt, TN

April 17-19, 2023, Franklin, TN

May 8-12, 2023, Pigeon Forge, TN (Instructor Class)

May 8-10, 2023, Jonesborough, TN

May 15-19, 2023, Nashville, TN (Instructor Class)

May 22-26, 2023, White House, TN (Instructor Class)

June 26-28, 2023, Covington, TN

Drug Recognition Expert School (DRE)

May 21-June 1, 2023, Gallatin, TN

DUI Tracker Report

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2023, through March 31, 2023, 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, 2023, through March 31, 2023, since the last quarter were 1,928. This number is up from the previous quarter by 324. 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 the last few quarters. The total number of guilty dispositions during this same period of January 1, 2023 through March 31, 2023 were 1,381. The total number of dismissed and nolle cases this last quarter were 195. Across the State of Tennessee, this equates to 71.63% of all arrests for DUI made were actually convicted as charged. This percentage is slightly lower than the last quarter, ending on December 31, 2022. Only 10.11% of the DUI cases during this current quarter were dismissed or nolle. Also, during this same period of time, only 325 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 16.86% 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, 2023 through March 31, 2023. During this period, there were a total of 286 fatalities, involving 249 crashes, which is a significant decrease from the previous quarter. Out of the total of 286 fatalities, 52 fatalities involved the presence of alcohol and 30 fatalities involved the presence of drugs, signifying that 28.67% 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 286. This is more than the 280 fatalities incurred last year at this same time. This year has started with more fatalities than last year. We need to stay vigilant in our prosecution of impaired drivers. Save lives, don't allow others to drive impaired.

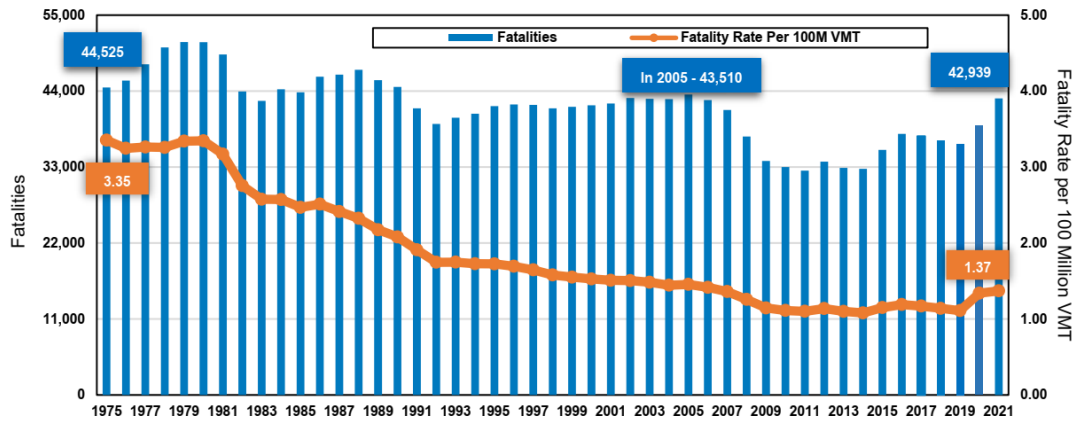
On March 22, 2023, the Traffic Safety Resource Prosecutors, the TNDAGC Education Department and General Effler's Office from the 8th Judicial District, jointly conducted a Cops in Court Seminar at Lincoln Memorial University, located in Harrogate, TN. Cops in Court provides education on how to effectively communicate and present an impaired driving case throughout the judicial process. The participants take part in a mock trial exercise, after being instructed on the importance of professionalism, preparation and the common challenges of prosecuting the alcohol or drug impaired driver.





NHTSA 2021 Crash Statistics

The National Highway Traffic Safety Administration just released their “Overview of motor vehicle traffic crashes in 2021” report.¹ Overall, there were 42,939 people killed in motor vehicle traffic crashes on U.S. road ways during 2021, which is a 10% increase from the 39,007 fatalities reported in 2020. (3,932 more people were killed in traffic crashes in 2021). The 2021 total is the largest number of fatalities since 2005. As you can see in Figure 2 (below), the number of fatalities nation wide had been dropping significantly from 1980 until 2019, when the fatality rates began to rise (a 7.3% increase in 2020 and a 9.9% increase in 2021).



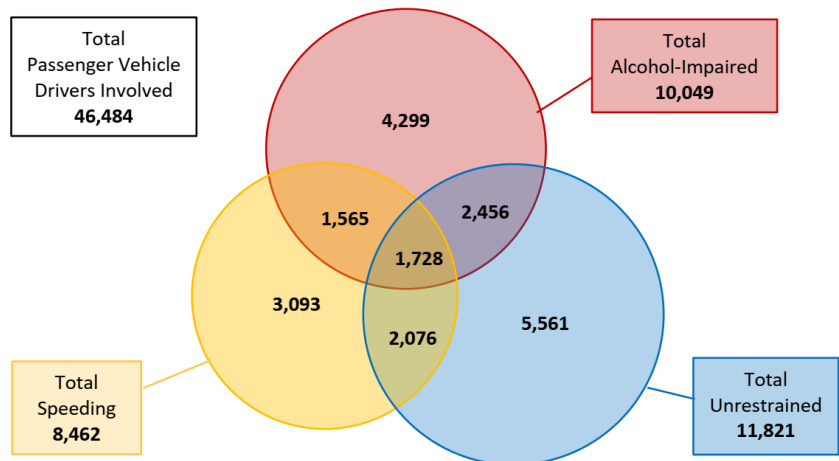
Sources: FARS 1975-2020 Final File, 2021 ARF; 1975-2021 VMT – FHWA’s Annual Highway Statistics

Figure 2. Traffic Fatalities and Fatality Rate per 100 Million VMT, 1975-2021

The three greatest factors contributing to the increase in fatalities in 2021 were: (1) Speeding related fatalities, which increased by 7.9%; (2) Alcohol impaired-driving Fatalities, which increased by 14%; and (3) Seat belt non-use fatalities, which increased by 8.1%. Forty-three states (including Tenn.), the District of Columbia

and Puerto Rico had increases in the number of fatalities on their roadways. Speeding-related was determined, if any driver involved in the crash was charged with a speeding-related offense or a police officer indicated that exceeding the posted speed limit was a contributing factor in the crash. Drivers are considered to be alcohol-impaired when their blood alcohol concentrations were .08% or higher. Seat belt non-use, indicated that the occupant was unrestrained. However, these three factors were not the only factors contributing to the recent rise in fatalities.

Of the passenger vehicle drivers involved in the overall number of fatalities in 2021, 45% had at least one of the three behavioral factors listed above. Therefore, almost half of the fatalities that occurred in 2021 could have been prevented by changing a few behaviors of drivers on our roadways. Of course, behaviors are often changed through increased enforcement and prosecution of these illegal and deadly driving conducts. As shown in Figure 8, many drivers will participate in more than just one deadly behavior at a time.

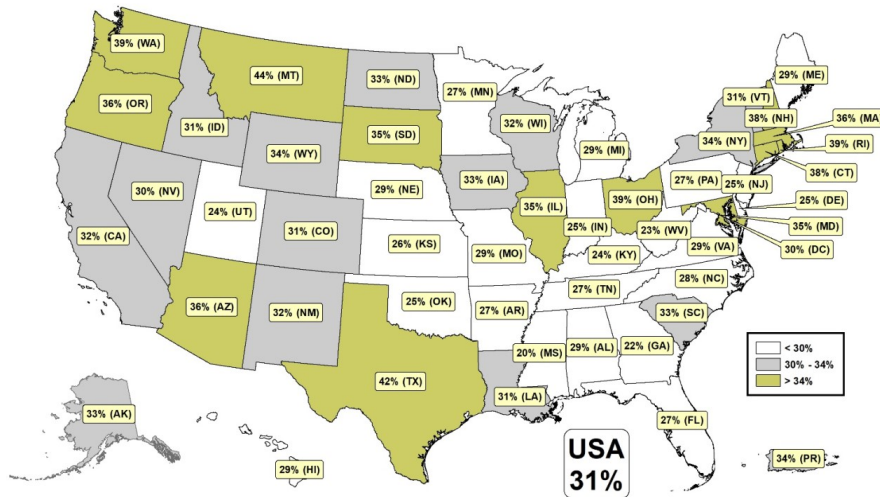


Source: FARS 2021 ARF

Figure 8. Passenger Vehicle Drivers Involved in Fatal Traffic Crashes, by Speeding Involvement, Alcohol-Impaired Driving, and Restraint Use, 2021

1. Stewart, T. (2023, April). *Overview of motor vehicle traffic crashes in 2021* (Report #DOT HS 813 435) (Continued on page 9)

NHTSA 2021 Crash Statistics (Continued)



Source: FARS 2021 ARF

Figure 12. Alcohol-Impaired-Driving Fatalities as Percentages of Total Traffic Fatalities, by State, 2021

The 10% overall increase in fatalities in 2021 is the highest year-to-year increase since the Fatality Analysis Reporting System (FARS) started data collection in 1975. However, Alcohol-impaired driving increases appear to be the greatest factor in the overall increase in fatalities. The total alcohol-impaired-driving fatalities increase of 14% was higher than the total traffic fatalities increase of 10%. Also, the monthly percentage changes for alcohol-impaired driving fatalities was greater in all months, except the month of August. In looking at Figure 12, 27% of Tennessee’s fatalities are caused by alcohol-impaired drivers. Although this is lower than the

U.S. average of 31%, Tennessee has seen an overall increase of drug-impaired-driving fatalities.

So what can Tennessee do to reverse this deadly trend? Fortunately, some countermeasures are currently being implemented. Last year, the Tennessee Legislature passed Public Chapter 694, which mandated annual in-service training regarding the proper testing procedures for use in investigating cases of suspected driving under the influence. All law enforcement officers assigned to their agency traffic division shall participate in this training as part of their certification process. This law became effective January 1, 2023. Also, the Tennessee Highway Safety Office has increased the number of training classes for “DUI Detection and Standardized Field Sobriety Testing” and for “Advanced Roadside Impaired driving Enforcement” (Please see page 6 of this Newsletter for the current class information). Also, Tennessee has recently hired a new Drug Recognition Expert Coordinator to increase training and certification opportunities for Tennessee’s law enforcement officers. (Please see page 12 of this Newsletter for information regarding the new DRE Coordinator). Tennessee’s two Traffic Safety Resource Prosecutors offer continuous training opportunities for persecutors and law enforcement officers. (Please see page 12 of this Newsletter for the TSRP offered training information). Technological advances in vehicle manufacturing, such as lane departure warnings and automatic braking will definitely help lower the number of fatalities, but we must stay vigilant in promoting changes in the deadly behaviors of impaired-driving, speeding and non-use of seat belts.

(Editor’s Note: all charts and figures in this article were taken from the, Stewart, T. (2023, April). *Overview of motor vehicle traffic crashes in 2021* (Report No. DOT HS 813 435) National Highway Traffic Safety Association, which can be found at <https://crashstats.nhtsa.dot.gov>).

IF YOU PUT AWAY SOME
DRINKS,

PUT AWAY YOUR
KEYS.

BOOZE IT
& LOSE IT

TENNESSEE HIGHWAY SAFETY OFFICE



Seated SFSTs are a Valid Predictor of Impairment

Roadside Standardized Field Sobriety Tests are not always suitable for every driving impaired investigation. The driver's weight, age, or medical condition may prevent an officer from requesting the suspect to preform a "Walk and Turn" sobriety test or a "One Leg Stand" sobriety test. However, there are validated alternative sobriety tests that can be administered to determine if a suspect is too impaired to safely operate a motor vehicle. A battery of four Seated field sobriety tests have been validated since 2010.

For many decades now, Marine Officers have been administering seated field sobriety tests to boaters who were suspected of operating their boat while being impaired. Roadside SFSTs are not suitable for the water, because walking and balancing tests need to be administered on a firm, flat surface. The Marine Officer would then be required to bring a suspected boater to shore and then wait a pre-established period of time, to get the suspect adapted to being on land (usually 15 minutes). Alternative sobriety tests, which allow the suspect to preform while seated, have been developed and used during these investigations. Unlike the roadside tests, the seated field sobriety tests cannot make use of any measure of equilibrium. Although the roadside SFSTs have been used since the 1970s and validated in studies since the 1990s, seated field sobriety test were identified and validated, during studies started in 2009 and published in 2010.¹

In a survey involving 14 states (including Tenn.), 1,146 BUI reports were examined, and it was found that no test, other than the roadside SFSTs, were uniformly administered, from state to state or even from agency to agency. Therefore, in 2009, the Southern California Research Institute (SCRI) set out to evaluate if sobriety tests that can be administered in the seated position, yet still detect and identify common signs of impairment.² The project was divided into two separate studies. The first study was conducted in the SCRI laboratory and was aimed at developing a battery of tests suitable for the seated position. The second study was conducted in the field and was used to validate the battery of tests.



During the laboratory part of the study, four different sobriety tests were identified as being useful to identify impairment (six different sobriety tests were initially studied). The four useful sobriety tests are:

- 1) **Horizontal Gaze Nystagmus.** (This is the same as used in the roadside SFST. 4 or more out of 6 clues indicate impairment.)
- 2) **Finger to Nose** (The suspect must bring the tip of their finger to the tip of their nose, with their head tilted and their eyes closed. 9 or more out of 13 clues indicate impairment.)
- 3) **Palm Pat** (One hand is extended out, palm up. The other hand is placed on the first, with the palm down. The top hand pats the bottom hand while alternating between the back of the hand and the palm of the hand, while counting with each pat. 2 or more out of 10 clues indicate impairment.)
- 4) **Hand Coordination** (The subject performs four tasks with their hands. Loosely adapted from the Walk-and-Turn test. 3 or more out of 15 clues indicate impairment.)

1. Fiorentino, D.D., Validation of sobriety tests for the marine environment. *Accid. Anal. and Prev.*, (2010), doi:10.1016/j.aap.2010.11.007.

2. *Validation of standardized field sobriety tests for the marine environment*, Fiorentino, D., Dietel, B., Jimenez, D., April 2010; Southern California Research Institute. (Continued on page 11)

Seated SFSTs are a Valid Predictor of Impairment (Continued)

The field portion of the study was conducted from June to September of 2009, at the Lake of the Ozarks in central Missouri. During the study, the four earlier identified field sobriety tests were always administered in the following order: HGN, FTN, PP and HC. Four Marine Officers from the Missouri State Water Patrol were selected to participate in the study. All four officers had prior experience administering the HGN test. The officers spent one 8-hour day training in the administration and scoring of the seated sobriety tests. Three days of ten-hour shifts in patrol boats on the waters were then conducted to allow the officers to become proficient with the tests. During the study 331 cases were conducted. The tests were examined by BAC Status (BACs < .08% v. BAC > .08%). Note that this is a very conservative approach as it classifies cases on the basis of the criterion rather than the behavioral characteristics of the subject. These cases involved both probable cause stops, in which the boater was suspected by the officer of operating while impaired, and by use of a check-point stop, which involved boaters being selected at random from the flow of boats on the lake (88% of the stops were for probable cause and 12% were for checkpoint stops). The stops occurred under clear, cloudy, or rainy conditions with winds ranging from 0 to 16+ miles per hour. Water conditions were calm, choppy or rough.

The overall study concluded that results from the laboratory study and the field study supported the use of four tests for the detection of impairment due to BACs of .08 or above. The four tests are Horizontal Gaze Nystagmus (HGN), Finger To Nose (FTN), Palm Pat (PP), and Hand Coordination (HC). The study proposes that marine officers administer HGN, FTN, PP and HC to all BUI suspects, and then, for each suspect, use the pattern of test results to estimate the probability of BAC > .08, as follows:

- Positive HGN, FTN, PP and HC tests indicate a .91 probability that the BUI suspect has a BAC > .08.
- Positive HGN, FTN, and PP tests indicate a .90 probability that the BUI suspect has a BAC > .08.
- Positive HGN, and FTN tests indicate a .89 probability that the BUI suspect has a BAC > .08.
- Positive FTN, PP and HC tests indicate a .76 probability that the BUI suspect has a BAC > .08.
- Positive FTN, and PP tests indicate a .73 probability that the BUI suspect has a BAC > .08.³

The authors noted that the overall correct percentages, sensitivity, specificity and reliability of the tests conducted during the field portion of the study were consistent with what is typically reported in the literature on roadside sobriety tests. Thus, the four tests may assist well-trained marine officers with assessments of alcohol-related impairment in boaters.⁴

3. *Id.*

4. *Id.*

Cops In Court THP

On March 9, 2023, the TSRPs conducted a Cops In Court seminar for a lateral class of THP recruits at the THP Training Center in Nashville. We will be conducting future Cops in Court seminars for THP cadets on April 12, 2023 and June 20, 2023. These are great opportunities for prosecutors to help during the Mock Trial portion. Prosecutors can improve their trial skills and also train the participants at the same time.





New DRE Coordinator and New JOL



New DRE/ARIDE Coordinator—John H. Mayes

The Tennessee Highway Safety Office has hired John H. Mayes as the new DRE/ARIDE Coordinator. John started his career in 1998 at the Roane County Sheriff's Office as a corrections officer, while also working part time at the Rockwood Fire Department. During this time, John received his EMT certification and training at the Tennessee Law Enforcement Training Academy. While at the Roane County Sheriff's Office, John worked in the narcotics unit with K-9 Buddy. John also worked at the Harriman Police Department and later with Department of Energy in Los Alamos.

After leaving the Depart of Energy, John returned to work with the Harriman Police Department in their narcotics and k-9 units. During this time, he received ARIDE training and became a Drug Recognition Expert. John received the MADD award for most DUI arrests and convictions. He also served as a Lead Trainer and Instructor in Baghdad, Iraq with the Department of State for explosive detection.

John has taught for the Tennessee Highway Safety Office, as a SFST instructor and as a DRE instructor. He has testified as a DRE and Drug Expert in court many times. He has taught and certified numerous officers in Tennessee. John has served as the Deputy Chief of Rockwood Police Department for the last eight years. We welcome John to the traffic safety and Law Enforcement Liaison family.



New Judicial Outreach Liaison—Judge Donald E. Parish

Judge Donald E. Parish has recently been named the new Judicial Outreach Liaison for Tennessee, replacing Judge Leon C. Burns, Jr., who recently retired. Judge Parish received his bachelor's degree with highest honors from the University of Tennessee, Martin, and his J.D. with high honors from the University of Tennessee College of Law. He spent 25 years in private law practice while also serving part-time as a Municipal Court Judge in his hometown of Huntingdon, Tennessee. He handled thousands of cases involving assorted misdemeanors, barking dogs and traffic citations.

In 2006 Judge Parish was elected to the 24th judicial District Circuit Court bench and served in Henry, Carroll, Benton, Decatur and Hardin counties, which jurisdiction runs from the Kentucky line in the north to the Alabama line in the south. He has served as an elected judge in the 24th Judicial District from 2006 until August of 2022. Judge Parish holds numerous professional and academic memberships, past and present, which include the Tennessee Judicial Conference, (2006-Present); Tennessee Trial Judges Association (2006-Present); Carroll County Bar Association (former Treasurer and President); Tennessee Municipal Judges Association, Tennessee Bar Association, American Bar Association, Tennessee Association of Criminal Defense Lawyers, Tennessee Trial Lawyers Association, American Trial Lawyers Association, Tennessee Municipal Attorneys Association, Tennessee Council of School Boards Attorneys, West Tennessee Legal Services Corporation Board of Directors and the University of Tennessee National Alumni Association Board of Governors. Welcome as our new JOL.

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