

**PUBLISHERS:**

Terry E. Wood, TSRP
Linda D. Sharer, TSRP

DISTRIBUTION:

Mary Campbell

INSIDE THIS ISSUE:

<i>Legislative Update</i>	1+2
<i>Dog Sniff (Hemp/Marij)</i>	3
<i>Recent Decisions</i>	4-5
<i>Cost of Crashes</i>	6+7
<i>Upcoming Training</i>	8
<i>DUI Tracker Report</i>	9
<i>Vehicular Homicides</i>	10-12

TN DISTRICT ATTORNEYS
GENERAL CONFERENCE,

Stephen D. Crump, 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
web-site: www.tntrafficsafety.org

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

2023 LEGISLATIVE UPDATE

Here are this year's recently passed legislative acts, regarding traffic safety:

Public Chapter 20, all new ignition interlock devices installed, on or after Jan. 1, 2024, must employ global positioning system (GPS) technology that will geotag the vehicle's location when startup, testing or circumvention is detected.

Public Chapter 64, the "Sergeant Chris Jenkins Law" makes it a Class C Misd. if a ladder falls onto the roadway from a motor vehicle or trailer. If death or bodily injury occurs due to the ladder on the roadway, then it is a Class A Misd.

Public Chapter 100, amends TCA §55-8-101(43) to define a "Motor-driven cycle" as a "Moterscooter". The new section expands the definition to include two and three wheeled automatic transmission vehicles with no more than 30 brake horsepower, and a cylinder capacity of no more than 300cc or an electric motor, not exceeding 5,000 watts. (Requires a Class M license to drive)

Public Chapter 116, lowers the required incarceration period for a DUI 2nd offense, from 25 days to 17 days, under TCA §55-10-402(a)(2)(B)(ii), the remainder mandatory 45 day jail period to be served in a substance abuse treatment program. It also requires, for a DUI 3rd or above conviction, the defendant to wear a transdermal alcohol monitoring device for a continuous 90 days of sobriety.

Public Chapter 137, allows for expunction of a violation of the implied consent statute, if the violation has been dismissed without costs. This does not apply to CDL holders or if the violation occurred in a commercial vehicle.

Public Chapter 164, limits excessive muffler noise to not more than ninety-five decibels (95dB). Also, excludes farm equipment and motorcycles.

Public Chapter 210, school bus drivers can now use hands free navigation devices if they are properly mounted.

Public Chapter 217, amends "Dillard's Law" regarding child maintenance costs awarded if a parent is killed during a vehicular homicide crash. Since sentencing is at 100%, the unpaid child maintenance obligations will convert to a civil Judgment after the payments are scheduled to terminate.

Public Chapter 243, adds a new section to Title 55, Chapter 10, Part 4 and is known as the "Silas Gable Flatt Law". This codifies DUI by permission. It is a Class A misdemeanor to provide a motor vehicle to... (Continued on page 2)

2023 LEGISLATIVE UPDATE (Continued)



anyone who is under the influence. Also, it is a Class A misdemeanor to provide a motor vehicle to a person whose driver license has been suspended or revoked by the court pursuant to TCA §55-10-404 unless they have a restricted DL. Mandatory minimums of 1st - 48 hours; 2nd - 72 hours; and 3rd - 7 days.

Public Chapter 354, known as the “Jabari Bailey Highway Safety Act” it raises the fines for the move over law, TCA §55-8-132. Also, it now applies to any vehicle with flashing hazard lights.

Public Chapter 362, no release on own recognizance or bail, without the approval of a judge, for Class A and B felonies; Aggravated Assault, as defined in §39-13-102; Aggravated Assault against a first responder, as defined in §39-13-116; and Domestic Assault, as defined in §39-13-111 (if a felony violation).



Public Chapter 383, expands the definition of impairment in boating under the influence (BUI) cases to match the definition of impairment in DUI cases. Also, adjusts BUI fines and penalties to match DUI fines and penalties, including enhancements, monitoring devices and the allowance for substance abuse treatment and care. BUI cases are not eligible for pre-trial diversion.

Public Chapter 412, makes the possession of Xylazine a Class A mid. It is a Class C felony to manufacture, deliver or sell Xylazine, unless used in the course of legitimate veterinary practice or pursuant to a valid prescription from a licensed veterinarian.

Public Chapter 416, it is a Class B misdemeanor if debris falls from your vehicle and comes in contact with another vehicle, while being operated. It is a Class C misdemeanor if debris falls from your vehicle and onto the highway. This Public Chapter also provides that there shall be no release eligibility for a person committing the offense of vehicular homicide, as defined in §39-13-213, and leaving the scene of an accident, as defined in §55-10-101(a). The person shall serve 100% of the sentence imposed with no sentence reduction credits allowed.

Public Chapter 423, regulates the manufacture, sell, and distribution of hemp-derived cannabinoids, such as Delta-8, Delta-10, THCP, THCV, THCA and others, but not CBD. Must be licensed to sell, and all products must be kept behind the counter. Prevents selling to anyone under 21 years old. May not be in actual physical control or drive a motor vehicle, motorized watercraft, aircraft or any other vehicle while under the influence of a hemp-derived cannabinoid. Illegal product is subject to seizure and forfeiture per §53-11-451.

Public Chapter 428, known as the “Eddie Conrad Act”, it adds seven points to the driving record of any driver under 18 years old, who commits a 2nd or subsequent violation of driving while using a wireless telecommunication device or a stand-alone electronic device.

Public Chapter 464, makes many changes to the way the Electronic Monitoring Indigency Fund is managed and distributed.

Public Chapter 481, allows a sentencing court to run sentences consecutively if the defendant is convicted of two or more offenses involving more than one victim, irrespective of whether the multiple offenses were part of a single criminal episode and the court determines that consecutive sentences, is in the interest of justice.

DOG SNIFF IS SUFFICIENT FOR PC TO SEARCH (Hemp/Marj.)

Since April 4, 2019, the possession of hemp has been legalized in Tennessee. Hemp is defined as *Cannabis sativa* containing not more than 0.3% Tetrahydrocannabinol (THC). Marijuana is defined as *Cannabis sativa* containing greater than 0.3% Tetrahydrocannabinol (THC). *See* Tenn. Code Ann. §39-17-415(c) (2019); and §43-27-101(3) (Supp. 2020). Since both hemp and marijuana are derived from the same plant, the smell of each product is indistinguishable from the other. Therefore, our Tennessee courts have been asked to determine if a probable cause search, based upon a canine sweep or an officer's smell, is reasonable, pursuant to the United States and Tennessee Constitutions. This issue was recently discussed in *State v. Andre Jujan Lee Green*, 2023 Tenn. Crim. App. LEXIS 209 (Tenn. Crim. App. June 12, 2023). In the *Green* case, Mr. Green was a passenger in a vehicle that was stopped for a traffic violation. The officer saw a backpack between Mr. Green's legs, but no one claimed ownership of the backpack and consent to search was denied. An open-air sniff of the vehicle was conducted and the canine indicated on the vehicle. A search of the backpack revealed marijuana, a handgun, a working scale, two cell phones and many ziploc bags. Mr. Green argued that a canine sweep is no longer valid because the police dog cannot distinguish between legal hemp and illegal marijuana.

The Tennessee Supreme Court has stated that "a canine sweep around the perimeter of a vehicle which has been legally detained does not constitute a search, and thus, does not require probable cause or reasonable suspicion so long as the duration of the canine sweep does not exceed the time necessary for the traffic stop." *State v. England*, 19 S.W.3d 762, 764 (Tenn. 2000). Also, the Tennessee Supreme Court has allowed on many occasions for the smell of marijuana to provide probable cause for a search. *See State v. Hughes*, 544 S.W.2d 99, 101 (Tenn. 1976); *see also Hicks v. State*, 534 S.W.2d 872, 874 (Tenn. Crim. App. 1975); *State v. Frederic A. Crosby*, No. W2013-02610-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 881, 2014 WL 4415924, at *8 (Tenn. Crim. App. Sept. 9, 2014). The Court of Criminal Appeals recently commented that "until our supreme court or our legislature determines otherwise, the smell of marijuana continues to establish probable cause for the warrantless search of an automobile." *State v. Stephen Paul Hampton and Margaret Mary Hampton*, No. W2021-00938-CCA-R3-CD, 2022 Tenn. Crim. App. LEXIS 488, 2022 WL 16919950, at *6 (Tenn. Crim. App. Nov. 14, 2022).

The CCA, in *Green*, stated that, "while the alert of a trained drug detection canine is alone sufficient, a review of the totality of the circumstances surrounding the stop, bolster a finding of probable cause." *Green* at *5. Other factors can always be used to support the probable cause of the search since probable cause is determined by a totality of the circumstances. The *Green* court stated that this conclusion is consistent with the approach outlined by the U.S. Supreme Court in *Florida v. Harris*, 568 U.S. 237, 248 (2013), "whether all facts surrounding the dogs alert" would lead a person to think a search would reveal evidence of a crime. *Id.*

Lethal Weapon/Vehicular Homicide

The TSRPs from Tennessee and Kentucky presented a Lethal Weapon/Vehicular Homicide seminar in Murfreesboro, TN, on June 6-8, 2023. Over 50 law enforcement officers and prosecutors from Tennessee and Kentucky participated in two mock crashes and many classes presented by Professor John Kwasnoski. Next year's seminar will be in Kentucky.





RECENT DECISIONS

State v. Steven Shawn Bowen, 2023 Tenn. Crim. App. LEXIS 127 (Statute of Limitations, Ferguson and Chain of Custody issues)

On December 14, 2017, Mr. Bowen was stopped for crossing the center line and turning without signaling. The officer smelled a strong odor of an intoxicating substance and Mr. Bowen admitted to drinking 5-6 beers. After a poor performance during field sobriety tests, Mr. Bowen was arrested for DUI 3rd, driving while license revoked 7th and no insurance. On January 7, 2019 the Monroe County grand jury indicted Mr. Bowen and he was convicted by a jury, on November 16, 2021. Mr. Bowen argued that the statute of limitations had expired due to the 13 month period between the arrest and the grand jury indictment. However, T.C.A. §40-2-104 “provides for the commencement of a prosecution by several methods, ’all deemed to provide the defendant with sufficient notice of the crime.’” *State v. Ferrante*, 269 S.W.3d 908, 914 (Tenn. 2008), (quoting *State v. Tait*, 114 S.W. 3d 518, 522 (Tenn. 2003)). An arrest warrant was issued on December 15, 2017 and a preliminary hearing was held on August 7, 2018, both of which are sufficient to commence prosecution within the statute of limitations.

Not every Ferguson issue results in a dismissal. Although a video of the encounter was lost or destroyed, there was sufficient other evidence to convict the defendant of DUI per se with a BAC of .177. Also, the trial court provided the jury instruction suggested in *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). The CCA decided that Mr. Bowen did receive a fundamentally fair trial and he was not disadvantaged due to the lost video.

Regarding the chain of custody issue, the state did not call every witness that touched the blood sample. However, the state is not required “to call all of the witnesses who handled the item.” *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008). Rather, “when the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence.” *Id.* In this case, the chain of custody provided was sufficient. Judgments were affirmed.

State v. Tinisha Nicole Spencer, 2023 Tenn. Crim. App. LEXIS 156 (Chain of Custody and Sentencing)

Ms. Spencer was stopped on the University of Tennessee campus for speeding at 1:20 am on October 20, 2018. Ms. Spencer had slurred speech, watery “glazed over” eyes and an odor of alcohol was coming from her vehicle. Ms. Spencer was arrested after performing poorly on the SFSTs. She refused a blood draw after being read the implied consent form. A search warrant was obtained and a blood sample was obtained at 4:57 am. The BAC result was .185. Ms. Spencer was convicted by the jury of DUI per se and DUI. During the sentence enhancement phase, Ms. Spencer was convicted of DUI 5th offense, as an E felony. She appealed the chain of custody of the blood sample and the sentencing enhancements because the indictment listed the offense dates and not the conviction dates, as required by TCA §55-10-411(b)(2).

Tennessee Rule of Evidence 901 governs the authentication of evidence. This rule ensures that “there has been no tampering, loss, substitution, or mistake with respect to the evidence.” *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 200). The trial court is given sound discretion and it’s determination will not be overturned in the absence of a clearly mistaken exercise of that discretion. *State v. Holbrooks*, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998). Ms. Spencer objected, at trial, to the phlebotomist not being called to testify, but in her appeal, she argued a different theory, of no evidence presented regarding the time period between when the officer put the blood sample in his agency’s evidence locker and when the TBI agent tested it. During the trial, the defense made only a vague reference to a *Gibson* case, but her arguments were unrelated to the *Gibson* case. Ms. Gibson failed to make any objection at trial regarding the *Gibson* issue. On appeal however, Ms. Spencer’s entire objection relied upon the ruling in *State v. Gibson*, 2018 Tenn. Crim. App. LEXIS 754 (Tenn. Crim. App. Oct. 3, 2018). Relief is not required where a party “failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error” *See* Tenn. R. App. P. 36(a). Therefore, the CCA deemed this issue waived for appellate review, as it was not argued earlier. (Continued on page 5)

RECENT DECISIONS (Continued)

Ms. Spencer also objected to the priors alleged in the indictment, for listing only the offense dates and not the conviction dates. Her first objection to this, was first raised at her trial. A motion alleging a defect in the indictment must be made prior to trial. *Tenn R. Crim. P., Rule 12 (b)(2)(B)*; See also, *State v. Nixon*, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997). The CCA pointed out that the issue of an indictment listing offense dates, rather than conviction dates, has already been decided in *State v. Daniels*, 656 S.W.3d 378, 392 (Tenn. Crim. App. 2022). Ms. Spencer was sufficiently apprised of the accusation against her and she could have objected, prior to trial. This issue is waived. The judgments of the trial court were affirmed.

State v. Ovitta Vaughn, 2023 Tenn. Crim. App. LEXIS 184 (Driving/Physical Control - Election)

Ms. Vaughn's car was stopped in the middle of a busy road and was seen directing traffic around her car. She said she was on her way home and her car just stopped working. Ms. Vaughn tried to start the car, but said that it was out of gas. A deputy smelled alcohol and Ms. Vaughn performed poorly on SFSTs. A blood sample revealed a BAC of .153%. At trial, Ms. Vaughn testified that someone else was driving and that they left the scene to get help. A jury convicted Ms. Vaughn of DUI per se and DUI. She appealed, based upon insufficiency of the evidence, that she was driving or in physical control of an operational vehicle, and that the State did not make an election between the two theories of actual driving or in physical control.

The Tennessee Supreme Court has stated that a conviction for DUI can be sustained even though no one saw the vehicle in motion or the accused driving, because it can be established by circumstantial evidence. *State v. Lawrence*, 849 S.W.2d 761, 763 (Tenn. 1993). "[T]he proper focus is not narrowly on the 'mechanical condition of the vehicle when it comes to rest, but upon the status of the occupant and the nature of the authority he or she exerted over the vehicle arriving at the place from which, by virtue of its inoperability, it can no longer move.'" *State v. Butler*, 108 S.W.3d 845, 852 (Tenn. 2003). Also, since DUI is a continuing offense, the State is not required to make an election as to whether the defendant was driving the vehicle or merely had physical control. See *State v. Morrell*, 2014 Tenn. Crim. App. LEXIS 935 (Tenn. Crim. App. July 22, 2014); *State v. Corder*, 854 S.W.2d 653, 654 (Tenn. Crim. App. 1992). The trial judgments were affirmed.

State v. Sebakire Crode, 2023 Tenn. Crim. App. LEXIS 188 (Sufficiency of Evidence - Marijuana)

Mr. Crode was stopped for driving 53 mph in a 35 mph zone. He did not pull over initially, when Officer Golden turned on his blue lights. Officer Golden stated, he smelled the odor of marijuana and he noticed Mr. Crode's eyes were bloodshot. Mr. Crode spoke with an accent, but he responded appropriately to Officer Golden's questions. As Mr. Crode attempted to exit his car, the car kept rolling forward. Officer Golden had to tell Mr. Crode twice to put his car in park. A marijuana cigarette was found in a baggie in Mr. Crode's shoe. Officer Golden offered to have someone pick Mr. Crode up or he could attempt SFSTs. Mr. Crode chose to take the field sobriety tests. Mr. Crode displayed many signs of cognitive and mental impairment. A blood sample indicated the presence of Delta 9 THC, the active drug in marijuana, as well as 11-hydroxy-THC, the active metabolite of marijuana. TBI agent, Sarah Douglas, testified that THC in a person's system could cause slowed reaction time, an "impaired ability [for] multitasking or doing divided-attention tasks," difficulty concentrating, and short-term memory lapse. Mr. Crode did not testify and the jury convicted him of DUI 3rd offense.

Due to the observed speeding, the slow reaction to the officer's blue lights, the smell of marijuana, the moving of the car as Mr. Crode attempted to exit the car, the poor performance on the SFSTs, and the testimony of both Officer Golden and Agent Douglas, regarding the presence and effect of marijuana, the CCA concluded that there was sufficient evidence that Mr. Crode did not possess the "clearness of mind" he would normally possess. Therefore, a rational jury could conclude that marijuana was the cause of the impairment. The evidence was sufficient for the jury to find Mr. Crode guilty of driving under the influence beyond a reasonable doubt. The judgments of the trial court were affirmed.

THE COST OF MOTOR VEHICLE CRASHES



The thought of things going bump on the road likely conjures mental images accompanied by sounds (with acknowledgements to the original Batman TV series) like SCREECH, THUD, BANG and CRACK! However, when the crash scene falls silent, other sounds, at first barely detectable, then become collectively deafening. CHA-CHING! Reverse CHA-CHING, the rushing sounds of money flowing outward, vanishing, or at least spent to only maintain or restore the pre-crash situation.

In December of 2022 the National Highway Traffic Safety Administration (NHTSA) issued an almost 300 page report entitled “The Economic and Societal Impact of Motor Vehicle Crashes”, which contained findings regarding the comprehensive costs of motor vehicle crashes taking place on American roads for the year 2019. This article will attempt to summarize the pertinent findings of that report as are particularly relevant to those interested in driver behavior within the highway traffic safety community. All the data referred to herein is found within the NHTSA report, (P. __), unless otherwise noted.

There are, on average, about 6 million motor vehicle crashes on American roads annually. See: Bureau of Transportation Statistics of United States Dept. of Transportation, National Transportation Statistics Table 2 - 17 accessed at bts.org as of April 28, 2023.

In 2019, between 36,500 and 39,000 (depending on the criteria used) people were killed, 4.5 million were injured and 23 million vehicles were damaged in motor vehicle crashes on the nation’s roads. (P. 5) Tennessee roadways saw the deaths of 1136 of those persons. See: Tennessee Highway Safety Office Resource Service data accessed at tntrafficsafety.org on April 28, 2023. Those lost lives and the diminished quality of life for those who were seriously injured but survived is, standing alone, enough for one to recognize the enormous human consequences of these crashes. But to fully comprehend the full scope of the losses, one must also be aware of the economic costs that result too.

NHTSA concluded that the “economic costs of these crashes totaled \$339.8 billion” in 2019. (P. 5) These costs include the provision of medical care, legal and court fees, fire-police-ambulance-emergency response, insurance administration, road congestion, lost productivity at work and at home and property damage. (P. 1)

To better put that number in perspective, the approximately \$340 billion cost equates to \$1,035 on average for every adult and child living in the United States. (P. 5) This per capita cost varies by state. At \$1,472 annually, only four states had a higher per capita cost than did Tennessee in 2019. It is estimated that Tennesseans spent 3% of their per capita personal income defraying motor vehicle crash costs. (P. 100-101)

Here is an approximate breakdown of the economic costs by category: Property damage 34%; Lost workplace, market and household productivity 32%; Traffic congestion 11%; Medical including emergency services 9%; Insurance administration 9%; and Legal costs 5% (P. 13)

All consequences of physical harm are, in our justice system, quantifiable in money. That is true in cases involving death and life altering injuries in which the quality or duration of life is valued. When this category of loss is combined with the economic costs, motor vehicle crashes resulted in total societal harm totaling \$1.37 trillion in 2019. Therefore, lost quality of life accounted for 75% of total societal harm caused by motor vehicle crashes, or about 6% of the nation’s real gross domestic product for that year. (P. 5, 9)

The following shows who paid these costs by approximate percentage: Private insurers 54%; Individual crash victims 23%; Charities including indigent care and uninvolved motorists 14%; and Government 9%. This means that, “those not directly involved in crashes pay for roughly three-quarters of all crash costs, primarily through insurance premiums, taxes and congestion related costs”. (P. 6, 15)

The trend in the number of roadway fatalities, and more significantly the fatality rate... (Continued on page 7)

THE COST OF MOTOR VEHICLE CRASHES (Continued)

per one hundred million vehicle miles traveled (VMT), has been historically downward since at least 1949. This is due to several factors such as safer vehicles and roads, safer drivers, more use of mass transit and a significant decrease in impaired driving. Looking back to 1949, 70 years before the study year of 2019, NHTSA reported a fatality rate of 7.13 deaths per 100 million VMT. In 2019, the fatality rate per 100 million VMT was near an historic low of 1.11. (P. 30-31) (This writer owns both a 1949 and 2019 pickup truck so the data is encouraging both personally and professionally.)

Importantly, the causes of all this bumping on the roads and the resultant costs were examined by the authors of the NHTSA report. “Adverse driver behavior” was the determined cause of 94% of crashes in 2019. The two most significant of these causes, which were related to that driver behavior, were distracted driving and the use of alcohol by a driver. “Distracted driving...was a causal factor in crashes that accounted for 29% of economic costs and societal harm.” (P. 10) “Alcohol-involved crashes...accounted for 20% of economic costs and 26% of societal harm.” (P. 10)

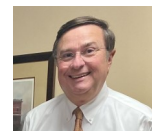
The report indicates that NHTSA compiles data on many different categories of distracted driving, which is defined as driving while alert, attentive and sober. Distraction categories include, for example, fiddling with the radio or cell phone, as one might expect. Some other categories of driver distraction were more surprising, like driving while brushing one’s teeth or removing one’s clothing. (P. 135) Distracted driving doubles the risk of a crash occurring. (P. 138) “In 2019, distraction affected crashes caused \$46 billion in economic costs.” (P. 130) Three thousand one hundred forty-two (3,142) persons were killed nationwide as a result of driver distraction. (P. 128) Of that number, 69 persons died on Tennessee roads. See: Tennessee Highway Safety Office Resources data at tntrafficsafety.org accessed on April 28, 2023.

Alcohol consumption continues to be a major cause of the bumps that occur on our roads which result in fatalities, serious injuries and the related enormous costs. But progress has been made. In 1982, 60% of all crash fatalities involved alcohol use. By 2019, that number had dropped to 39%. This improvement is attributable to several factors but two are primary: (1) increased enforcement of driving under the influence laws, and (2) public awareness campaigns of entities such as NHTSA, the Tennessee Highway Safety Office and private partners like Mothers Against Drunk Drivers (MADD). During the same time period the number of drivers involved in fatal crashes who were presumptively impaired by law due to their blood alcohol content (BAC) being .08 g/dl or above fell by more than half. (P. 102-103)

There is a... “disproportionate impact that high BACs have on crash incidence. Less than 1% of overall miles are driven by impaired drivers...but they account for over 11% of all vehicle crashes, and over 80% of all alcohol-involved crashes, including 86% of all alcohol-involved fatalities.” (P. 114) Alcohol use increases both the likelihood and severity of crashes and therefore drives up crash costs.

The NHTSA authors found that “alcohol-involved crashes cost \$69 billion in economic costs in 2019, with 84% of this or \$58 billion, occurring in crashes where the highest BAC was greater than .08.” (P.119) In Tennessee alone, DUI crash costs exceeded \$833 million last year. See: Tennessee Highway Safety Office Resource Services data accessed at tntrafficsafety.org on April 28, 2023. And most injuries, about 79% nationally, arising from crashes that were alcohol-involved are attributed to alcohol use as a causative factor. So, the economic cost of motor vehicle crashes to Americans in 2019 was about \$340 billion. One final factoid for perspective is helpful. That same year, Russia spent an estimated \$65 billion, less than one-fifth the sum, on its entire military establishment. See: Stockholm International Peace Research Institute (SIPRI) “Russia Military Spending/Defense Budget 1992-2023” accessed at macrorends.net on April 28, 2023. Oh my! Is that the rushing sound of vanishing dollars?

Written by: Tennessee Judicial Outreach Liaison/Judge Donald Parish, Retired





UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - July 19, 2023, Nashville, TN (THP Cadets)

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 from 1 p.m. to 4 p.m.

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

This two-day seminar is designed to jointly train law enforcement officers and prosecutors in all aspects of prosecuting drugged driving cases. The agenda includes a brief overview of the investigation technique involved in the detection of drug impaired drivers; how to understand and present impairment evidence in court; and, how to develop and improve courtroom skills and strategies. A wet-lab will be included.

Tennessee Lifesavers Conference– August 2-4, 2023 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 - August TBA, 2023, Johnson City, 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 from 1 p.m. to 4 p.m.

DA Conference: DUI Breakout - October 17-20, 2023, 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 2023 legal updates and CDL masking issues that are commonly faced by our DUI prosecutors.

Victims of DUI - December TBA, 2023 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 7-8, 2023, Atoka, TN
September 18-19, 2023, Jackson, TN

DUI Detection & Standardized Field Sobriety Testing

July 24-28, 2023, Jonesborough, TN
September 18-20, 2023, Kingston, TN

Drug Recognition Expert School (DRE)

August 2, 2023, Franklin, TN (Pre-Conference)
September 18-28, 2023, Johnson City, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from April 1, 2023, through June 30, 2023, 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, 2023, through June 30, 2023, since the last quarter were 1,694. This number is down from the previous quarter by 234 cases. DUI cases have dramatically increased the last few years and a larger number of cases are now being prosecuted. However, the decrease in total dispositions this quarter is unusual. The total number of guilty dispositions during this same period of April 1, 2022 through June 30, 2022 were 1,849. The total number of dismissed cases this quarter, were 133. Across the State of Tennessee 67.83% of all arrests for DUI, were actually convicted as charged. This percentage is slightly lower than the last quarter, ending on March 31, 2023. Only 13.28% of the DUI cases during this current quarter were dismissed or nolle prossed. Also, during this same period of time, only 284 of the total DUI cases disposed of, were to different or lesser charges. Therefore, only 16.77% 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, 2023 through June 30, 2023. During this period, there were a total of 337 fatalities, involving 312 crashes, which is an increase from the previous quarter. Out of the total of 337 fatalities, 60 fatalities involved the presence of alcohol, signifying that 17.8% of all fatalities this quarter had some involvement with alcohol. Further, there were a total of 42 fatalities involving the presence of drugs, signifying that 12.5% of all fatalities this quarter involved some form of drugs. Therefore, over 30% 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 634. This is up by 32 from the 602 fatalities incurred last year at this same time. This increase in alcohol and drug related fatalities is trending in the wrong direction. We must stop the pointless death and injuries caused by the preventable crime of impaired driving. Please do not let others drive impaired.

Train the Trainer - Nashville

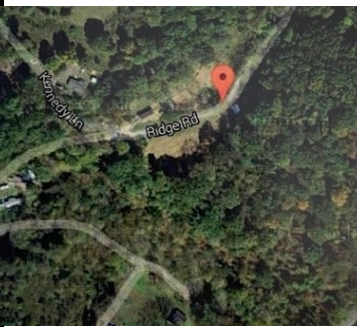
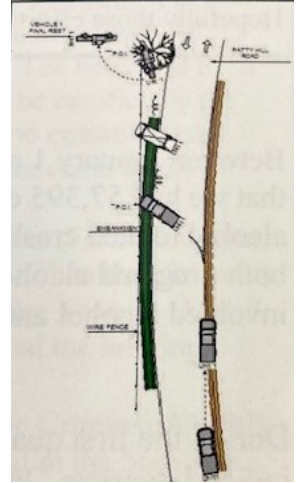
The DUI Training Department held a Train the Trainer seminar at the Homewood Suites Hotel in downtown Nashville on April 18-21, 2023. Prosecutors from Kentucky and Tennessee were able to learn how to better communicate and to lead others. Many of these skills crossover into the courtroom and help to improve the effectiveness of trial performance. Instructors from all over the United States were able to share their knowledge and experiences. Please join us for future trainings.



VEHICULAR HOMICIDE MURDERER’S ROW

Kevin Allen Fleming v. State, 2023 Tenn. Crim. App. LEXIS 121 (Post Conviction)

Mr. Fleming was convicted of three counts of aggravated vehicular homicide and one count of DUI 4th offense, which arose from a single-car crash that occurred on July 21, 2014. Mr. Fleming lost control of his truck on a very narrow section of Ridge Road in Campbell County, TN (See the diagram on the right). All three of his passengers, Darrell Carroll, Charles Morris and Carl Daugherty were killed due to injuries suffered in the crash. A blood sample, taken over 2.5 hours after the crash, revealed a BAC of .07% and the presence of cocaine, cocaethylene (a chemical caused from consuming alcohol and cocaine simultaneously), and Hydrocodone. Mr. Fleming received an effective sentence of 42 years. He filed a post-conviction petition claiming that his trial counsel was ineffective. The trial court denied it and the courts ruling was appealed.



When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S.668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The *Strickland* standard has been applied under the Tennessee Constitution in *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). “We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result.” *Rohden v. State*, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). “As to the prejudice prong, the petitioner must establish ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S.at 694). “That is, the petitioner must establish that his counsel’s deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome.” *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)). Mr. Fleming could not meet this burden and his appeal was denied.

State v. Gavin Tyler Sheets, 2023 Tenn. Crim. App. LEXIS 123 (Judicial Diversion/Recklessness)



On October 20, 2020, twenty-one year old Gavin Sheets was traveling over 100 mph in a 45 mph zone, when he failed to negotiate a “significant curve” on Sheegog Lane in Maury County, TN. (data from the airbag control module recorded the vehicle “travelling 112 [miles] per hour” two and a half seconds before impact, and “half a second prior to the airbag deployment signal the vehicle slowed down to [ninety-one] miles per hour.”) Mr. Sheet’s car left the roadway and rolled multiple times, until coming to rest over 500 feet away. Tyler Blalock was a passenger in the front seat and he suffered severe injuries. Sixteen year old Jillian Brown was a passenger in the back seat and died, at the scene, from her injuries.

On October 13, 2021, Mr. Sheets entered an open plea to one count of vehicular homicide by recklessness and one count of reckless endangerment. After a lengthy and emotional sentencing hearing, the State requested a full service of a six-year sentence in custody at TDOC. The defense requested judicial diversion or an alternative sentence of probation, short of the maximum. (There was testimony from a Columbia police officer that on July 19, 2020, the officer cited Mr. Sheets for reckless driving, ... (Continued on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW

after being clocked, by radar, traveling ninety-two miles per hour. Mr. Sheets plead guilty to reckless driving on September 23, 2020 and was on probation at the time of the vehicular homicide crash. The trial judge stated that the defendant was a “missile looking for something to hit, and the Brown family was it.” He further stated, Mr. Sheets was given a “second chance” and he did not “take that chance or that second opportunity”, when he was placed on probation for reckless driving. The trial judge refused to even consider judicial diversion, although several factors were considered before the court denied alternative sentencing and then sentenced Mr. Sheets to six years to serve in custody at TDOC for the vehicular homicide by recklessness and one year for the reckless endangerment, to be served concurrently. The State tried to revisit the factors for denying judicial diversion, but the trial judge stated that the factors he used in denying probation “should [have] and did” set forth his analysis on judicial diversion. Mr. Sheets appealed his sentence.

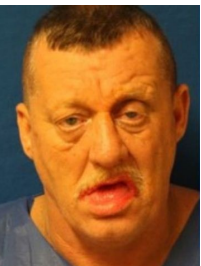
It is true that the factors that a trial court considers in deciding issues of judicial diversion and alternative sentencing can overlap substantially. *See State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017). However, these concepts and their underlying purposes are distinct, and a trial court should analyze the issues separately and differentiate between judicial diversion and alternative sentencing. *See State v. John Edward Wilson, Jr.*, 2020 Tenn. Crim. App. LEXIS 743 (Tenn. Crim. App. Nov. 19, 2020). Since the trial court failed to state separate factors for denying judicial diversion, the CCA could not apply a presumption of reasonableness for any review on appeal. *Id.*



Jillian Brown

The CCA could have remanded the case to the trial court for a further hearing to consider the judicial diversion factors, but they instead conducted a de novo review to determine if an adequate basis for the trial court’s decision existed within the record. *See State v. King*, 432 S.W.3d 316, 328 (Tenn. 2014). The CCA considered all of the judicial diversion factors. *See, State v. Parker*, 932 S.W.2d 945 (Tenn. Crim. App. 1996) and *State v. Electroplating, Inc.*, 990 S.W.2d 211 (Tenn. Crim. App. 1998)). The CCA determined that factors weighing against judicial diversion greatly outweighed all other factors. Likewise, the CCA determined that the trial court did not abuse its discretion in denying alternative sentencing. Therefore, the judgments of the trial court were affirmed.

State v. Randy O. Reynolds, 2023 Tenn. Crim. App. LEXIS 193 (Exigent Circumstances)



This case involves a car crash, on October 20, 2019, in which Mr. Reynolds crossed the center line of a highway and struck another car, killing the driver, Irma Ortiz, and injuring her passenger, Paul Pewitt. Mr. Reynolds left the scene, on foot, and was discovered two hours later. A blood sample was collected and it indicated the presence of methamphetamine and diazepam. A jury convicted Mr. Reynolds of Aggravated Vehicular Homicide, Vehicular Homicide, Reckless Homicide, Vehicular Assault by DUI, Simple Possession of a Sch. II Drug, Leaving the Scene, Evading Arrest, and Driving on a Revoked License. Mr. Reynolds was sentenced to 52 years in TDOC custody, consecutive to three misdemeanor sentences of eleven months, twenty-nine days. Mr. Reynolds appealed the trial court’s denial of his Motion to Suppress.

THP Trooper Binkley stated that he arrived at a crash scene at 3:39 pm and the driver of an involved F-250 pickup had left the scene. A smaller Nissan with the topped ripped off was also involved. The driver, Ms. Ortiz, was dead and a passenger, Mr. Pewitt, was injured. Approximately an hour later, Mr. Vandivort, the registered owner of the pickup, was contacted at his home. He stated that he loaned... (Continued on page 12)

VEHICULAR HOMICIDE MURDERER'S ROW

the pickup to Mr. Reynolds. Approximately another hour later, Mr. Reynolds was located "several hundred yards from the crash site. When Trooper Binkley encountered Mr. Reynolds, he was incoherent and non-responsive ("on the nod"). No alcohol was detected, but Mr. Reynolds appeared impaired. Mr. Reynolds' condition rendered him unable to give consent and a warrantless blood draw was obtained. Trooper Binkley said it would have taken him another 1 to 2 hours to obtain a warrant, starting at 6 pm.

"To determine whether a law enforcement officer faced an emergency that justified acting without a warrant," a reviewing court "looks to the totality of the circumstances." *Missouri v. McNeely*, 569 U.S. 141, 149 (2013). Based upon the circumstances in this case, the Court of Criminal Appeals determined that exigent circumstances did exist to justify the warrantless blood draw. Although there were several officers at the scene of the crash, it took several hours to locate the defendant and to address his medical condition. Most of the delay was caused by the defendant, who fled the scene. The trial court accredited Trooper Binkley's testimony, that it would have taken another 1-2 hours to obtain a warrant, and even longer if the defendant had been transported to a Nashville hospital while attempting to get the warrant. Also, since the intoxication was due to drugs and not alcohol, Trooper Binkley was faced with a more compelling need to act and a greater possibility that he had insufficient time to obtain a warrant (TBI Agent Bramlage testified at the suppression hearing that drugs, unlike alcohol, metabolize at different rates for different persons).

An additional factor considered by the CCA was the incoherent and, essentially, passing in and out of consciousness of Mr. Reynolds, while interacting with the law enforcement officers. The CCA stated, "We observe that the United States Supreme Court and this court have concluded that exigent circumstances existed to justify a warrantless blood draw based on an unconscious driver who was, at the time of the police encounter, unable to consent to such a request. See *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2537-38 (2019) (intoxicated driver who was unable to stand for field sobriety tests, lost consciousness during ride to hospital, and did not respond to a verbal implied consent admonition; "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when an impaired driving suspect is unconscious); *State v. Bowman*, 327 S.W.3d 69, 85 (Tenn. Crim. App. 2009) (exigent circumstances existed for warrantless blood draw when apparently intoxicated driver in fatal accident was found unconscious outside his car, and given lateness of hour, judge would be unavailable to sign warrant for blood draw). Considering the totality of the circumstances, the warrantless blood draw was justified by the existence of exigent circumstances. The judgments of the trial court were affirmed. (Editor's note: This appears to be the first exigent circumstances case decided by the CCA since the U.S. Supreme Court published the *Mitchell* case, which reaffirmed *Schmerber v. California*, 384 U.S. 757 (1966) (a car crash took priority over a 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. Sharer (615) 945-2040

Mary Campbell (615) 933-6339