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PUBLISHERS:
Terry E. Wood, TSRP
Linda D. Sharer, TSRP
LAYOUT AND DESIGN:
Mary Campbell

INSIDE THIS ISSUE:

TN DISTRICT ATTORNEYS GENERAL CONFERENCE,

Stephen D. Crump, Executive Director
226 Anne Dallas Dudley Blvd., Suite 800
Nashville, TN 37243

DUI Training Division
DUI Office: (615) 253-6734
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

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TESTIMONY BY ZOOM ALLOWED IN TRIAL

The CCA in *State v. William Michael Bowers,* 2023 WL 6211909 (Tenn. Crim. App. Sept. 25, 2023) addressed an important conflict between a confrontation clause violation analysis under the Sixth Amendment of the United States Constitution and one under Article I, Section 9 of the Tennessee Constitution, which requires a "face-to-face" confrontation.

Mr. Bowers was charged with vehicular homicide by Intoxication (Fentanyl), due to a crash occurring on August 21, 2020, that killed Stella Barnett. During all times herein, a state of emergency for the Judicial Branch of Tennessee was in place due to the COVID-19 pandemic.[1] On the morning of January 18, 2022, a jury was impaneled, and the trial commenced. By the afternoon, the prosecutor had learned that a witness she intended to call had COVID-19 and the flu. The trial court asked if the parties would agree to allow testimony "via Zoom", but the defense counsel said no. After further discussion, the court permitted the witness to testify via Zoom and "utilized an 'Owl' device" to permit the witness, to see the person speaking within the courtroom. The court confirmed all jurors could see the witness. Upon the completion of proof in the case, the jury returned a verdict of guilty. In a motion for a new trial, Mr. Bowers alleged that the court erred by denying his right to confrontation. Mr. Bowers argued that the Tennessee Constitution provided more protection than the federal constitution and that under the Tennessee Constitution, "if you are going to testify against somebody, you need to be in the courthouse." Before denying the motion for a new trial, the trial court asked how the outcome of the trial was affected, to which defense counsel argued that he did not have to demonstrate prejudice because an error of this nature was not subject to harmless error analysis.

In addressing the federal constitutional claim, the CCA first looked at the Sixth Amendment which reads, "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him" and noted that this right applies to the states through the Fourteenth Amendment. The confrontation clause, as established through its plain language and United States Supreme Court (USSC) precedent, generally requires that a witness testify face-to-face with the defendant; however, face-to face testimony is not always required and a defendant's confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony

1. The initial COVID-19 pandemic state of emergency was declared by the Tennessee Supreme Court on March 13, 2020. *See In re: COVID-19 Pandemic,* No. ADM2020-00428 (Tenn. March 13, 2020) (Order). This order was modified and extended several times until it was lifted on June 8, 2023. (approximately one and half years after the trial of the defendant). *See In re: COVID-19* Pandemic, No. ADM2020-00428 (Tenn. June 8, 2023) (Order Ending State of Emergency). One order modification provided "Judges shall not require or allow any individual who has tested positive for COVID-19 to appear or be present in court." *See In re: COVID-19 Pandemic,* No. ADM2020-00428 (Tenn. Aug. 26, 2021) (Order). That provision was in place at the time of the defendant's trial.

(Continued on page 12)

RECENT DECISIONS

State v. Luis Alexis Briceno, 2023 WL 4146280 (Anxiety did not invalidate consent)

On May 9, 2018, at approximately 6 a.m., Mr. Briceno was located passed out, while sitting in his truck at an intersection. A responding officer noticed, an odor of alcohol, bloodshot, watery eyes and slurred speech. After performing poorly on SFSTs, Mr. Briceno was arrested, read his Miranda rights and the implied consent form. Mr. Briceno agreed to give a breath sample which indicated a BAC of .155%. During a motion to suppress, Mr. Briceno argued that he suffered from severe anxiety, which caused his poor performance and which prevented him from possessing the ability to give voluntary consent. Before the motion to suppress, defense counsel requested expert fees regarding testimony of severe anxiety as a defense. The trial court granted the request, but the Administrative Office of the Courts denied the request. Mr. Briceno chose to proceed with the motion and the trial, rather than wait for an appeal to the expert fee request. Therefore, the Court of Criminal Appeals determined that the denial of expert fees issue was waived and there existed sufficient evidence for the trial court to determine that the Mr. Briceno's consent was both knowing and voluntary. The trial court had determined that the officer's testimony was credible and that Mr. Briceno's testimony was not credible. The judgments of the trial court were affirmed.

Marshall G. Tate v. State, 2023 WL 4489447 (Ineffective assistance of counsel)

Mr. Tate plead guilty to one count of DUI Per Se. During a crash investigation, Mr. Tate was determined to be the driver of one of the vehicles, he showed signs of intoxication, and was arrested for DUI. A blood sample indicated a BAC of 0.183%. At the time, Mr. Tate was on parole for murder, after serving 37 years in TDOC. Mr. Tate had served over a year in custody by the time of his plea and he was sentenced to, 11 months and 29 days, time served. Unfortunately for Mr. Tate, the parole board kept him longer. He later filed a post conviction petition, based upon ineffective assistance of counsel. The CCA court determined that there was no right of appeal after the guilty plea and there was no evidence of Mr. Tate's counsel being ineffective. The judgments of the trial court were affirmed.

State v. Jimmy L. Cobble, 2023 WL 4611748 (Violation of probation)

Mr. Cobble plead guilty to Vehicular Assault and DUI, fifth offense, in January, 2022, and he received a split confinement sentence of one year jail, followed by seven years on supervised probation. One month later, a violation of probation was filed due to a positive drug test, after the plea hearing, but before reporting for jail. The trial court then ordered Mr. Cobble to serve his entire sentence in TDOC custody. Mr. Cobble appealed.

A trial court may revoke probation upon its finding, by a preponderance of the evidence, that a violation of the conditions of probation occurred. See T.C.A. § 40-35-311(e) (2019). The CCA stated that although the trial court's reasoning could have been more robust, it did find full revocation appropriate, based upon Mr. Cobble's lack of amenability to correction as evidenced by his admission to having illegally used drugs, all within a few days of entering his guilty plea. The judgments of the trial court were affirmed.

State v. William Timothy Kirk, 2023 WL 4948887 (Consecutive sentencing)

Mr. Kirk plead guilty to one count of DUI first offense and the manner of service was to be determined by the court. Mr. Kirk was determined to be under the influence, during a crash investigation, and he admitted to taking Oxycodone. In 1978, a jury had convicted Mr. Kirk of robbery with a deadly weapon and sentenced him to 65 years. While he was in TDOC, in 1982, he was involved in the death of two other inmates and was convicted of two counts of voluntary manslaughter and aggravated kidnapping. Mr. Kirk was sentenced to life, concurrent with his 65 years sentence. Mr. Kirk made parole and was later arrested for this DUI. The trial court sentenced him to 11 months, 29 days, consecutive to his life sentence. Mr. Kirk appealed.

(Continued on Page 3)

RECENT DECISIONS (Continued)

Sentencing issues within the appropriate statutory range are reviewed under an abuse of discretion standard, with a presumption of reasonableness. *State v. Bise,* 380 S.W.3d 682, 708 (Tenn. 2012). This standard applies to "all sentencing decisions." *State v. King,* 432 S.W.3rd 316, 324 (Tenn. 2014). Also, a person convicted of a misdemeanor offense has "no presumption of entitlement to a minimum sentence." *State v. Johnson,* 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999). The trial court has more flexibility in misdemeanor sentencing than in felony sentencing. *Id.* This applies to the court's exercise of its discretionary authority to impose consecutive sentences. *State v. Pollard,* 432 S.W.3d 851, 861 (Tenn. 2013). The judgments of the trial court were affirmed.

State v. Lonell Montez Hartshaw, 2023 WL 5165803 (Sentencing and fines)

Mr. Hartshaw entered an open plea, on the day of trial, to felony evading arrest, DUI Pre Se (second offense), simple possession and many other traffic offenses. These all stemmed from an attempted traffic stop for a window tint violation. Mr. Hartshaw failed to stop and after a chase, he was determined to be under the influence of alcohol. Between his plea and his sentencing hearing, Mr. Hartshaw was arrested for another DUI. He claimed that it was dismissed, but evidence proved he had in fact pled guilty to the charges. Mr. Hartshaw had also since been arrested in Kentucky for driving on a revoked license and there was a current warrant for his failure to appear. The trial court sentenced Mr. Hartshaw to six years as a Range III offender for the evading count, consecutive to the other counts, for a total effective sentence of six years, 11 months and 29 days to serve in TDOC custody. The fines totaled $6,150 to be paid at $250 a month. Mr. Hartshaw appealed the TDOC sentence and the amount of fines.

The CCA stated that although Mr. Hartshaw was eligible for probation, the trial court properly engaged in a careful and detailed consideration of the facts and the law and concluded defendant "would not abide by any terms of probation" in part because of his "behavior since the arrest." The trial court was particularly concerned with Mr. Hartshaws's new violations of law, while awaiting the sentencing hearing. Mr. Hartshaw also complained that the trial court did not consider his ability to pay the fines. However, Mr. Hartshaw testified during sentencing that he could pay the court costs at $300 a month. The judgments were affirmed.

State v. Kelli M. Cates, 2023 WL 5213937 (Certified question of law on appeal)

Ms. Cates plead guilty to DUI, after the trial court denied her motion to suppress. As part of the plea, Ms. Cates attempted to certify a question of law for appeal. On June 2, 2022, Knox County Sheriff's Officer Smith received a "BOLO" regarding a black Jeep suspected of being driven by an impaired driver. Officer Smith observed a black Jeep, within five minutes, swerving in the lane. The Jeep drove onto the double yellow center lines and then onto the fog line. After stopping the Jeep, it was determined that the driver, Ms. Cates, was impaired. The trial court determined that Officer Smith had reasonable suspicion to stop the Jeep. Ms. Cates reserved five certified questions of law, as part of the DUI plea.

The CCA stated that all certified questions must be in compliance with the requirements of Tenn. R. Crim. P. Rule 37(b)(2)(A) or (D). Since these procedural requirements are "explicit and unambiguous," they must be strictly followed. *State v. Armstrong,* 126 S.W.3d 908, 912 (Tenn. 2003) (quoting *State v. Irwin,* 962 S.W.2d 477, 479 (Tenn. 1998). Failure to properly reserve a certified question of law will result in the dismissal of the appeal for lack of jurisdiction. *State v. Pendergrass,* 937 S.W. 2d 834, 838 (Tenn. 1996); *see also State v. Walton,* 41 S.W.3d 75, 96 (Tenn. 2001). Although the trial court and parties involved in the case agreed that the certified questions were dispositive, the CCA is not bound by that determination and must make an independent judgment as to whether of not the certified questions are actually dispositive. *State v. Dailey,* 235 S.W.3d 131, 134-5 (Tenn. 2007). The questions in this case were determined to not be dispositive, because they focused on the crossing of the lane lines and not Officer Smith's independent observations of reasonable suspicion for stopping the black Jeep. The judgments of the trial court were affirmed. (Continued on Page 4)

RECENT DECISIONS (Continued)

State v. Rodney Paul Beech, 2023 WL 5448016 (Certified question of law on appeal)

This is another case of a certified question of law being overly broad and failing to identify any of the reasons the defendant relied upon in their motion to suppress. A certified question must clearly identify the scope and limits of the legal issue and "articulate the reasons relied on by the defendant in the trial court." *See State v. Hall,* 2020 WL 2126509, at *3 (Tenn. Crim. App. May 5, 2020); *State v. Davis,* 2018 WL 3409678, at *5-6 (Tenn. Crim. App. Apr. 3, 2018). Merely stating that the trial court was wrong for ruling against you is not sufficient. Likewise, the question must identify the evidence that the defendant seeks to suppress. *See Davis,* 2018 WL 3409678, at *5-6 (citing *Yarbrough,* 2014 WL 34735927, at *3 (Tenn. Crim. App. July 29, 2014)). The appeal was dismissed for lack of jurisdiction.

State v. Casey DeWayne Hodge, 2023 WL 5472212 (Speedy trial violation)

This case involved a traffic stop on June 1, 2019, an agreed bind over to grand jury on October 30, 2020, an indictment on January 13, 2021 and a trial set for February 22, 2022. While the case was pending in the grand jury, Mr. Hodge filed a Per Se Motion to Dismiss, based upon delays in the General Sessions Court. The trial court determined that this motion was in fact a request for a speedy trial. Mr. Hodge claimed that the unusual delay was caused by the State not providing a video and due to the Covid-19 pandemic. The trial court denied the speedy trial motion, finding Mr. Hodge had caused or acquiesced in the delay in General Sessions Court. The trial court also noted that a defendant is not entitled to discovery in General Sessions Court. *State v. Willoughby,* 594 S.W.2d 388, 390 (Tenn. 1980). The CCA agreed and also noted that other courts have not attributed a speedy trial delay, due to Covid-19, as against the State (Many different state and federal cases were cited). The judgments of the trial court were affirmed.

State v. Demarcus Taiwan Russell, Jr., 2023 WL 5543748 (Sufficiency of the evidence)

On March 5, 2020, Trooper Shelton stopped Mr. Russell for driving 72 mph in a 55 mph zone. Trooper Shelton observed bloodshot eyes and he smelled the odor of marijuana. Mr. Russell's driver's license was suspended and he admitted to recently smoking marijuana. Mr. Russell performed poorly on SFSTs and was arrested for DUI. A blood sample confirmed the presence of THC in Mr. Russell's blood. After a jury convicted him, Mr. Russell complained that there was insufficient evidence of bad driving, and insufficient evidence that he was under the influence at the time of driving. Of course, the relevant question is, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *See also* Tenn. R. App. P. 13(e); *State v. Evans,* 838 S.W.2d 185, 190-92 (Tenn. 1992). The CCA determined that between the poor performance on the SFSTs, the video of the traffic stop, the admission of use, and the testimony of the TBI analyst regarding impairment causing slow reaction time and loss of judgment, there was sufficient evidence for the jury to find Mr. Russell guilty of DUI. The judgments of the trial court were affirmed.

State v. Riki Kale Moss, 2023 WL 5702902 (No license plate light and probable cause)

At approximately 3:15 a.m., on December 30, 2018, Officer Cannon of the Chattanooga Police Department heard a vehicle squealing it's tires. Officer Cannon also noted that the vehicle did not have a tag light on the license plate. He then stopped the vehicle being driven by Mr. Moss. It was unclear on the body camera and dashboard camera if the license plate light was illuminated. TCA 55-4-110(c) requires the license plate light to be illuminated, when the headlights are on. Once Mr. Moss was stopped, Officer Cannon smelled alcohol and noticed slurred speech on Mr. Moss. A blood sample obtained by a search warrant indicated a BAC of .217%. A jury convicted Mr. Moss of DUI, and DUI Per Se. Mr. Moss appealed. (Continued on Page 5)

RECENT DECISIONS (Continued)

The Court of Criminal Appeals noted how our Supreme Court made clear that a traffic violation, however minor, created probable cause to stop a vehicle. *State v. Davis,* 484 S.W.3d 138, 143 (Tenn. 2016). Also, T.C.A. 55-4-110(c)(1) requires the license plate to be illuminated, when the headlights are illuminated. Therefore, the findings of the trial court are appropriate and the CCA found that there was sufficient probable cause to stop the defendant's vehicle. Likewise, there was sufficient evidence for the jury to determine a violation of DUI and DUI Per Se. The judgments of the trial court are affirmed.

State v. Jefferey Wayne Seidel, 2023 WL 5995530 (Withdraw of guilty plea)

On August 7, 2015, Mr. Seidel was found unconscious, behind the wheel of his running car. After observing many signs of impairment, Mr. Seidel was arrested for DUI 3rd offense, and DUI Per Se. During the next few years, Mr. Seidel went through many attorney appointments. On January 27, 2022, he plead guilty to DUI 2nd offense, with terms of conditions for release. The plea agreement was to 45 days jail, followed by probation, unless Mr. Seidel did not follow the terms of release, in which case, the court would then determine the manner of Sentence. Before the sentencing date of July 13, 2022, Mr. Seidel filed a Motion to Withdraw Guilty Plea, because he learned that one of the investigating officers died and that officer was a critical witness against him. Had he known of this fact, he would not have plead guilty. A few days later, the State moved to revoke or increase bail, because it was discovered Mr. Seidel was arrested for DUI 3rd offense, in Wisconsin, on May 15, 2022. The trial court noted that another officer was initially present, denied the Motion to Withdraw Guilty Plea, and sentenced Mr. Seidel per the plea agreement. Mr. Seidel appealed.

The standard of review for a motion to withdraw a guilty plea is an abuse of discretion. *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010) (citing *State v. Crowe,* 168 S.W.3d 731, 740 (Tenn. 2005)). An abuse of discretion occurs when a trial court "applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *Id.* (citing *State v. Jordan*, 325 S.W.3d 1, 38-40 (Tenn. 2010)). An appellate court will "also find an abuse of discretion, when the trial court has failed to consider the relevant factors provided by higher courts as guidance for determining an issue." *Id.* (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)). A trial court may grant a motion to withdraw a guilty plea for any fair and just reason before the sentence has been imposed. Tenn. R. Crim. P. 32(f)(1). Mr. Seidel did file his motion prior to sentencing. The *Phelps* case adopts many factors for determining "any fair and just reason." *Id.* at 446-47. However, no single factor is dispositive and each factor varies. *Id.* (quoting *United States v. Haygood,* 549 F.3d 1049, 1052 (6th Cir. 2008)). Although the trial court did not apply the *Phelps* factors, the record was sufficient for the CCA to conduct their own analysis. The CCA denied any abuse of discretion and affirmed the judgments.

Impaired Driving Advisory Council 10-year Anniversary

On September 12, 2023, the Tennessee Impaired Driving Advisory Council celebrated their 10-year anniversary. The IDAC brings many different state organizations together, with the goal of preventing impaired driving within the State of Tennessee. Many past members were recognized, including former TNDAGC Traffic Safety Resource Prosecutor, Tom Kimball. The IDAC also introduced their new 3-year Impaired Driving Strategic Plan.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

TNDAGC Fall Conference - October 17-20, 2023, Murfreesboro, TN
The DUI training department will offer DUI training sessions on October 19, 2023, during the DA Fall Conference, Thursday breakout sessions. The classes will cover legislative updates and CDL masking.

Cops in Court - November 14, 2023, Johnson City, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

Cops in Court - November 17, 2023, Clarksville, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

Victim Issues and DUI Cases - December 8, 2023, Nashville, TN
The DUI training department will offer three hours of training focused on victim issues in DUI cases. This training will cover victim issues and DUI specific issues. This training will be provided for prosecutors and Victim-Witness Coordinators. (Training will be virtual)

Cops in Court - December 19, 2023, Mt. Juliet, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

DUI Detection & Standardized Field Sobriety Testing
November 20-22, 2023, Jonesborough, TN
February 19-23, 2024, Decherd, TN

Advanced Roadside Impaired driving Enforcement (ARIDE)
October 9-10, 2023, Bartlett, TN
October 9-10, 2023, Kingston, TN
October 16-17, 2023, Madisonville, TN
October 23-24, 2023, Bartlett, TN
November 1-2, 2023, Manchester, TN

Drug Recognition Expert School (DRE)
October 13, 2023, Dandridge, TN (In-Service)
November 6-16, 2023, Jackson, TN

DUI TRACKER

DUI Tracker this quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from July 1, 2023, through September 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 July 1, 2023, through September 30, 2023, since the last quarter were 1,983. This number is up from the previous quarter by 289. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has increased temporarily. We have had a busy quarter with all Judicial Districts trying to get back to full capacity. Our DUI prosecutors have continued to be vigilant in the prosecution of impaired driving cases and in the protection of their citizens within their districts. The total number of guilty dispositions during this same period of July 1, 2023 through September 30, 2023 were 1,494. The total number of dismissed cases were 118 and 51 were nolle prossed. Across the State of Tennessee, 75.34% of all arrests for DUI related charges were actually convicted as charged. This percentage is moderately higher than the last quarter ending on June 30, 2023. Only 8.52% of the DUI cases during this current quarter were dismissed or nolled. Also, during this same period of time, only 302 of the total DUI cases disposed of, were to different or lesser charges. Therefore, only 15.23% of the total cases were disposed of to another charge. We must continue to contribute when and where we can within this process. Impaired driving is a preventable crime.

Fatal Crashes this 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 July 1, 2023 through September 30, 2023. During this period, there were a total of 373 fatalities, involving 351 crashes, which is an increase from the previous quarter. Out of the total of 373 fatalities, 47 fatalities involved the presence of alcohol, signifying that 12.60% of all fatalities this quarter had some involvement with alcohol. This percentage is lower than the previous quarter. Further, there were a total of 46 fatalities involving the presence of drugs, signifying that 12.33% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 1,029. This is up by 23 from the 1,006 fatalities incurred last year at this same time. For most of the year, we have experienced a slight increase from last year in the number of fatalities on our roadways. Also, during the summer months, the fatality rate increased substantially. Currently, the number of Tennessee drivers on our roadways is higher than last year and the number of fatalities is slightly higher. Speed is an incredible catalyst in increasing the number of fatalities in our state and we have experienced an increase in vehicle speed since the Covid-19 shutdown. Combined with an impairing substance, speed has a synergistic effect on the fatality rates of involved crashes. With the increase of polydrug use, we are experiencing a greater danger of crashes and fatalities on our roads and highways. It is only with a united effort between law enforcement, prosecutors and other community leaders that will we be able to stem the tide of our rising fatality crashes. Please slow down, drive responsibly and arrive home safely.

TN Supreme Court, "No Probation Allowed for VH by Intox."

On August 9, 2020, Ebony Robinson backed out of a parking space at an apartment complex and struck two children, under ten-years-of-age riding bicycles. Her actions resulted in the death of one child and bodily injury to the other. During the investigation, officers determined that Robinson had been driving under the influence.[1] As a result, Robinson was charged with and ultimately pleaded guilty to vehicular homicide by intoxication and other charges.[2] Prior to sentencing, the State prepared and submitted a memorandum taking the position that due to the plea to vehicular homicide by intoxication, Robinson was not eligible for probation pursuant to the probation eligibility statute, T.C.A. § 40-35-303(a). A sentencing hearing was held where witness testimony was provided, and the defendant provided a statement of allocution.[3]

The court took the State memorandum under advisement and in a later hearing announced the sentencing decision and entered a written order of findings.[4] Upon finding that that three enhancement factors applied and no mitigating factors,[5] the trial court sentenced Robinson to a ten-year suspended, probated sentence coupled with periodic confinement and various other probation requirements.[6] In the court's written findings, the court addressed probation eligibility by stating:

> The Court notes there appears to be a conflict of laws in this matter and the case of State [ ] v[.] Cindy B. Hinton, No. M2020-00812-CCA-R3-CD (Tenn. Crim. [ ] App[.]) Opinion filed 7-21-21, which was submitted by the State, was "not binding precedent on the Court" and "does not think it was a finding" when the Court of Criminal Appeals stated that probation was not available any longer for Vehicular Homicide by Intoxication. The Court stated that it does not believe it is necessary to look at the legislative intent of the statute, and they are presumed to know the laws that they pass. The Court finds that 40-35-303 only states no probation, but 40-35-104 lists 8 types of alternative sentencing. The Court further finds the Defendant is eligible for an alternative sentence.[7]

The state subsequently filed a timely appeal of the sentence on the grounds that as of January 1, 2017, T.C.A. § 40-35-303(a) specifically excluded those convicted of vehicular homicide by intoxication from those eligible for probation and cited *State v. Stephen Jacob McKinney,* 2022 WL 122867 (Tenn. Crim. App. Jan. 13, 2022), *no perm. app. filed*.[8] The defendant responded by stating that... (Continued on page 9)

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1. A surveillance video showed Robinson back up at a high rate of speed, without looking, and hit the two children on bikes while on her cell phone. She "smelled of alcohol" and admitted to drinking that evening. Officers located a cup in the center console that "contained what smelled like tequila". She showed indicators of impairment on the field sobriety tests she agreed to complete and refused to continue the tests. A search warrant was obtained. Her BAC was .08 and she tested positive for THC. *State v. Ebony Robinson,* 2022 WL 4004153 (Tenn. Crim. App. Sept. 2, 2022) and *State v. Ebony Robinson,* --- S.W.3d ---, 2023 WL 6323462 (Tenn. 2023).
2. Robinson was indicted by Davidson County Grand Jury on November 4, 2020. She was charged with vehicular homicide by intoxication, aggravated assault, resisting arrest, and driving without a license. *Robinson,* 2023 WL 6323462 at * 1.
3. *Robinson,* 2022 WL 4004153 at *1.
4. *Robinson,* 2022 WL 4004153 at *2.
5. This fact is only mentioned in the CCA opinion. The enhancement factors relied upon are not specified within the court's opinion. *Robinson,* 2022 WL 4004153 at *2.
6. The trial court required the defendant to enter the Hope Center, a recovery program, and comply with all conditions of probation including drug and alcohol screens; as well as serve one week in jail during each child's birthday week and the week of Christmas for three years (the author characterizes this as periodic confinement); and attend and complete two Mother's Against Drunk Driving Victim Impact Panels per year. The defendant lost her driving privileges for eight (8) years. *Robinson,* 2023 WL 4323462 at *2.
7. *Robinson*, 2022 WL 4004153 at *3.
8. 2016 Tenn. Pub. Act 1021, signed into law on April 28, 2016, by Governor Bill Haslam, reads: AN ACT to amend Tennessee Code Annotated, Title 40, Chapter 35, Part 3, relative to eligibility for probation for persons convicted of certain alcohol-related offenses. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: SECTION 1. Tennessee Code Annotated, Section 40-35-303, is amended by deleting from subsection (a) the citation"§ 39-13-304" and substituting instead the citations"§ 39-13-213(a)(2), § 39-13-304". SECTION 2. This act shall take effect January 1, 2017, the public welfare requiring it.

"No Probation Allowed for Veh. Hom. by Intoxication" (Continued)

T.C.A. § 40-35-303(a) prohibits "full" probation when read together with T.C.A. §39-13-213(b)(2)(B) which includes minimum service requirements, thus making her eligible for split confinement, citing *State v. Johnny David Key,* 2019 WL 7209603 (Tenn. Crim. App. Dec. 27, 2019). On September 22, 2022, the Court of Criminal Appeals (CCA), in an opinion authored by Judge Jill Bartee Ayers, concluded that the trial court erred in sentencing Robinson to probation with periodic confinement. In reaching this conclusion, the CCA provided that the rules of statutory construction required a de novo review. This required the CCA to look at the legislative intent by reading the plain language of statute "in context of the entire statute, without any forced or subtle construction which would extend or limit its meaning."[9] The CCA noted, that statutes are presumed to be applied prospectively and when looking at a more recent statute in relation to pre-existing legislation, courts will presume that the legislature has knowledge of prior enactments and judicial construction of those enactments.[10] The CCA briefly discussed the history of both T.C.A. § 40-35-303 and T.C.A. § 39-13-213 before concluding that "the amendment to the probation statute repeals by implication the conflicting provisions of the vehicular homicide statute concerning probation eligibility for a defendant convicted of vehicular homicide by intoxication."[11] As a result of this error, the CCA reversed the trial court's grant of probation and ordered execution of the sentence.[12]

The defendant appealed to the Tennessee Supreme Court (TSC). On September 29, 2023, in a unanimous opinion, the TSC held that "the clear and precise language of the 2017 amendment to the probation eligibility statute, Tennessee Code Annotated Section 40-35-303, prohibits all forms of probation for a defendant convicted of vehicular homicide by intoxication." The TSC, like the CCA, stated the rules of statutory construction, addressed the cases each side used to argue its position, and reached its own conclusion. However, unlike the CCA, the TSC found that the statutes were not in conflict. The TSC stated:

> The State reasons that, because the vehicular homicide statute cross-references the probation statute, the vehicular homicide statute is subject to all conditions and exclusions of the probation statute. We agree. Subsection 39-13-213(b)(2)(B), in part, states that "[t]he person shall not be eligible for release from confinement on probation pursuant to § 40-35-303 until the person has served the entire forty-eight-hour minimum mandatory sentence." Tenn. Code Ann. § 39-13-213(b)(2)(B) (emphasis added). This language demonstrates the legislature's clear intent for the vehicular homicide statute to be subject to all limitations and conditions set forth in the probation statute. As a result, the two statutes can be reasonably read together without conflict.

As a result of its findings, the Tennessee Supreme Court affirmed the decision of the CCA.[13]

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9. 2022 WL 4004153 at *3 with citation to *State v. Cauthern,* 967 S.W.2d 726, 735 (Tenn. 1998) (*quoting, State v. Davis*, 940 S.W.2d 558, 561 (Tenn. 1998).

10. In this case, there were no potential ex post facto considerations for the court. The offense date (2020) and sentencing date both occurred after the effective date that placed vehicular homicide by intoxication as an offense for which one is ineligible to receive probation (2017).

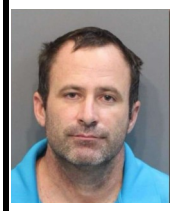
11. For more information on the history and evolution of T.C.A. § 40-35-303 and T.C.A. § 39-13-213, including interaction of the two, read Issue 77 of DUI News, "A History of Sentencing for Vehicular Homicide by Intoxication: It is Now a Non-Probatable Offense" at https://dui.tndagc.org/newsletters/DUI%20News%20-%20Issue%2077.pdf

12. *Robinson,* 2022 WL 4004153 at *5.

13. The current opinion has not been released for publication. In footnote 6 of the unreleased opinion the Court states: "We note that neither of the statutes discussed in this opinion specifically addresses a sentence to community corrections**.** This opinion addresses only probation and does not reach the distinct question of whether a person convicted of vehicular homicide by intoxication may receive community corrections." However, looking at the plain language of T.C.A. § 40-36-106, since vehicular homicide by intoxication is a felony involving alcohol or drugs; and is a "crime against a person" within title 39, chapter 13, part 1-5, community corrections would not be available as an alternative sentence either. (Also, the *Key* and *McKinney* decisions are discussed by the TSC in its opinion. These opinions, contrary to argument, were not inconsistent interpretations of the probation eligibility statute and the vehicular homicide by intoxication statute. The reference to the statute in the CCA opinion in *Key* was a reference in passing and was dictum; and the interpretation of the statute in *McKinney* is completely consistent.)

VEHICULAR HOMICIDE MURDERER'S ROW

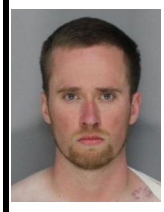
Benjamin Scott Brewer v. State, 2023 WL 4445966 (Ineffective assistance of counsel)



This case, on direct appeal, approved a Drug Recognition Expert (DRE) officer to qualify, in the trial court, as an expert regarding the recognition of drug impairment. *State v. Brewer*, WL 1672958 (Tenn. Crim. App. Apr. 6, 2020). Mr. Brewer was convicted of six counts of Vehicular Homicide by Intoxication, along with other charges. He was sentenced to fifty-five years in TDOC custody. The CCA previously affirmed the judgments of the trial court. Mr. Brewer subsequently filed a pro se petition for post-conviction relief claiming ineffective assistance of counsel, by not objecting to cumulative and unfairly prejudicial descriptions of the scene, including fire, explosions, and burnt corpses. The trial court denied the petition and Mr. Brewer has appealed.

To prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. state,* 120 S.W.3d 828, 830 (Tenn. 2003). In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor,* 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997). Since the record supports the trial court's determination that petitioner failed to establish deficient performance under *Strickland*, the judgments of the trial court are affirmed.

State v. William David Phillips, 2023 WL 5011978 (Excessive sentence)

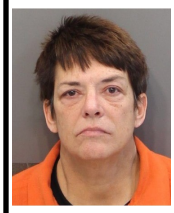


On June 17, 2019, Mr. Phillips bought CBD from the Compassionate Buds Dispensary in Morristown, TN. Mr. Phillips ingested CBD honey sticks and a CBD isolate sucker. Twenty minutes later, Mr. Phillips struck multiple pedestrians, at a very high rate of speed, with his car, killing Sierra Cahoon and her two-year-old son. Mr. Phillips was very combative and claimed a voice told him to kill the victims. Mr. Phillip's blood sample was positive for Trazodone, Diazepam, Nordiazepam, delta-9 THC and its metabolites. Mr. Phillips had a prior, diagnosed history of mental illness. A jury convicted Mr. Phillips of four counts of reckless homicide and two counts of reckless endangerment. He was sentenced to a consecutive sentence, for an effective sentence, of fourteen years, eleven months and 29 days confinement. Mr. Phillips appealed the sentences as being excessive and that they should not have been run consecutive.

The CCA determined that since the trial court carefully considered the evidence, the enhancement and mitigating factors, and the purposes and principles of sentencing, prior to imposing within range sentences, Mr. Phillip's contention that the trial court did not consider the purposes and principles of the sentencing act, is without merit. The defendant is not entitled to the least severe method of punishment or a presumptive minimum sentence. Trial courts have the discretion to select any sentence within the applicable range so long as the length of the sentence is consistent with the purposes and principles of the Sentencing Act. *State v. Carter,* 254 S.W.3d 335, 343 (Tenn. 2008). The CCA did determine that the trial court misapplied two enhancing factors. However, there still was not a proper basis for vacating the sentence. *State v. Trent,* 533 S.W3d 2282, 294 (Tenn. 2017). The trial court did not state facts for consecutive sentencing, but after a de novo review, the CCA determined that consecutive sentencing was appropriate. Judgments were affirmed.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Janet Elaine Hinds, 2023 WL 5164634 (Sufficiency of the evidence/Cumulative effect of errors)



On February 23, 2019, Ms. Hinds spent several hours drinking beers and a Lemon Drop shot at the Farm to Fork restaurant in Ringgold Georgia. Although she was offered a ride home, two or three times, Ms. Hinds drove herself home. After arriving home, she called her daughter-in-law and told her that she had hit a sign with a "blinky light," which wasn't working. The next day, news reports of a car striking and killing Officer Nicholas Galinger of the Chattanooga Police Department were broad cast. The daughter-in-law and other family members went to Ms. Hind's home and inspected her car, which had a shattered windshield, hood damage, and human hair lodged in the windshield. Although Ms. Hinds was urged to call the police, she instead went to an attorney's office.

According to the Officer Galinger's body camera, Ms. Hind's car was driving fast and straddling both sides of the roadway when she hit the victim and a reflective barricade that had been placed over a flooded manhole cover. The area had been barricaded for days, due to rain. Officer Galinger was adjusting the barricade when he was hit. Ms. Hinds stopped briefly, but then left the scene. Her car was later found at her house, but no one was home. After an extensive search, Ms. Hinds turned herself in the next day. Search warrants were executed for Ms. Hind's car and home. Video from the restaurant showed Ms. Hinds drinking 76 ounces of beer and a shot of alcohol, during a 4-hour period before driving away. It was a 30 minute drive from the restaurant to the crash scene.

A jury convicted Ms. Hinds of Vehicular Homicide by Intoxication, Reckless Driving, Leaving the Scene and other traffic infractions. She was sentenced to an effective sentence of eleven years incarceration. On appeal, Ms. Hinds complains of the sufficiency of the evidence to support the vehicular homicide charge, denial of her motion to suppress the search warrants, the admission of a life photo, the limitation of cross-examination, jury instructions, comments during closing arguments and the cumulative effect of the errors. Evidence is sufficient if, "after considering the evidence--both direct and circumstantial--in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Tenn. R. App. P. 13(c); *Jackson v. Virginia*, 443, U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). The evidence showed Ms. Hinds consumed 76 ounces of beer and one shot of alcohol during the four hours prior to the crash. Signs of impairment could be observed on the restaurant video. Her driving, which included excessive speed, failing to maintain her lane, and straddling the center lane, demonstrated impairment. Driving while intoxicated on a public highway creates a "significant risk of serious bodily injury or death." *Cook v. Spinnaker's of Rivergate, Inc.,* 878 S.W.2d 934, 938 (Tenn. 1994). The CCA found sufficient evidence to support the convictions.

Ms. Hinds attacked the search warrant of her home because it listed the wrong address. However, when viewed "as a whole," there was sufficient information to identify the correct address. (The vehicle involved was in the driveway and the officer had prior knowledge of the residence). The search warrant was adequate. Questions concerning evidentiary relevance rest within the sound discretion of the trial court and this court will not interfere with the exercise of this discretion in the absence of a clear abuse appearing on the face of the record. *See State v. DuBose,* 953 S.W.2d 649, 652 (Tenn. 1997). The CCA affirmed the court judgments.

TESTIMONY BY ZOOM ALLOWED (Continued)

is otherwise assured. *See Maryland v. Craig,* 497 U.S. 836, 850 (1990). In applying *Craig* to the situation at issue, the CCA found that the trial court was prohibited by the Tennessee Supreme Court from permitting the witness to physically enter the courtroom to "further the important public policy of ensuring the health and safety of others present." No other option was available under the circumstances, since the jury had already been impaneled, jeopardy had attached, and there was no way of continuing the trial due to the uncertainty of when, or if, the witness would recover. Also, since the witness was placed under oath and cross-examined by the defendant in a manner that permitted the jurors to see and observe the witness as he was testifying, and sine there was no indication of issues that hindered the process, the CCA found that the practice employed by the trial court "preserved the essence of confrontation,", ensured the reliability" of the witness's testimony, and found that the defendant was not entitled to relief pursuant to the Sixth Amendment.

Moving to Article I, Section 9 of the Tennessee Constitution's confrontation clause, the court first looked at the plain language of the section. This section provides "[t]hat in all criminal prosecutions, the accused hath the right… to meet the witnesses face to face[.]" Though the language of Tennessee's confrontation clause differs from the Sixth Amendment and the text has been described as providing a "higher" right, the CCA noted that the Tennessee Supreme Court has "expressly adopted and applied the same analysis used to evaluate claims based upon the Confrontation Clause of the Sixth Amendment.[2] Thus, the CCA used the *Craig* balancing test to Mr. Bower's challenge of the use of Zoom video testimony by the trial court under the Tennessee Constitution and found that the defendant was not entitled to relief pursuant to Article I, Section 9.

In the concurring opinion, as to the result, but dissenting as to the analysis of the court, Presiding Judge Camille McMullen found that the defendant did not properly preserve the issue presented to the court for review. Like her colleagues, she points to Tennessee Rule of Evidence 103(a)(1), but she states how an objection must be contemporaneously made and the specific reason for the objection must be given, if the specific ground was not apparent from the context.[3] Further, Judge McMullen noted that "[a]lthough Tennessee Courts have expressly adopted and applied the same analysis to evaluate federal and state confrontation clause claims," the courts "have never construed the "face-to-face" requirement of Article I, Section 9 of [Tennessee's] Constitution to coexistence with or the same as the Confrontation Clause of the Sixth Amendment." Moreover, Tennessee has yet to squarely address whether the "face-to-face" language in our state constitution is violated by the use of Zoom or other platforms.[4] Given these considerations, Justice McMullen points out the difficulty of the court to anticipate specifically what Mr. Bower's true objection was, as evidenced by the trial court's attempts to seek clarity for the record. Judge McMullen declined to review the case for plain error and dissented as to the analysis of the court but concurred in the result.

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2. *See State v. Dotson,* 450 S.W.3d 1, 62 (Tenn. 2014) (quoting *State v. Deuter,* 839 S.W.2d 391, 395 (Tenn. 1992)).
3. There appears to be an emphasis on specificity based upon the citations provided by Justice McMullen. In addition to Tenn. R. Evid. 103, there are citations to *State v. Vance,* 596 S.W.3d 229 (Tenn. 2020) (Basis of objection and motion for new trial were different, impact on review), *State v. Biggs,* 218 S.W.3d 643 (Tenn. Crim. App. 2006) (For meaningful review, objecting party has duty to put reasons for objection on the record) and Tennessee Rule of Appellate Procedure 36(a), advisory commission comments (steps taken regarding error).
4. *Bowers*, at *13. Justice McMullen points out that *Crawford v. Washington,* 541 U.S. 36 (2004) came after *Maryland v. Craig*, 497 U.S. 836 (1990), which relied heavily on *Ohio v. Roberts*, 448 U.S. 56 (1990). *Roberts* was "overturned" by *Crawford.* She also points out different analysis in *White v. Illinois*, 502 U.S. 346 (1992) regarding the evaluation of confrontation clause claims impact on the admissibility of out-of-court declarations under the exceptions to the hearsay rule.

Tennessee District Attorneys General Conference

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

Terry E. Wood (615) 253-6734
Linda D. Sharer (615) 945-2040
Mary Campbell (615) 933-6339