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NO CROSS-EXAM WITH TRAINING MANUALS

Too often law enforcement officers are being cross-examined during a jury trial, with National Highway Traffic Safety Association (NHTSA) training materials. Specifically, with Standardized Field Sobriety Test (SFST) training manuals. This is an improper cross-examination of a lay witness by use of a learned treaty. Tennessee Rule of Evidence Rule 618 states:

To the extent called to the attention of an **expert witness** upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice, may be used to impeach the **expert witness's** credibility but may not be received as substantive evidence. (emphasis added)

This rule does not apply to lay witnesses. It specifically does not apply to a law enforcement officer that testifies, as a lay witness, in a DUI case. This issue was first addressed in *State v. Christopher R. Hicks*, 1997 WL 260069 (Tenn. Crim. App. May 13, 1997). The State objected when the defense attempted to cross-examine the officer with a SFST training manual. The trial court sustained the objection and the defendant appealed. The CCA ruled:

As correctly noted by the State, Officer Tipton was not tendered as an expert witness. And, as correctly noted by the trial court, “the only time you can use a book like that to impeach a witness is if the witness is an expert witness and you can show [him] other expert books to impeach him to show that he might be wrong.” See Tenn. R. Evid. 618. The trial court committed no error by refusing to allow defense counsel to impeach Officer Tipton by reading into the record from the training manual and cross-examining him about his memory thereof and/or his application of the information with which he had been trained. This issue is without merit. *Id.*

With the exception of the horizontal gaze nystagmus test, field sobriety tests are not scientific tests requiring testimony of a qualified expert pursuant to Tennessee Rule of Evidence 702. See *State v. Murphy*, 953 S.W.2d 200, 202-03 (Tenn.1997); *State v. Gilbert*, 751 S.W.2d 454, 459 (Tenn.Crim.App.1988). Thus, police officers do not need to be qualified as expert witnesses in order to testify about their administration and interpretation of field sobriety tests. See *State v. Robinson*, 2000 WL 364844 (Tenn. Crim. App. Apr. 7, 2000).

A leading case on this issue was tried by our Traffic Safety Resource Prosecutor, Linda D. Sharer (Walls). After a motion in limine,... (Continued on page 12)



RECENT DECISIONS

State v. Raghu Singh, 2023 WL 6160384 (Chain of Custody and Miranda)

On March 3, 2018, Mr. Singh was involved in a single car crash that had struck a brick mailbox. Responding officers noticed the smell of alcohol, slurred speech, bloodshot eyes and other signs of intoxication. Mr. Singh admitted to drinking alcohol earlier and to driving the car when he hit the mailbox. He also performed poorly on SFSTs. A search warrant was obtained for a blood sample, which indicated a BAC of 0.13%. Mr. Singh appealed his jury convictions.

The Court of Criminal Appeals clarified that the State is not required to present every witness handling a blood sample to establish a proper chain of custody. *See State v. Parton*, 2019 WL 2929076, at *6-7 (Tenn. Crim. App. July 8, 2019). Importantly, the absence of the testimony of the transporting officer does not impair the chain of custody if the other parts of the chain are present. *Id.*; *State v. Laning*, 2012 WL 3158782, *3 (Tenn. Crim. App. Aug. 6, 2012). (Testimony regarding transporting and receiving procedures were entered at trial). Also, the CCA ruled that Mr. Singh's statements made at the scene were admissible, as he was not in custody during the crash and further DUI investigation, conducted by the officers. *See State v. Manzenberger*, 2021 WL 2255502, at *5, *7 (Tenn. Crim. App. June 3, 2021). Trial court judgments were affirmed.

State v. Ariana Elizabeth Major, 2023 WL 7166314 (Dog Sniff-Marijuana/Hemp)

This is another, in a long line of cases, regarding a dog sniff. On September 9, 2019, a Clarksville Police Officer stopped Ms. Major, for failure to use a turn signal. During the stop, a police dog indicated the presence of narcotics. The dog was trained and certified to detect the presence of methamphetamine, marijuana, heroin, and cocaine. Substances believed to be heroin, methamphetamine and fentanyl were discovered, under the driver's seat. Ms. Major argued that since the dog could not distinguish between legal hemp and illegal marijuana, the result of the dog's signaling the presence of narcotics was unreliable. The trial court granted a motion to suppress and the State appealed.

The CCA ruled, consistently with other recent decisions, that a positive alert from a dog, trained to detect narcotics, supplies probable cause for a search. (The defense did not question the dog's training or actual history of positive or negative alerts). *See State v. Andre JuJuan Lee Green*, 2023 WL 3944057 (Tenn. Crim. App. June 12, 2023); and *State v. Mark David Bond*, 2023 WL 5559259 (Tenn. Crim. App. Aug. 29, 2023).

State v. Christopher James Funk, Sr., 2023 WL 7130289 (Appeal Waiver/No Motion for New Trial)

Mr. Funk was involved in a motorcycle crash on August 4, 2019. A responding Trooper smelled the odor of alcohol coming from Mr. Funk's breath and person. The Trooper also noticed red bloodshot eyes and Mr. Funk was stumbling and limping. Mr. Funk admitted to drinking earlier that evening, but he refused to perform field sobriety tests, or to submit to a breathalyzer. Mr. Funk was then arrested for DUI and possession of a firearm, while under the influence of alcohol. The Trooper obtained a search warrant about two and one-half hours after the crash and a blood sample was obtained. Mr. Funk's BAC was 0.177%.

Before trial, Mr. Funk filed a motion to suppress. The trial court found that Rule 41 was not complied with, because the magistrate did not retain a copy of the warrant, and the return was made directly to the clerk's office. However, the trial court determined that the "technical noncompliance [with Rule 41] was the result of neglect and not at the level of systematic error or reckless disregard of constitutional requirements. The trial court then denied the motion to suppress and a motion to seek interlocutory appeal. Mr. Funk was convicted by the jury of both counts. A motion for a new trial was not filed. An appeal was later filed.

The CCA determined that any argument regarding the motion to suppress was waived, by not filing a motion for a new trial. *See Tenn. R. App. P. 3(e)*; and *Tenn. R. Crim. P. 33(b)*. (Continued on page 3)

RECENT DECISIONS (Continued)

Failure to file a motion for a new trial waives plenary review of all issues on appeal that could have resulted in a new trial. *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010). The CCA also ruled that a denial of an interlocutory appeal may not be challenged in a later direct appeal as of right. (It must be appealed pursuant to Tenn. R. of App. Pro. Rule 10, or the underlying issue must be appealed, making the denial of interlocutory appeal harmless. *State v. Johnson*, WL 1306440, at 10 (Tenn. Crim. App. Apr. 16, 2012). Judgments of the trial court were affirmed.

State v. Timothy Elliott Davis, 2023 WL 7297937 (Exigent Circumstances)

On March 1, 2019, a 911 call described a “reckless driver” in a “red vehicle travelling on 411 north”. A few minutes later, a Monroe County deputy saw a matching vehicle with nearly identical license tag information, stopped in an industrial park. The driver, Mr. Davis was in reverse and partly on the shoulder. The Deputy stopped Mr. Davis and noticed the smell of alcohol. Mr. Davis was very “hostile” and used profanity. Mr. Davis was arrested after showing signs of impairment on two SFSTs. The intoximeter at the jail was not working and Mr. Davis refused a blood draw. The deputy prepared a search warrant, but he could not find a Monroe County judge available. (Bradley County judges were approximately an hour drive, each way). Three hours after the traffic stop, a blood sample was drawn, based upon exigent circumstances. The BAC was 0.27%. A jury convicted Mr. Davis of DUI, DUI per se and DUI 3rd offense. Mr. Davis appealed.

The defense brought a motion to suppress the blood sample results, relying on *State v. Oaks*, 2019 WL 560271 and *Missouri v. McNeely*, 569 U.S. 141 (2013). The CCA ruled that reliance on these cases was misplaced, because the arresting officers in those cases made no effort to obtain a search warrant, whereas the deputy in this case wrote a search warrant, contacted the on-call district attorney and attempted to find a judge (He called five times). Therefore, based upon the totality of circumstances, as articulated in this case, exigent circumstances did exist to obtain a warrantless blood draw. The CCA also ruled that there existed sufficient evidence for a reasonable jury to convict Mr. Davis of DUI. The judgments of the trial court were affirmed.

State v. Jennifer Michelle Childs, 2023 WL 7321165 (Illegal Arrest - Suppression/Not Dismissal)

The remedy for an illegal arrest is suppression of any evidence obtained after the arrest. The remedy is not a dismissal of the indictment. On November 1, 2019, a Sumner County Sheriff’s Deputy received a call-out regarding a reckless driver. The caller indicated that the car was driving down the middle of the road, entered a driveway, and then drove across the yard and into the next driveway. Five minutes later the deputy pulled into the driveway and found Ms. Childs sitting in her car, with the engine running. The deputy knocked on the window and Ms. Childs lowered her driver’s window. The deputy noticed a “slightly” slurred speech, bloodshot eyes, and a smell of alcohol. After conducting HGN, Ms. Childs complained of fractures in her feet for which she was taking prescribed medication. Further SFSTs were not attempted. Ms. Childs filed a motion to suppress and a motion to dismiss the indictment, since the deputy did not observe the driving or see an offense occur in his presence. The trial court granted both motions.

Initially, the trial court only addressed the motion to dismiss and not the suppression of evidence when making its oral ruling and in the written order. The review is for an abuse of discretion. *State v. Harris*, 33 S.W.3d 767, 769-70 (Tenn. 2000). Although both the United States Constitution and the Tennessee Constitution protect citizens from unreasonable searches, the remedy would be suppression, unless the search was conducted pursuant to an exception to the warrant requirement. *State v. Dotson*, 450 S.W.3d 1, 49 (Tenn. 2014); See also, *State v. Keith*, 978 S.W.2d 861, 865 (Tenn. 1998). However, the proper remedy for an illegal arrest is suppression of the evidence seized as a result of the arrest, not dismissal of the indictment. *State v. Baker*, 966 S.W.2d 429, 432 (Tenn. Crim. App. 1997); *State v. Smith*, 787 S.W.2d 34, 35 (Tenn. Crim. App. 1989). (“Generally, an illegal arrest does not invalidate an indictment.”). The judgment of the trial court is reversed. The indictment is reinstated and the case is remanded for further proceedings.



CANNABIS BRINGS INCREASED HEALTH RISKS IN TN

Increased Cannabis Usage Brings Health Risks to Tennesseans - Legal Does Not Mean Safe Or Wise

By: Judge Donald Parish, Retired - Tennessee Judicial Outreach Liaison



Introduction

Legislative actions by the Congress and the Tennessee General Assembly in the last five years have dramatically increased the availability of some forms of legal cannabis to Tennesseans. These actions reflect a significant change in public policy which will likely impact Tennesseans in disparate ways. Cannabis industry supporters are calling for even freer access.

Advocates for the decriminalization or increased legalization of cannabis typically point to individual freedom of choice within a free market system as justification. Just folks choosing to be “high”. They also laud the “sin tax” revenue expected to arrive in government coffers, to fix the roads and such, while minimizing the consequential costs.

A smaller but influential group of persons are supporters of cannabis legalization for limited medicinal purposes. There is evidence to support the efficacy of cannabis in the treatment of nausea and seizures. Highway Safety advocates are concerned about the prospect of more impaired drivers on Tennessee roadways. Data clearly evidences that as cannabis availability and usage rise, so does the number of persons arrested for driving while impaired by cannabis and cannabis mixed with alcohol and other drugs. There is also growing discussion among medical researchers and public health officials regarding the adverse risks of cannabis usage on the health of individual users. In Tennessee, there is currently little to no independent verifiable testing of the cannabis products offered for sale to the public. This article is not intended to be an exhaustive study of these complicated topics. Rather, the intent is to summarize the current legal status of cannabis in Tennessee and to warn of the serious health risks as legal restrictions fall.

Legal Status

In 1964, Bob Dylan sang that, “the times, they are a changing”. That remains true today. As attitudes regarding the use of cannabis have evolved in the almost 60 years since then, the result is a confusing patchwork of laws and regulations governing cannabis across the nation. Not even all experts agree on how to chart the legality or illegality of various cannabis products within the several states. Approximately 39 states and the District of Columbia have legalized medical cannabis while 35 states have legalized cannabis for recreational use. The cannabis industry often advocates for legal medicinal cannabis as a gateway to full decriminalization. Tennessee has not yet legalized medicinal cannabis.

However, Tennessee has legalized the possession and use of substances containing tetrahydrocannabinol, generally known as THC, in certain quantities. THC is one of many cannabinoids found in cannabis. It is responsible for producing intoxicating and impairing psychoactive effects.

The cannabis plant may be classified as *cannabis sativa*, *cannabis indica* or a hybrid. Marijuana comes from both plants. Hemp comes from only the *cannabis sativa* family.

Cannabis has historically been grown throughout the world for use as a psychoactive drug in the form of marijuana and as a fiber in the form of hemp. In the hemp form it is fast growing and is a desirable method to produce rope, cloth, paper and building materials. The two types look similar when processed and produce the same aroma. Even well-trained canines cannot differentiate the odor of the two. They differ in the quantity of the psychoactive ingredient, THC, found in each.

The federal Marihuana Tax Act of 1937 essentially banned both marijuana a/k/a marihuana and hemp in this country. However, the 2018 Farm Bill a/k/a the Agriculture Improvement Act adopted by Congress and signed into law by then President Trump legalized, at the federal level, the cultivation and use of *cannabis sativa* plant derivatives of hemp. The law defined hemp as cannabis which contains up to .3% THC by dry weight. The Tennessee General Assembly followed suit... (Continued on page 5)

CANNABIS - INCREASED HEALTH RISKS (Continued)

and adopted this as the standard for legal cannabis products in the state. Therefore, cannabis containing .3% or less of THC is legal hemp. Cannabis containing more than .3% THC is illegal marijuana. The .3% threshold is arbitrary. It was apparently suggested by the researcher and author, Ernest Small, in 1979. Small was unable to identify a difference between the two types other than one contained more THC than the other. In this regard, the difference between marijuana and hemp is both legal and botanical.

In recent sessions of the Tennessee General Assembly, there have been bills filed which seek to decriminalize marijuana and tax its sale at a 15% rate in addition to the normal sales tax. However, based on the published comments of certain influential legislators, full legalization seems unlikely in Tennessee so long as marijuana is listed as a schedule I controlled substance under federal law. Schedule I controlled substances are considered by federal law to be of no medicinal value and have a high potential for abuse. Other schedule I controlled substances under federal law are LSD and heroin. Under Tennessee law, which uses a different standard, marijuana is a schedule VI controlled substance. Federal authorities have undertaken a review of this classification. The United States Department of Health and Human Services recommended the reclassification of marijuana to schedule III in August of 2023. Federal prosecutions for the possession of small amounts of marijuana are rare.

In 2021, the General Assembly passed legislation creating the Tennessee Medical Cannabis Commission. The Commission was given the mandate to recommend proposed legislation to create a medical cannabis program for Tennessee. The Commission has met and made proposals which have not yet been acted upon by Tennessee lawmakers.

More Science Than Lawyers Wish

More discussion of botany, certainly so than most lawyers wish, is necessary here.

THC is further classified during microanalysis by the position of a double bond on the chain of carbon atoms which comprise it. The exact location of that double bond identifies the variety as delta 8, delta 9 or delta 10 THC. Delta 8 THC has this double bond on the eighth carbon atom. Delta 9 THC has it on the ninth carbon atom. Delta 10 THC has a double bond present on the tenth carbon atom of the chain.

The impairing "high" resulting from the use of cannabis is greatest for delta 9. We refer to delta 9 THC as marijuana. While delta 8 and delta 10 THC are less psychoactive than delta 9 THC, both interact with the central nervous system to produce psychoactive effects.

Presumably, most products being marketed in the so called "cannabis stores", "head shops" and in convenience stores across Tennessee are derived from delta 8 or 10 THC. The advertising and packaging of these supposedly hemp-based products strongly suggests that they deliver intoxicating results.

As the result of action by the Tennessee General Assembly in 2023, the sale of delta 8 based products to persons under 21 years of age is illegal. Furthermore, cannabis edibles offered for sale, which contain delta 8 THC cannot legally be shaped like animals or cartoon characters. For real. Formerly, the products were legal to sell in Tennessee to persons of any age and bearing the semblance of any animal or cartoon character, it seems.

Also available in Tennessee convenience stores are products which contain a cannabinoid known as cannabidiol, or CBD. CBD may be marketed as a food, oil, lotion or capsule. CBD is a compound found in cannabis which may contain up to .3% THC but does not cause psychoactivity and is generally considered to be nonaddictive. However, the prescription of laboratory purified CBD has been approved by the United States Food and Drug Administration to treat rare seizure disorders. So, presumably, it can produce a powerful effect on the body. CBD may be sourced from both hemp and marijuana but is only legal in Tennessee in its hemp form.

While cannabis science may be confusing, it is obvious that if one consumes more of a product containing .3% THC, like gummies or other edibles of any shape, one is consuming more THC. This is important for the same reason that consuming two shots of 100 proof whiskey is more intoxicating and impairing than consuming one shot of 100 proof whiskey. Intrepid users are aware that tetrahydrocannabinolic acid, commonly referred to as THCa flower, a chemical precursor to THC,...

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CANNABIS - INCREASED HEALTH RISKS (Continued)

which can be legally purchased in Tennessee is, with simple administration of heat, turned into THC which can produce a “high”. While beyond the scope of this article, one wonders how prosecutors are responding to this quandary. Next, a discussion of the risks to human health from cannabis usage.

Health Risks

The health risks to the consumers of cannabis are varied. Some risks are well known while others are only becoming more widely appreciated as increased usage has led to greater study. According to the Substance Abuse and Mental Health Services Administration (SAMHSA), one in ten people who begin to use marijuana will become addicted to the THC it contains with that number rising to one in six people who begin using marijuana before age 18. And with this use comes risks which include a permanent IQ loss, increased rates of depression, reduced physical performance, abnormalities in babies born to chronic users and an increase in interpersonal relationship problems.

The use of cannabis products has reached an all-time peak with more than 61 million Americans now estimated to participate. Usage among all age groups and both sexes is going up. So is the number of visits to hospital emergency departments due to cannabis poisoning. Even the frequency of vet visits due to the unintentional cannabis poisoning of the family pet tracks upward with the increased availability of cannabis. The diagnosis of cannabis use disorder is on the uptick. This is the term that describes a patient who is unable to curtail the use of cannabis despite the presence of adverse health consequences affecting the person. Drugs designed to lessen the craving for cannabis have not proven widely successful. Behavioral therapy is the most common treatment. Sometimes the two treatments may be employed together.

A factor contributing to the increase in health risks is that the amount of THC found in today’s marijuana products is much greater than was typically found in prior decades. In the 1970’s, it is estimated that most marijuana contained about 3% THC. Several strains of marijuana, which are marketed in states with legal recreational marijuana, now contain up to 30% THC.

THC usage impairs a person’s ability to perform the complex activities required for driving. In Tennessee, it is illegal for one to drive when the presence of THC deprives that person of the clearness of mind and control of oneself that he or she would otherwise possess when sober. The resulting impairment of the ability to safely operate a motor vehicle to any extent prohibits lawful driving.

People who operate a vehicle while under the influence of cannabis and others who encounter them, will experience danger because of the operators reduced reaction time and decreased coordination. Decades of published data correlate impairment from cannabis use with the number of motor vehicle crashes and fatalities. Since recreational cannabis became legal in Colorado, traffic deaths where drivers tested positive for cannabis increased 138%. Studies show that driver impairment from cannabis or polysubstance use is now nearly as prevalent as alcohol related impairment alone.

While there is little research yet on the relationship between higher potency THC and the chronic health risks of cannabis use, it is probable that increases in THC levels do result in increased dependency.

Recent studies by the American Heart Association (AHA) point to the conclusion that the use of cannabis products, whether recreational or medicinal, may result in the development of cardiovascular disease which impacts the heart, lungs and blood vessels. The effects of inhaling cannabis are like those of inhaling tobacco: chest pain and heart attacks are much more likely to occur.

The Center For Disease Control (CDC) warns that the use of CBD is not risk free. The CDC says that CBD may cause liver damage, interfere with prescribed medication, cause sleepiness, mood changes and adversely affect unborn children. Nursing mothers should also avoid CBD because the compound is passed from mother to child while nursing. The over-the-counter proliferation of CBD products comes without any research on the effects of long-term usage. We do not know what the long-term health impact will be. CBD sold over-the-counter is not regulated by the Food and Drug Administration (FDA).

These health risks are enhanced with age. Cannabis use in adults over age 65 is reported to have doubled in the past few years. Persons in this age group often have chronic health conditions which may make the use of cannabis riskier. Hypertension, diabetes and high cholesterol,...

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CANNABIS - INCREASED HEALTH RISKS (Continued)

which are diseases commonly found in older adults, may be aggravated by cannabis usage.

One AHA study found that among daily users of marijuana there was a 34% increase in the risk of heart failure. A Danish study from 2022 found that the use of medicinal marijuana was linked with a 64% increase in abnormal heart rhythms. Dr. Peter Grinspoon, a Harvard Medical School physician and lead researcher has suggested that this may be because THC activates the fight or flight response in the human body which increases blood pressure and strain on the heart. More research is needed on the effect of THC ingested by edibles like gummies. Most of the data comes from smoking/vaping related studies. It is probable that edibles present fewer health risks because the user is not inhaling the toxic chemicals found in smoke. But less risky does not mean safe.

An academic article published in the journal, *Frontiers In Microbiology*; on October 19, 2023, entitled “Fungal And Mycotoxin Contaminants In Cannabis And Hemp Flowers: Implications For Consumer Health”, concludes that cannabis use, including medicinal cannabis, may cause illness in people because of the presence of unsafe fungi which contaminate the plant. The peer reviewed article was researched and written by Professor Kimberly Gwinn of the University of Tennessee, Assistant Professor Maxwell Leung and graduate student Ariell Stephens of Arizona State University and Professor Zamir Punja of Simon Fraser University in British Columbia, Canada.

The authors studied the data and regulations regarding the production of cannabis including hemp on a world-wide scale. The article summarizes available information regarding mycotoxins produced by pathogens in hemp and cannabis products. Professor Gwinn noted that the increased availability of ingestible cannabis suggests a need for more study of the health risks resulting from the presence of contaminants, as is true with other agricultural products. According to the article, the “human health risk assessment method(s) used to regulate food and pharmaceuticals have yet to become standard for the emerging cannabis industries.” The authors say that research suggests that some common fungi found in cannabis may cause skin and lung infections in humans. Patients being treated for cancer and using cannabis to help with nausea, organ transplant patients and cannabis users with diabetes and HIV are likely to be at the most risk. They recommend that users or cannabis industry workers who are immunocompromised exercise the greatest caution.

The CDC has warned that CBD products may contain pesticides, heavy metals, bacteria and fungi.

The CDC has also issued a health advisory to inform consumers that CBD can be synthetically converted into Delta 8 THC which is psychoactive. The inconsistency, even dearth, of verifiable testing for agricultural contaminants of cannabis products in the marketplace has resulted in a lack of data on the prevalence of known and unknown impurities and their health impacts.

Moreover, in Tennessee there is no required, authorized statewide system in place to test or monitor the cannabis products being sold for the detection of the amount of THC present nor for the presence of impurities. There are only anecdotal reports of sporadic testing being done as the result of the actions of some appropriately curious police departments. This lack of testing is itself a serious risk to public health. Public Chapter 423 of the Acts of 2023 requires that Tennessee Department of Agriculture establish such a testing procedure. Proposed rules to do so have been published and an initial public hearing on those proposals has been scheduled. Recent cases involving noncannibals demonstrate the commercial production of products which are deceitfully labeled as seemingly safe, albeit pricey, dietary supplements and the like, when, in fact, they are designed to mimic the effects of highly regulated and addictive drugs with severe health consequences.

Conclusion

Determining the legality of a particular cannabis-based product in Tennessee today may require both a law license and a well-staffed modern laboratory. Even then, “legal” does not mean safe or wise.

What happened to “just say no”?

Caveat emptor, indeed.



UPCOMING TRAINING

Cops in Court - January 24, 2024, TBI, Nashville, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation.

Cops in Court - January 25, 2024, THP Training Center, Nashville, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation.

20/20 Medical Foundation of Eye Movements & Impairment - March 12-14, 2024, Memphis, TN

This seminar will be located at the Southern College of Optometry in Memphis, TN and it will be taught by faculty members and professors of optometry. The legal and physiological aspects of eye movement and the detection of impairment will be covered. Registration is open to prosecutors, drug recognition officers TBI analyst and SFST instructors. Officers will receive training needed to be qualified as an expert on HGN.

Impaired Driving Academy - April 17-19, 2024, Gatlinburg, TN

This course gives the General Sessions and Circuit Court prosecutor, the tools and information needed to successfully prosecute impaired driving cases. It presents legal and scientific knowledge through experienced trial attorneys and expert witnesses.

Lethal Weapon/Vehicular Homicide Seminar - May 20-23, 2024, Louisville, KY

This course will be a joint effort with prosecutors and law enforcement officers from Kentucky. It features all aspects of the investigation and prosecution of vehicular homicide cases. Included topics are: the role of the prosecutor at the scene of a fatality, crash reconstruction, expert cross-examination, and a group discussion of current vehicular homicide cases.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

DUI Detection & Standardized Field Sobriety Testing

January 22-24, 2024, Algood, TN
 February 12-14, 2024, Martin, TN
 February 19-23, 2024, Decherd, TN (Instructor Class)
 March 4-6, 2024, Newport, TN
 March 11-15, 2024, Chattanooga, TN (Instructor Class)
 March 25-29, 2024, Germantown, TN (Instructor Class)

Advanced Roadside Impaired Driving Enforcement

January 8-9, 2024, Knoxville, TN (THP only)
 January 30-31, 2024, Kingsport, TN
 February 26-27, 2024, Springfield, TN
 March 11-12, 2024, Waynesboro, TN
 March 25-26, 2024, Newport, TN

Drug Recognition Expert (DRE) School

February 6-16, 2024, Knoxville, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from October 1, 2023, through December 31, 2023, and reflect the DUI Tracker conviction report for all judicial districts within the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from October 1, 2023, through December 31, 2023, since the last quarter were 1,942. This number is slightly down from the previous quarter by 41. From looking at these numbers, we can see that the trend in DUI related dispositions, yearly in Tennessee has still slightly increased throughout the last year. Although, DUI disposition trends are usually lower near the end of the year, they are remaining increased for the entire year of 2023. The total number of guilty dispositions during this same period of October 1, 2023 through December 31, 2023 were 1,468. The total number of dismissed cases were 88, and 71 more were nolle prossed. Across the State of Tennessee, this equates to 75.59% of all arrests for DUIs made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on September 30, 2023. Only 8.18% of the DUI cases during this current quarter were dismissed or nolle. Also, during this same period of time, 285 of the total DUI cases disposed of were to different or lesser charges. Therefore, 14.68% of the total cases were disposed of to another charge.

Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from October 1, 2023 through December 31, 2023. During this period, there were a total of 314 fatalities, involving 293 crashes, which is a decrease from the previous quarter, but a slight increase over this same time last year. Out of the total of 314 fatalities, 55 fatalities involved the presence of alcohol, signifying that 17.52% of all fatalities this quarter had some involvement with alcohol. This percentage is higher than the previous quarter. Further, there were a total of 33 fatalities involving the presence of drugs, signifying that 10.51% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 1,362. This is up by 17 from the 1,345 fatalities incurred last year at this same time. For most of the year, we experienced a consistent increase from last year in the number of fatalities on our roads. Unfortunately this increase has continued an alarming trend in a higher number of fatalities rising each year, since 2018. Let's make impaired driving enforcement a priority for 2024. Impaired driving is preventable. Let's find workable solutions!

Cops in Court Seminar

On December 6, 2023, the DUI training staff, in partnership with the Tennessee Highway Patrol, Training Center, held a Cops in Court Seminar in Nashville, TN. Cadets participated in the seminar and acquired information about the importance of communication, court procedure and evidence presentation in impaired driving related cases. Another Cops in Court class is scheduled at the THP Training Center on January 25, 2024.



VEHICULAR HOMICIDE MURDERER'S ROW

State v. Patricke Conley, Bradley County, Tennessee (ADA Sean S. Boers)



At approximately 5:45 pm on Christmas Day, 2022, a crash occurred on Highway 64, in Bradley County, TN. Patricke Conley was driving a 2004 Isuzu Ascender, when he struck a mailbox on the right side of the Roadway. His vehicle then traveled across both lanes of travel and entered a steep median. The Isuzu then became airborne and landed on top of a 2022 Jeep Wagoneer. The Jeep Wagoneer was occupied by Dustin Dillard, Brittany Dillard and their three minor children. Dustin and Brittany both died from their injuries and all three children, ages 7,4, and 2, suffered serious bodily injury. (Brittany was a teacher at Walker High School).

A search warrant was obtained for the electronic data recorder of the Isuzu. The data indicated that the Isuzu was travelling 84 miles per hour, one second before impact. The engine was at 100% throttle and the accelerator was fully depressed. No braking was measured by the electronic data recorder. The speed limit for that area of roadway is 55 miles per hour. Many beer cans and a cooler were located in the Isuzu. Mr. Conley admitted to drinking earlier. A blood sample was obtained at the hospital and the BAC was 0.144%, several hours after the crash.

Mr. Conley plead guilty to all charges and was sentenced to 22 years to serve at 100%, consecutive to an 8 year sentence for a violation of probation. (Two counts of Vehicular Homicide by Intoxication, three counts of Vehicular Assault, Open Container, Failure of Due Care and Failure to Maintain Lane, for a total of 30 years).

State v. Eduardo Tejeda, Rutherford County, Tennessee (ADA Ashley E. Chisum)



Eduardo Tejeda was sentenced to 11 years to serve in TDOC, as a Range I Standard Offender. He plead guilty to one count of Vehicular Homicide by Intoxication, three counts of Vehicular Assault, Reckless Endangerment with a Deadly Weapon, DUI, Driving Without a License, and Open Container. On May 23, 2022, Mr. Tejeda drove across the center lines and into on-coming traffic on Old Lascassas Highway near Providence Christian Academy. Eleven year old Cole Johnson and his younger brother had just been picked up from PCA, by their grandparents, when the crash occurred. Cole Johnson died from his injuries and the others in the car suffered serious bodily injury.

While investigating the serious head-on crash, officers observed obvious signs of intoxication and a blood sample was obtained. Mr. Tejeda's BAC was 0.17%. He had no prior felony or intoxication related charges or convictions. Mr. Tejeda was sentenced at a 30% release eligibility, as this crash occurred before July 1, 2022. Shortly before, the law which requires a Vehicular Homicide by Intoxication conviction to be served at 100% until release eligibility, became effective. (Mr. Conley's case above occurred after July 1, 2022).

KNOWING AND VOLUNTARY CONSENT

The Court of Criminals Appeals recently decided a vehicular homicide by intoxication case, which involved a blood sample obtained by consent. As with many vehicular homicide cases that involve a crash, the scene was chaotic, the suspect had been quickly transported to the hospital, and many officers were involved. The CCA opinion in *State v. William James Andrews*, No. M2022-00812-CCA-R3-CD, WL 8924722, was filed on December 27, 2023.

On December 20, 2022, Mr. Andrews was driving his Ram truck on Goose Creek Bypass in Williamson County, Tennessee. While travelling west, Mr. Andrews drifted into on-coming traffic lanes. A Nissan Rouge was able to pull to the right of the road, to avoid a collision. However, an Infiniti SUV, following directly behind the Nissan, was not able to avoid a head-on crash with the Ram truck. Mrs. Olga Danylov was the driver of the Infiniti SUV and her husband was in the passenger seat. Their two children were in the seats behind them. The crash killed Olga Danylov and her son, who was sitting directly behind her. Prior to the crash, witnesses had seen Mr. Andrews hit the median and swerve within his lane. Mr. Andrews appeared to have passed out shortly before the crash. No brakes were applied.

Mr. Andrews was quickly put into the back of an ambulance and treated by EMS personnel. The investigating Trooper was at the back of the ambulance for a short time, but she could not get close enough to observe any signs of impairment (Mr. Andrews did have a restricted driver's license, which required an ignition interlock device). EMS gave Mr. Andrews a Glasgow Coma Scale rating of 14 initially, but amended it to 15 while in the ambulance. EMS determined that he was alert, oriented, and understood "what was happening." Mr. Andrews was transported by ambulance to Vanderbilt Hospital in Davidson County. Another Trooper, from Cheatham county, was called to Vanderbilt to obtain a blood sample.

The Trooper conducted HGN and noticed "a slight nystagmus" in both eyes. Mr. Andrews admitted to taking a prescription for morphine. The Trooper then asked for consent to draw a blood sample. Mr. Andrews was hesitant and the Trooper read the implied consent form. (the Trooper stated that the blood draw was mandatory at some point). Mr. Andrews then consented to the test. The nurse was then notified and a blood sample was obtained. The nurse also testified that she would not draw a blood sample unless she heard the patient verbally consent to the blood draw. During a jail call, Mr. Andrews stated to his mother that he consented to the blood draw and a search warrant was not required. The blood sample indicated the presence of Fentanyl and Clonazepam. Mr. Andrews was convicted at a bench trial. He appealed the denial of his motion to suppress.

Consent must be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *State v. Berrios*, 235 S.W.3d 99, 109 (Tenn. 2007). "If the [individual's] will was overborne and his or her capacity for self-determination critically impaired, due process is offended." *State v. Cox*, 171 S.W.3d v174, 185 (Tenn. 2005). Of course this requires a consideration of a totality of the circumstances. *Id.* The trial court noted Mr. Andrews ability to answer questions, the testimony of the EMS, the Vanderbilt nurse testimony of getting consent, and the jail call in which Mr. Andrews said he gave consent and a warrant was not required. (Mr. Andrews also had a prior conviction for DUI) Even though the Trooper said the blood draw was mandatory, Mr. Andrews told his Mother that he consented to the blood draw. The CCA ruled that the evidence does not preponderate against the trial court's findings. Acknowledging Mr. Andrews injuries from the crash were significant, the totality of the circumstances indicate that consent was voluntary.

During the motion to suppress and as part of the appeal, the State argued that exigent circumstances existed to also justify the blood draw. Exigent circumstances are also considered based upon the totality of the circumstances. *Missouri v. McNeely*, 569 U.S. 141 (2013). The CCA ruled that important factors in evaluating exigent circumstances is the number of officers present and available to assist in obtaining a search warrant, and when probable cause is developed. The trial court emphasized the number of officers present and denied the presence of exigent circumstances. The CCA ruled the evidence did not preponderate against these findings. (Interestingly, *Mitchell v. Wisconsin*, 139 S.Ct. 2525, (2019) was not mentioned or considered).



NO CROSS-EXAM WITH TRAINING MANUALS (Continued)

the defense was prevented from using the NHTSA manual to cross-examine the arresting law enforcement officer. In *State v. Ronnie Wayne Blair*, 2011 WL 743369 (Tenn. Crim. App. Mar. 3, 2011), the trial court ruled that the officer was not being called as an expert and that, because SFSTs are not scientific, the NHTSA manual did not contain information on scientific tests. Therefore, the officer testified under Tennessee Rule of Evidence 701 as a lay witness and the defense was not allowed to cross-examine the officer with the NHTSA manual. The CCA ruled that to subject a “lay” witness to cross-examination based upon a “learned treatise”, in the same fashion an expert is subjected to cross-examination, would be improper. *Id.*

In *State v. Angela K. Pendergrass*, 2014 WL 1232204, the CCA fully discussed this issue. Although the police officer, in *Pendergrass*, denied ever having testified as an expert, he did admit that a general sessions court judge once referred to him as “an expert on DUI.” The defense counsel attempted to cross examine the officer, “as an expert going into matters such as authoritative treatises and so forth.” The trial court denied this request. The CCA ruled that the statement of the general sessions court judge was merely anecdotal and the CCA has repeatedly held that “police officers generally do not need to be qualified as expert witnesses in order to testify about their administration and interpretation of field sobriety tests. *Id.* Also, although the officer did, upon questioning by the defense, offer some testimony about his knowledge of the history of and studies on field sobriety tests, it did not rise to the level of expertise, and, thus the trial court did not abuse its discretion by refusing to qualify the officer as an expert. *Id.* The defense cannot attempt to qualify a police officer as an expert, merely to then attempt to impeach them with training materials and other articles or treatises.

How then can an officer testify and offer an opinion, based upon their training and experience, that the defendant is under the influence, and that the defendant is not able to safely drive a vehicle? This very issue was addressed in *State v. Jeffrey Douglas Gwinn*, 2017 WL 1505615 (Tenn. Crim. App. Apr. 26, 2017). In the *Gwinn* case, the officer saw a truck stopped on the side of the road. The truck was running, vomit was located inside and outside of the truck, and the officer smelled the faint odor of an alcoholic beverage. Mr. Gwinn performed poorly during the SFSTs. He refused a blood draw and he was arrested for DUI. No video existed. A jury convicted Mr. Gwinn of DUI. Mr. Gwinn appealed, arguing that the trial court erred by allowing the officer to offer his lay opinion testimony that the defendant was “unfit” to drive a motor vehicle.

Tennessee Rule of Evidence 701 states, a lay witness may testify to opinions or inferences that are “rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.” Opinion testimony which embraces an ultimate issue to be decided by the trier of fact, if otherwise properly admitted, is not objectionable. *See* Tenn. R. Evid. 704. The CCA stated, “a lay witness may testify to his own physical condition or that of another person provided that the witness first states the detailed facts and then gives his opinion or conclusion.” *Simpson v. Satterfield*, 564 S.W.2d 953, 955–56 (Tenn. 1978). On numerous occasions, this Court has held to be admissible the lay opinion testimony of law enforcement officers as to a suspect's intoxication and the ability to safely operate a vehicle. *See State v. Thomas Santelli*, No. E2015–01004–CCA–R3–CD, 2016 WL 3563423, at *6 (Tenn. Crim. App. June 22, 2016). Merely testifying to these lay opinions does not qualify the officer as an expert, nor does it open the officer to cross-examination by training manuals, articles, or learned treatises.

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