TNDAGC

DUI NEWS

ISSUE 86
April 2024

PUBLISHERS:
Terry E. Wood, TSRP
Linda D. Sharer, TSRP
DISTRIBUTION:
Mary G. 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
web-site: www.tntrafficsafety.org

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

Void v. Voidable Prior Convictions

Occasionally, an attack is made on the use of a prior judgment offered to enhance punishment in a DUI, Vehicular Assault, or Vehicular Homicide case. An important distinction to make is whether the prior judgment is void upon the face of the judgment, or if the judgment is merely voidable (meaning additional information from outside the judgment form is needed to determine its invalidity). If a judgment is not void upon its face, then it is entitled to the presumption of regularity and it cannot be collaterally attacked in the present case. *State v. Wenzler,* 2013 WL 865333 (Tenn. Crim. App. Mar. 6, 2013).

In the *Wenzler* case, a prior DUI conviction from Desoto County, Mississippi was used to enhance Mr. Wenzler's DUI conviction and sentence. Mr. Wenzler argued that the Mississippi judgment was facially invalid because it did not indicate that Mr. Wenzler was represented by counsel and it was silent as to whether Mr. Wenzler waived his right to counsel. The CCA stated that silence does not make a prior judgment void, only voidable at best. Voidable judgments must be attacked by post conviction in the original court, not the present court and jurisdiction. *Id*. at *6-7 (Quoting *Hickman v. State,* 153 S.W.3d 16, 25 (Tenn. 2004); and overruling *State v. O'Brien,* 666 S.W.2d 484 (Tenn. Crim. App. 1984), and *State v. Whaley,* 982 S.W.2d 346 (Tenn. Crim. App. 1997) and their progeny). Also, the CCA stated that the burden of proof that the judgment is void is on the defense and not the State. *Id*.

The *Hickman* court ruled that a prior judgment is facially valid if the judgment indicates that the convicting court had proper jurisdiction. *Hickman,* 153 S.W.3d at 24. The *Wenzler* case determined that the ruling in *Hickman* applies to all DUI cases and not just habeas corpus proceedings *Id*. at *7. The Tennessee Supreme Court stated, "[C]onsequently, the rule is that unless invalid on its face, a prior judgment of conviction in a court with personal and subject matter jurisdiction cannot be collaterally attacked in a subsequent proceeding in which the challenged conviction is used to enhance punishment. The authorized route for attacking a facially valid, final judgment of conviction is by the Post-Conviction Procedure Act. An evidentiary hearing can be afforded in that forum and not at the proceeding in which such prior conviction is used." *State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987).

Another important issue to consider is that an out of state driving under the influence prior cannot be attacked merely because the statute of the foreign state is not similar to Tennessee's statute. (They merely need to be convicted for that state's driving under the influence statute). *State v. Davis*, 2002 WL 1760210 (Tenn. Crim. App. Jul. 31, 2002), quoting *State v. Rea*, 865 S.W.2d 923, 924 (Tenn. Crim. App. 1992). According to T.C.A. § 55-10-405, any foreign conviction that constitutes the listed offenses qualifies. Even unlisted offenses, if they share the same elements of the offenses listed in § 55-10-405(b).

Recent Decisions

State v. Jeffery Clay Dale, 2024 WL 139243 (Other signs of impairment during HGN allowed)

On March 24, 2020, while responding to a domestic disturbance in Maury County, an officer observed Mr. Dale sitting in his truck. The truck was partially on a public road and partially on the roadside grass area. The motor was running and Mr. Dale was seated in the driver's seat, with his seatbelt fastened, while holding an open beer. The officer observed many signs of impairment. After performing poorly on SFSTs and admitting to drinking six to eight beers, Mr. Dale was arrested for DUI. His BAC was O.22%. Mr. Dale claimed that he was sitting in his truck until his friends stopped arguing, and that he had no intention of driving. A jury convicted Mr. Dale of DUI, DUI Per Se and DUI third offense, after a bifurcated trial. Mr. Dale argued on appeal that the officer should not have been allowed to testify, as a lay witness, regarding signs of impairment observed, other than the known clues, during the HGN test.

The Tennessee Supreme Court in State v. Murphy, 953 S.W.2d 200, 203 (Tenn. 1997) stated, "Because the average juror does not possess "scientific, technical, or other specialized knowledge" to understand the correlation between alcohol consumption and nystagmus, which involves eye movement, evidence surrounding HGN testing must be offered through an expert witness." Although the officer was not qualified as an expert, he testified to observing Mr. Dale not following instructions regarding keeping his head still, while following the officer's finger move across Mr. Dale's field of vision. The video of the HGN test was played and the officer testified that the inability to follow instructions was a "clue" of impairment. The CCA, cited State v. Childress, 2016 WL 7468206, at 6 (Tenn. Crim. App. Dec. 28, 2016) (Holding that the trial court did not err in permitting an officer's testimony about the defendant's failure to follow instructions during the HGN test, where the officer did not testify about the test results). The judgments of the court were affirmed.

State v. Danny A. Shults, 2024 WL 335776 (Sentencing higher than the minimum is not excessive)

On December 17, 2021, a Hancock County Deputy stopped Mr. Shults for driving an all terrain vehicle (ATV) on a public roadway. Mr. Shultz was "sweating profusely" and constantly referring to his "truck." A second deputy arrived at the scene and conducted SFSTs, which the defendant performed poorly on. Mr Shultz testified that a friend gave him an injection of an unknown substance and he had ingested a piece of suboxone. He claimed that he did poorly on the SFSTs due to a back injury and high blood pressure.

A jury convicted Mr. Shultz of DUI and DUI 2nd, as he was proven to have a prior DUI conviction from March 11, 2014. Mr. Shultz was sentenced the same day, following the trial. Although, Mr. Shultz was convicted of a DUI 2nd offense, the evidence showed that on March 11, 2014, Mr. Shultz plead guilty to two separate DUI counts that occurred on February 14 and March 3 of 2014. The trial court relied upon the defendant's two prior convictions and sentenced him to a term of 11 months and 29 days with 300 days to be served in confinement and the remainder to be served on supervised probation. The trial court also noted that this offense occurred just outside of a school zone and during school hours. Mr. Shultz appealed the length of his sentence as being excessive.

Our courts adopted an abuse of discretion standard with "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). This "applies to all sentencing decisions." *State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014). Although Mr. Shultz had two prior DUI convictions, he was only convicted as a DUI 2nd offense and therefore, was subject to the provisions for DUI 2nd offense per T.C.A. § 55-10-402(a)(2)(A) (Supp. 2021). The trial court failed to state a minimum percentage of service. In a DUI case, a sentence cannot be minimized and the court has the authority to sentence at 100%, contrary to T.C.A. 40-35-302(d). *State v. Palmer*, 902 S.W.2d 391, 392-94 (Tenn. 1995); *See also, State v. Nelson Edward Meeks*, 2002 WL 31373477, at *2 (Tenn. Crim. App. Oct. 15, 2002). The sentence of the trial court was affirmed.

(Continued on page 3)

Recent Decisions (Continued)

State v. Brandon R. Richardson, 2024 WL 639794 (Denial of Juror Challenge for Cause abuse)

Mr. Richardson was involved in a high-speed pursuit in Rutherford County, which ended in a crash with another vehicle on Interstate 24, on September 6, 2019. The passengers in the second vehicle were injured. Mr. Richardson was convicted by a jury of two counts of vehicular assault, one count of felony reckless endangerment, misdemeanor reckless endangerment, evading arrest, DUI, driving without a driver's license, and open container. Mr. Richardson appealed his convictions based upon the trial court's decision to deny defendant's challenge for cause to many members of the jury pool.

During voir dire, the defense counsel asked many questions regarding the defendant's decision not to testify. Most of the jury pool agreed that the defendant's silence was not indicative of guilt. However, approximately 25 potential jurors indicated that they were not sure or thought that it might be incriminating. The defense then moved to exclude all those jurors "for cause." The court denied the request and stated that the defense would need to use their peremptory challenges for those individuals, as that was not an indication that they could not be fair. Two other jurors were removed for cause. The state exercised five peremptory challenges and the defense exercised ten, but only six were of jurors that had not raised their hands regarding the defendant not testifying. Mr. Richardson was convicted and sentenced to 16 years, consecutive to other sentences. Since defense counsel did not follow up regarding questions of whether or not the jurors could be fair, proof of proper affectum ("on account of prejudice") was not shown. *Carruthers v. State*, 145 S.W.3d 85, 94 (Tenn. Crim. App. 2003). "A defendant must not only exhaust his peremptory challenges, but he must also challenge or offer to challenge any additional prospective juror in order to complain on appeal." *State v. Kiser*, 284 S.W.3d 227, 280 (Tenn. 2009). Mr. Richardson failed to do so. Trial court judgements were affirmed.

Joseph Floyd v. State, 2024 WL 735414 (Ineffective assistance of counsel, post conviction)

On December 20, 2009, Mark Scales, the victim, suffered extensive injuries after being struck by a van. The primary issue at trial and on post-conviction review was whether Mr. Floyd was the driver of the van. An eye witness to the crash testified that he observed Mr. Floyd in the driver's seat of the van and a larger male passenger in the passenger seat. Mr. Floyd attempted to leave after the crash and he was instructed to return to the van. An officer testified that he heard Mr. Floyd state, "I shouldn't have been driving," while at the hospital. Mr. Floyd was convicted at trial for DUI and reckless driving.

On post-conviction, Mr. Floyd argued that his trial counsel failed to call witnesses that would have proven he was not driving the van. Evidence at the post-conviction hearing indicated that the witnesses were not at the crash and they only observed Mr. Floyd earlier in the day. The post-conviction court determined that evidence at trial was sufficient to convict Mr. Floyd, that his trial attorney was proficient at cross-examination and trial strategy, and that the other witnesses would not be helpful as they were not present.

To prevail on an ineffective assistance of counsel claim, the petitioner must establish that: (1) his lawyer's performance was deficient; and (2) the deficient performance prejudiced the defense. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner successfully demonstrates deficient performance when the petitioner establishes that his attorney's conduct fell "below an objective standard of reasonableness under prevailing professional norms." *Goad,*938 S.W.2d at 369. Prejudice arising therefrom is demonstrated once the petitioner establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* At 370 (quoting *Strickland,* 466 U.S. at 694). The Court of Criminal Appeals found that Mr. Floyd was deficient in proving that his trial attorney was ineffective or deficient in his performance. The CCA agreed with the trial court that the attorney's trial strategy was well founded. Also, Mr. Floyd failed to show how calling the other witnesses would have changed the outcome of the trial. The judgments of the post-conviction court were affirmed.

Upcoming Training

Impaired Driving Academy - April 17-18, 2024, Gatlinburg, TN
This course will provide Prosecutors with specific information on how to effectively conduct impaired driving jury trials. All aspects of preparing and conducting a jury trial will be discussed. This seminar will also discuss charging decisions, ethics, case law updates and current motions.

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 jury selection, expert cross-examination, toxicology, qualifying an expert and a group discussion of current issues.

Cops in Court - May 30, 2024, THP Training Center (Cadets), Nashville, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases and how to communicate this to the jury. It also includes a mock 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.. This exercise will feature a marijuana impaired DUI case.

Cops in Court - June 14, 2024, Robertson County Sheriff's Office, Springfield, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases and how to communicate this to the jury. It also includes a mock 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. This exercise will feature a marijuana impaired DUI case.

Protecting Lives/Saving Futures - July 17-19, 2024, Montgomery Bell State Park, Burns, TN
This course is designed to teach police officers and prosecutors together on all aspects of the detection, investigation and prosecution of impaired drivers. Each participant will learn firsthand, the challenges and difficulties of prosecuting an impaired driving case. A wet lab will be involved to assist the learning process.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
April 9-10, 2024, Algood, TN
April 29-30, 2024, Clinton, TN
May 20-21, 2024, Gallatin, TN
June 20-21, 2024, Jasper, TN
June 26-27, 2024, Cookeville, TN

DUI Detection & Standardized Field Sobriety Testing
April 15-17, 2024, Germantown, TN
April 22-26, 2024, Millington, TN (Instructor Class)
April 29-May 3, 2024, Jonesborough, TN (Instructor Class)
May 7-9, 2024, Johnson City, TN
May 13-17, 2024, White House, TN (Instructor Class)
June 10-12, 2024, White House, TN
June 10-12, 2024, Jackson, TN

Drug Recognition Expert School (DRE)
April 15-25, 2024, Fairfield Glade, TN
June 3-13, 2024, Jackson, TN

DUI Tracker Report

DUI Tracker this last quarter

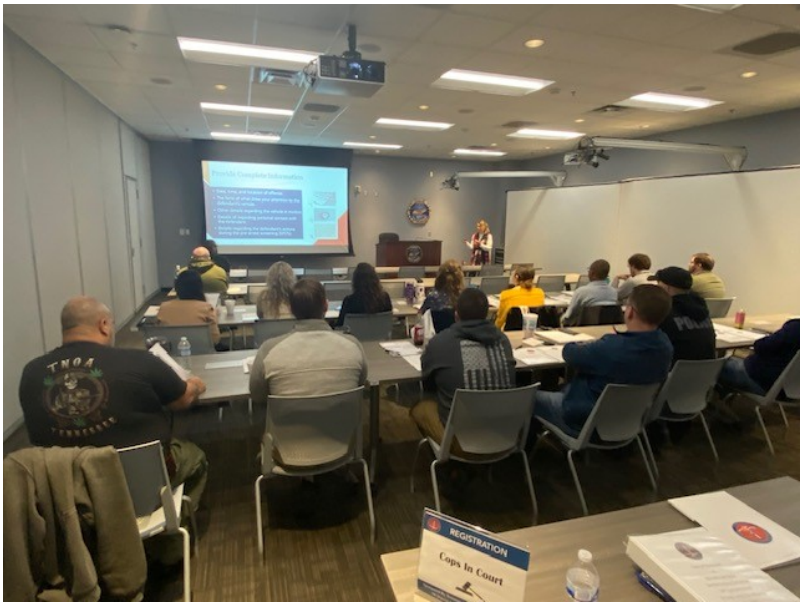
The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2024, through March 31, 2024, and reflect the DUI Tracker conviction report for all judicial districts within the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from January 1, 2024, through March 31, 2024, since the last quarter were 1,773. This number is down from the previous quarter by 169. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has decreased, which is a change from the increased disposition trends that we have been observing the last few quarters. The total number of guilty dispositions during this same period of January 1, 2024 through March 31, 2024 were 1,250. The total number of dismissed and nolled cases this last quarter were 220. Across the State of Tennessee, this equates to 70.50% of all arrests for DUI made were actually convicted as charged. This percentage is lower than the last quarter, ending on December 31, 2023. Approximately 12.41% of the DUI cases during this current quarter were dismissed or nolled. Unfortunately, we are seeing more and more cases being dismissed or nolled. Also, during this same period of time, 293 of the total DUI cases disposed of were to different or lesser charges. Therefore, 16.52% of the total cases were disposed of to another charge.

Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from January 1, 2024 through March 31, 2024. During this period, there were a total of 240 fatalities, involving 242 crashes, which is a significant decrease from the previous quarter. Out of the total of 240 fatalities, 44 fatalities involved the presence of alcohol and 34 fatalities involved the presence of drugs, signifying that 32.50% of all fatalities this quarter involved some form of alcohol and/or drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 240. This is less than the 286 fatalities incurred last year at this same time. Although, this year has started with less fatalities than last year, we need to stay vigilant in our prosecution of impaired drivers. It is only with diligent effort that we will be able to save lives and to permanently lower the number of fatalities that occur on our roadways.

On January 24, 2024, the Traffic Safety Resource Prosecutors, the TNDAGC Education Department and TBI, jointly conducted a Cops in Court Seminar at TBI's Crime Lab and Offices located in Nashville, TN. Cops in Court provides education on how to effectively communicate and present an impaired driving case throughout the judicial process. The participants took part in a mock trial exercise, after being instructed on the importance of professionalism, preparation and the common challenges of prosecuting the alcohol or drug impaired driver. TBI special agents and analysts took part in this seminar.



Vehicle Data Forensics

When a person steps into a modern vehicle today and powers it up, a sophisticated network of computer systems springs into action, gathering and generating millions of data points and information. Increasingly, vehicles come equipped with an array of equipment and features that rely on the collection and use of the data. This data contains details about both the driver and the vehicle and serves many purposes, from supporting safety features, conducting performance analyses, and enhancing convenience features, to elevating entertainment options. While many of these Electronic Control Units (ECUs) collect and process this data within the vehicle itself, the increasing prevalence of Wi-Fi-enabled vehicles, Bluetooth technology, and cellular connections means that today's cars are becoming increasingly connected to other devices, including smartphones and other vehicles.

In this age of advanced technology, vehicles have become more than just a mode of transportation, they have transformed into rolling data repositories. Modern vehicles are equipped with sophisticated computer systems that record a wealth of information. This trove of data presents law enforcement and prosecutors with insights into a wide range of criminal offenses. Harnessing this data, however, raises significant legal and privacy concerns. This article provides an overview of some of the systems investigators can delve into, along with potential legal considerations.

Vehicle data forensics is the intricate process of extracting, preserving, and analyzing electronic data stored within a vehicle. In the realm of vehicle-related crimes, such as vehicular homicides, fatal hit-and-runs, and even street racing offenses, investigators can find valuable information through a forensic examination of these systems. The systems most likely to be accessible, beneficial, and contain relevant data include the vehicle's Event Data Recorders and the infotainment and telematics systems.

Event Data Recorders

Often colloquially referred to as "black boxes" in informal conversation, an Event Data Recorder (EDR) is a module bearing little resemblance to the flight data recorders used in aircraft. An EDR functions as an ECU and the Airbag Control Module is the most common type. Its main function is to control the vehicle's restraint and airbag systems, with data recording for events being a secondary function. When an "event" occurs, this module records a time series of data. Originally, manufacturers installed EDRs to collect data to ensure the proper functioning of airbag and engine systems.

EDRs are subject to federal regulation under the Federal Motor Vehicle Safety Standards, specifically within 49 CFR Part 563. These federal regulations provide precise definitions for events and trigger thresholds, which dictate what data is recorded. In this context, an event is defined as "a crash or other physical occurrence that causes the trigger threshold to be met or exceeded, or any non-reversible deployable restraint to be deployed, whichever comes first."[1] The trigger threshold, on the other hand, is characterized as "… a change in vehicle velocity, in the longitudinal direction, that equals or exceeds 8 km/h within a 150 ms interval. For vehicles that record 'delta-V, lateral,' trigger threshold means a change in vehicle velocity in either the longitudinal or lateral direction that equals or exceeds 8 km/h within a 150 ms interval."[2]

Since EDRs became federally regulated, the availability of EDR data has proliferated. Approximately 276 million vehicles are registered in the United States.[3] According the manufacturer of the Bosch Crash Data Retrieval (CDR) system, "[i]n the United States and Canada alone, … (Continued on page 7)

1. 49 CFR Part 563.5(b).
2. Id.; see also www.nhtsa.gov/research-data/event-data-recorder, accessed on October 10, 2023.
3. This number is from the 2020 Highway Statistics, State Motor-Vehicle Registrations 2020, from the U.S. Department of Transportation, Federal Highway Administration, Policy and Government Affairs, Office of Highway Policy Information and last updated February 16, 2023, available at www.fhwa.dot.gov/policyinformation/statistics/2020/mv1.cfm, accessed on October 11, 2023.

Vehicle Data Forensics (Continued)

more than 200 million registered vehicles are equipped [with EDRs] and approximately 98% of new vehicles sold in the US and Canada today have an EDR."[4] President Obama signed the Driver Privacy of Act of 2015, providing that vehicle electronically recorded data is the property of the vehicle owner and cannot be accessed by third parties (e.g., law enforcement) without the owner's consent or a court order (e.g., search warrant).[5]

A report generated from the data extracted from an EDR usually consists of pre-crash data related to vehicle performance and safety systems. It is important to emphasize that each report varies, since the data presented is dependent on the manufacturer's specifications. Generally, an EDR records five seconds of pre-crash data, which may include the following information: 1) Vehicle speed (as reported by the vehicle); 2) Brake usage; 3) Acceleration data; 4) Engine RPM; 5) Input from the steering wheel; 6) Delta-V (change in velocity); and 7) Potentially additional data elements as per manufacturer specifications and capabilities.

Generally, the recorded speed is the data point of most interest to an investigator. Everyone involved, including investigators, prosecutors, and jurors, usually want to know, "How fast was the defendant driving at the moment of impact?" Thus, some data points, like steering wheel input, are frequently overlooked. These overlooked details can offer a seasoned analyst a much broader understanding of the events preceding the collision. With a little mathematical analysis, the five seconds of pre-crash data can be used to determine the vehicle's locations during that timeframe, thereby offering a clearer picture of the moments leading up to the crash. A trained and experienced CDR technician and analyst can provide significant insight from this data, providing valuable information about the sequence of events.

Infotainment Systems and Telematics Data

In an age where connectivity reigns supreme, many vehicles come equipped with telematics systems. Vehicle telematics, in essence, combines GPS systems, onboard vehicle diagnostics, wireless telematics devices, and black box technologies to record and transmit a wide spectrum of vehicle data. This data includes information like speed, location, maintenance requirements, servicing needs, and is cross-referenced with the vehicle's internal behavior.[6] A vehicle telematics system includes these vehicle-installed tracking devices to "… facilitate the transmission and storage of telemetry data via wireless networks and the vehicle's own onboard modem and diagnostics. ..."[7] These systems continually collect data on various aspects, including vehicle location, speed, fuel consumption, and even driver behavior. Telematics data essentially serves as a digital breadcrumb trail, aiding investigators in reconstructing events.

A vehicle's infotainment system represents more than just a source of entertainment. It functions as an integrated media system that delivers information and entertainment features to both drivers and passengers. The infotainment screen, positioned at the top of the center stack, serves as the digital control panel for adjusting cabin temperature, audio volume, and other preferences. Moreover, drivers can use this screen for navigation and to operate their phone.8 What's noteworthy is that modern infotainment systems not only provide these functions but also store data related to phone calls, text messages, navigation history, and other user interactions. This stored data can offer significant insights into a driver's activities leading up to a particular incident.

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4. Bosch Event Data Retrieval Tool Solutions, available at boschcdrtool.com/#:~:text=In%20the%20United%20States%20and,Canada%20 today%20have%20an%20EDR., accessed on October 11, 2023.
5. www.govinfo.gov/app/details/COMPS-13423 Driver Privacy Act of 2015, Pub.L. 114-94, Div. B, Title XXIV, Subtitle C, Part I (§§24302 to 24303), Dec. 4, 2015, 129 Stat. 1712.
6. www.heavy.ai/technical-glossary/vehicle-telematics, accessed October 4, 2023.
7. Id.
8. Kelley Blue Book website, www.kbb.com/car-advice/best-infotainment-systems/, accessed October 4, 2023.

Vehicle Data Forensics (Continued)

Ultimately, infotainment and telematics systems are a collection of ECUs that combine information and entertainment, effectively connecting vehicle occupants to their digital world. While some of these ECUs and systems operate discreetly in the background, the infotainment system interacts directly with the occupant(s) (including the driver) and is a primary focal point within the vehicle. It directly engages with the occupants and plays a pivotal role in enhancing their driving experience. Moreover, many infotainment systems are intertwined with telematics systems, such as OnStar, enabling the transmission of data through telecommunications. Many modern vehicles are equipped with cellular connectivity, which can extend to wireless connectivity like Vehicle-to-Infrastructure (V2I) or Vehicle-to-Vehicle (V2V) systems. These systems facilitate communication and requests to and from the infotainment system, and this connectivity can be either integrated within the vehicle itself or tethered, usually through an occupant's cellphone.

Accessing data beyond the EDR within the various vehicle ECUs is becoming more prevalent. Law enforcement agencies now have access to an array of tools that support investigators throughout the entire vehicle forensic process. This includes the identification of vehicle systems, the utilization of specialized hardware for data acquisition from these systems, and the application of forensic software for in-depth data analysis.

An invaluable aspect of infotainment and telematics systems is their ability to furnish geolocation data. A forensic analysis of the data stored within these systems can reveal loads of information, including vehicle tracklogs, precise locations, travel routes, and velocity records. Within these systems, navigation features often record trackpoints, which are compiled into tracklogs, essentially serving as historical records of the vehicle's locations and movements. In addition to tracklogs, there are also location and route data, which differ in that they represent places manually entered or selected on the map by the user. These locations and routes may not necessarily signify that the vehicle physically journeyed to those spots, but they do provide insights into the user's intent or planned destinations.

Another significant data category to explore within infotainment systems revolves around media data. Many modern infotainment systems either possess their own connectivity capabilities or establish connections to apps and media through the user's mobile phone. There are multiple ways in which these systems can link with media devices, with the most common methods being Bluetooth, Wi-Fi, or USB cables. Regardless of the chosen method, the infotainment system and the mobile phone engage in communication and data sharing. Often, when a person enters a vehicle, he might be prompted to "pair" his device with the vehicle's system. This pairing process results in the exchange of a substantial amount of information and data. Even in cases without pairing a phone to the vehicle's system, the system may still record the detection of a nearby Bluetooth device and store its identifier. USB connections also serve as a common means of connectivity. While not all USB ports offer the same functionality, a USB connection can essentially function similarly to a Bluetooth pairing, facilitating the transfer of data from one device to another.

The data accessible through these connections has the potential to be vast. It can encompass a wide range of information, including unique identifiers of devices. For instance, a vehicle may retain records of dozens of cell phone identifiers for phones that were present in the vehicle and communicated via Bluetooth or other connection methods. Contacts represent another potential data category that may be discovered within infotainment system data though access to contact data is typically subject to user permissions within many systems.

Call logs, much like what one might find on a cell phone, could also be present in the infotainment system data. Text messaging (SMS) data may also potentially be stored in infotainment systems, but most SMS data found during vehicle forensic analysis primarily include only incoming messages. In a broader context, any media files, such as an index of audio files accessible to the vehicle, could also be accessed through vehicle forensics.

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Vehicle Data Forensics (Continued)

Legal Considerations

While vehicle data forensics provides access to a wealth of information, it also raises significant legal and privacy concerns that require careful consideration by both the law enforcement officer and the prosecutor. When accessing vehicle data, a vehicle owner may consent for law enforcement to access it. Typically, though, the primary question is whether a warrant is necessary. Generally speaking, in the absence of an owner's consent, accessing the data will require a judicially approved search warrant. The protections of the Fourth Amendment against unreasonable searches and seizures extend to digital data stored within vehicles (see the above reference to the Driver Privacy Act of 2015). Courts often assess the reasonableness of the search based on whether the data is easily accessible or if invasive methods are required for extraction.

In order to secure a search warrant for the contents of the EDR, an officer or prosecutor must establish probable cause to believe a crime was committed by the defendant, and evidence of the crime is present within the EDR. The affidavit submitted to the judge must provide a comprehensive description of the EDR, what it does, and the data it contains and how it relates to the probable cause. It is imperative for law enforcement officers and prosecutors to possess a thorough understanding of the laws, policies, procedures, and practices applicable in their specific jurisdiction.

A prosecutor must also be well-prepared to address any motions to suppress or motions in limine brought by a defendant. Achieving this requires a thorough conversation with the crash investigator responsible for the data recovery and analysis. The prosecutor will need to substantiate the reliability of the technology, including both the hardware and the software, as well as confirming the soundness of the methodology used by the technician and analyst. This entails a comprehensive assessment of the expert's qualifications, the adherence to proper data retrieval procedures, and the expert's ability to interpret the data accurately. It is essential for both the law enforcement officer and prosecutor to remember that a data report cannot replace traditional crash reconstruction and investigation. When executed correctly, a data report should enhance and reinforce the credibility of the reconstructionist.

After successfully acquiring data from a vehicle, law enforcement must exercise caution when contemplating the release of the vehicle. It is important that an officer or prosecutor avoids the inadvertent destruction of possibly exculpatory information prior to affording the defendant the chance to access it. In this regard, a prosecutor must remain vigilant, understanding the obligations established by *Brady*,[9] and acknowledge that bad faith is not a prerequisite for potentially adverse consequences to be imposed. Potential remedies for such mishandling of evidence encompass the exclusion of evidence from trial, the issuance of a jury instruction regarding the mishandling of evidence, or in more severe cases, the dismissal of the entire case. It is critical for all parties involved to maintain due diligence in preserving and disclosing evidence to uphold the principles of justice.

A state's privacy laws can also impose limitations on the collection and utilization of certain vehicle data. These legal provisions are designed to protect individuals' privacy rights while also granting law enforcement the necessary means for conducting their investigations. Striking a balance between these two objectives requires careful consideration of principles, including proportionality and necessity. Law enforcement agencies must weigh the need for gathering evidence against the imperative of safeguarding individuals' privacy rights, ensuring they do not overstep their lawful authority.

(Continued on page 12)

9. The suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963).

VEHICULAR HOMICIDE MURDERER'S ROW

State v. William James Andrews, 2023 WL 8924722 (Knowing and Voluntary Consent)

Following a Williamson County bench trial, Mr. Andrews was convicted of two counts of vehicular homicide by intoxication, two counts of vehicular homicide by recklessness, two counts of reckless aggravated assault resulting in death, and two counts of vehicular homicide with a prior DUI conviction. Mr. Andrews was sentenced to a twenty year sentence, to be served in the Tennessee Department of Correction. Mr. Andrews appealed the trial court's denial of his motion to suppress evidence of drugs in his blood, contending that he did not give consent for a blood draw.

On December 20, 2020, Mr. Andrews was travelling West on Goose Creek Bypass when his Ram truck drifted into the East bound lanes of traffic. His truck narrowly missed a Nissan Rouge, that had pulled to the right, and barreled head-on into a an Infinity SUV, which was occupied by Mr. Danylov, Mrs. Danylov and their two children. Another witness had been following Mr. Andrews earlier and had observed his truck hit the median barrier on three occasions. At no time had the truck attempted to brake. Mr. Andrews appeared to be unconscious as he entered the opposing lane of traffic. Mrs. Danylov, the driver of the SUV, died at the scene. Her son, who was sitting behind her, died after being transported to the hospital. Mr. Danylov and his daughter were both injured. Mr. Andrews was transported quickly to Vanderbilt Medical Center, while Deputies, THP Troopers and others attempted to direct traffic, tend to the injuries, investigate the crash and preserve the scene, as many witnesses from a near by neighborhood were surrounding the vehicles. No officer was close enough to Mr. Andrews to observe any signs of impairment.

The Trooper in charge of investigating the crash could not leave the scene and she requested another Trooper to interview Mr. Andrews at the hospital and to attempt to get a blood sample. The Trooper asked about the crash, conducted HGN, and read the implied consent form. Mr. Andrews agreed to have his blood drawn and he signed the form. The Trooper said he saw some signs of impairment and Mr. Andrews stated he was prescribed morphine. The attending nurse testified that she does not draw blood unless she personally receives consent from the patient to draw the blood. During a jail call, Mr. Andrews admitted that he agreed to the blood sample. The blood sample indicated the presence of fentanyl and clonazepam.

The consent exception to the warrant requirement applies when a person voluntarily consents to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *State v. Berrios*, 235 S.W.3d 99, 109 (Tenn. 2007). The State has the burden to prove that "consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). Based upon the above facts, the trial court determined that Mr. Andrews was aware and that he gave a voluntary and unequivocal consent. Although he had just been in a crash, both the EMT and the treating nurse stated that Mr. Andrews was alert and oriented to time, place, and circumstance.

The State also argued that the blood sample could have been obtained based upon exigent circumstances. The trial court stated that due to the large number of law enforcement officers present and the fact the Nashville Metro Police Officers often help with the search warrant process at Vanderbilt Medical Center, a search warrant could have been attempted, if consent had not been obtained. The trial court did not appear to consider the United States Supreme Court ruling of *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019). The Court of Criminal Appeals determined that the evidence does not preponderate against the trial court's findings. The judgments of the trial court were affirmed. (Continued on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Vicky L. Smith, 2024 WL 639985 (Denial of Probation in Lake County)

On August 5, 2020, while driving under the influence of methamphetamine, Ms. Smith struck and killed a pedestrian, Lisa Tate. Ms. Smith plead guilty to one count of vehicular homicide by recklessness and agreed to a ten-year sentence as a Range II offender, with the manner of service to be determined by the trial court. In considering alternative sentencing, the trial court considered the statutory factors and determined that confinement was necessary to protect society because the defendant has an extensive criminal record, there's little hope the defendant can be rehabilitated, and less restrictive measures would not be effective as the defendant has received measures less restrictive than confinement in the past and yet, she has continued to commit crimes. The court also found that probation would unduly depreciate the seriousness of the offense. Ms. Smith was sentenced to ten-years to serve in TDOC custody. Ms. Smith appealed her sentence.

"[A] trial court's decision to grant or deny probation will not be invalidated unless the trial court wholly departed from the relevant statutory considerations in reaching its determination." *State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014). The trial court considered all of the factors listed in T.C.A. § 40-35-130(1). Accordingly, the trial court's sentence is presumed reasonable, and the CCA concluded that there was no abuse of discretion. Also, since the trial court relied on more than one factor, even if the court misapplied a factor, the other factors were sufficient to deny probation. The judgment of the trial court was affirmed.

United States v. Bryce Allen Axline, 93 F.4th 1002 (6th Cir. 2024, Tenn.) (Excessive Sentence)

On June 7, 2021, Mr. Axline (20 years-old) drove along the spur, between Gatlinburg and Pigeon Forge, within the Great Smoky Mountains National Park. He lost control of his car and crashed into an embankment at over 90 miles per hour. He had two 19 year-old female passengers. One was seriously injured and one, Elizabeth Parker, died. The Airbag Control Module indicated that the car was "fully accelerated at 100 percent, five seconds before the crash". (The speed limit was 45 mph). Mr. Axline's BAC was determined to be between 0.065 and 0.081 at the time of the crash. (*Per se* level is 0.02 for under 21 yrs.)

Mr. Axline plead guilty to one count of vehicular homicide and one count of vehicular assault. The Federal Sentencing Guidelines recommended a sentence of between 37 to 46 months. The trial court agreed with the government's motion for an upward variance and sentenced Mr. Axline to 65 months in federal custody, followed by three years of supervised release. Mr. Axline appealed the length of his sentence, arguing that it was unreasonable for the district court when it varied upward of 40 percent from the advisory guideline range.

When a district court varies from the guideline range, it requires an explanation regarding "why the defendant's unique circumstances fall outside the 'heartland' of cases affected by the relevant guideline." *United States v. Boucher*, 937 F.3d 702, 708 (6th Cir. 2019). The district court in this case offered an extensive explanation based upon the seriousness of the offense ("[t]o say that the offense conduct and consequences were of a serious nature is certainly an understatement of the highest regard."). The district court pointed out that Mr. Axline's actions included both impaired driving and extremely reckless driving. The district court also relied upon Mr.Axline's personal history and prior criminal involvement with alcohol and drugs to vary upwards as consistent with the ruling in *United States v. Cechini*, 834 F. App'x 201, 207 (6th Cir. 2020). The U.S. Court of Appeals did not find that the sentence caused an unwarranted sentence disparity. Although the sentence was lengthy, it was substantively reasonable. The judgement was affirmed.

Vehicle Data Forensics (Continued)

Conclusion

Vehicle data forensics undeniably serve as a powerful tool for law enforcement and prosecutors in modern investigations and legal proceedings. Nevertheless, it exists within a complex landscape fraught with legal intricacies and privacy considerations. Achieving equilibrium between the demand for evidence and the protection of privacy rights, adhering to proper forensic protocols, and staying informed about evolving legal precedents are key challenges in this field. As technology continues to advance, the legal framework surrounding vehicle data forensics will inevitably evolve, demanding law enforcement and prosecutors tread responsibly and ethically in the pursuit of justice.

About the Author

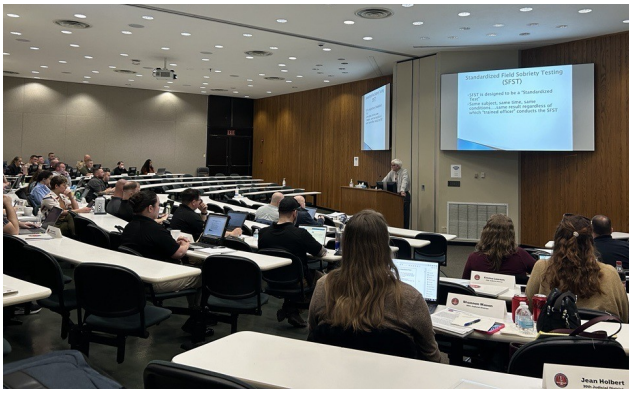
Lieutenant Williams has worked for the Metro Nashville Police Department for seventeen years and currently oversees the Traffic Investigations and School Crossing Guard Sections of the Department's Traffic Division. Prior assignments within the Department include serving as an officer in patrol as a Crash Investigator on the Fatal Crash Team and as a sergeant where he was the supervisor of the DUI Unit, Crash Investigation Unit, Hit & Run Unit, and Aggressive Driving Unit.

In 2016, he was selected as a National Institute of Justice Law Enforcement Advancing Data and Science (LEADS) Scholar. Since 2020, he has served as the Co-Chair of the International Association of Chiefs of Police (IACP) Police Research Advancement Section and is a member of the IACP Research Advisory Committee.

Lt. Williams is a Drug Recognition Expert (DRE) and is accredited in crash reconstruction by the Accreditation Commission for Traffic Accident Reconstruction (ACTAR).

* This article was originally published in Volume 31, Issue 10 of the National Traffic Law Center's *Between the Lines* newsletter in October 2023 under NHTSA cooperative agreement 693JJ91950010. It is reprinted here with the permission of the National Traffic Law Center.

The Traffic Safety Resource Prosecutors presented their 20/20 Understanding the Physiology of Eye Movements and Impairment Seminar at the Southern College of Optometry in Memphis, TN on March 12-14, 2024. Approximately 50 students attended and they were instructed by the College staff and guest speakers, regarding the science behind involuntary eye movement, caused by impairment, environmental conditions and medical conditions. Please look for future trainings, seminars and classes, as listed on page 4.



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) 232-2944
Mary G. Campbell (615) 933-6339