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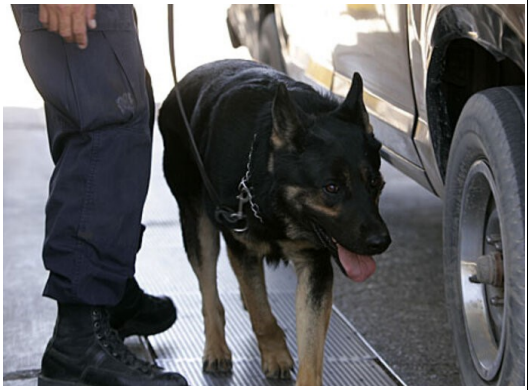
STATE V. GREEN (PC BASED ON CANINE ALERTS)

Within the last few years, a number of dog-sniff cases have been decided by the Tennessee Court of Criminal Appeals. These cases have uniformly provided that use of a drug-sniffing canine, during a traffic stop, is not a violation of the United States 4th Amendment, as long as the stop was not delayed for the arrival of the canine. Also, a positive alert by the drug-sniffing canine does provide sufficient probable cause for a search of the vehicle and its passengers. These many CCA decisions have been upheld, even after the passage of the Federal Farm Bill, which legalized hemp. Also, even with the stipulation that a drug-sniffing canine cannot differentiate between the smell of legal hemp and illegal cannabis.

The Tennessee Supreme Court has now definitively outlined the analysis that must be used when the probable cause used to justify a search includes a positive alert from a drug-sniffing canine. In *State v. Andre JuJuan Lee Green*, ___ S.W.3d ___. 2024 WL 3942511 (Tenn. 2024), a vehicle being driven by Mr. Chavez was stopped by Officer Trescott for operating the vehicle while using high beams in traffic. The officer smelled a strong odor of a fragrance (there were 3 pine-tree air fresheners hanging from the rear view mirror). Officer Trescott also noticed a backpack between the feet of the passenger, Mr. Green. Everyone denied ownership of the backpack and a drug-sniffing canine was deployed around the vehicle. The canine indicated a positive alert on the vehicle. Upon being told that both occupants would be held responsible for anything found in the vehicle, Mr. Chavez prodded Mr. Green to talk. Mr. Green said he picked up the backpack from his brother, but he does not know what was in it. A search revealed marijuana, a loaded firearm, baggies, scales and a phone charger that belonged to a phone found on Mr. Green's person.



The defense filed a motion to suppress in the trial court, arguing that a canine sweep is no longer valid to establish probable cause for a search since a canine cannot distinguish between the smell of legal hemp and illegal marijuana. The trial court granted the motion to suppress and the CCA reversed the ruling, concluding that the Tennessee Supreme Court allows the smell of marijuana to provide probable cause for a search, citing, *State v. Hughes*, 544 S.W.2d 99, 101 (Tenn. 1976). Although the CCA ruled that the alert of a trained canine is alone sufficient to establish probable cause, the CCA alternatively held that probable cause was even more evident, based upon the totality of the circumstances. The TSC granted permission to appeal. (Continued on page 12)

RECENT DECISIONS

Marshall G. Tate v. State, 2024 WL 3549187 (Post Conviction, Remand from TN Supreme Court)

Mr. Tate was involved in a minor vehicle crash on December 24, 2018. During the crash investigation, Mr. Tate showed signs of impairment. He performed poorly on field sobriety tasks and he submitted to a BAC test, which indicated a BAC of .183%. On August 27, 2020, Mr. Tate pleaded guilty to one count of DUI per se, first offense. He admitted to reviewing his plea agreement, being satisfied with his counsel and that he was not forced, pressured, or intimidated to enter the plea agreement. Mr. Tate was on parole for murder, at the time, and was sentenced to 11 months, 29 days to serve, credit for time served. Mr. Tate had been held in jail, without bond, for over a year.

On October 20, 2020, Mr. Tate filed a pro se notice of appeal, which was determined to be untimely. The appeal was dismissed on February 5, 2021. On March 31, 2021, Mr. Tate filed a post-conviction petition claiming that his counsel was ineffective, which rendered his guilty plea involuntary and unknowing. The trial court denied the petition and filed an order. The CCA ruled that although the trial court's written order did not contain written findings of fact and conclusions of law with regard to each ground raised, the record was sufficient for review. On November 22, 2023, the Tennessee Supreme Court vacated the CCA order and remanded the case back to the trial court for a "sufficient order." The trial court order "denied the petition, but did not address the issues raised by the petition as required by statute." T.C.A. §40-30-111(b).

On May 29, 2024, the post-conviction court entered a detailed amended written order denying the Petitioner's claims. Mr. Tate appealed the order. Appellate courts do not reassess the post-conviction court's determination of the credibility of the witnesses. *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009). The "findings of fact will not be disturbed unless the evidence contained in the record preponderates against the findings. *Brooks v. State*, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988); *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). The burden is on the petitioner to show both (1) counsel's performance was deficient and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate ineffective assistance of counsel in the context of a guilty plea, a petitioner must prove that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Mr. Tate could not prove ineffective assistance of counsel or that any representations by counsel led to an involuntary and unknowing guilty plea. The judgment of the post-conviction court was affirmed.

State v. Vikash Patel, 2024 WL 3888338 (Sufficiency of the evidence/Blood sample—chain of custody)

Officers responded to a call of a car that had veered off of the road on August 7, 2021. The driver, Mr. Patel, presented a strong smell of alcohol, slurred speech and showed signs of intoxication while conducting field sobriety tests. He consented to provide a blood sample. A nurse from the Greenville Community Hospital drew the blood sample, sealed the TBI kit, with the analysis request form, and gave the kit to the arresting officer. The kit was deposited into the police department's evidence locker. The BAC result was .114%. At a jury trial, the officer and a TBI agent testified regarding the blood draw, the procedures for transporting the sample and how the sample was tested. Mr. Patel was convicted for one count of DUI and he was sentenced to 11 months, 29 days suspended, after service of ten days. Mr. Patel appealed based upon the sufficiency of the evidence to prove DUI and the sufficiency of the chain of custody for the blood sample evidence.

Mr. Patel argued that since the indictment and the jury instructions stated that the BAC was exactly .114%, the State had a higher burden of proof to show that the BAC was exactly .114% at the time that Mr. Patel was driving. The TBI agent could only testify that the BAC was .114% at the time the blood sample was drawn. In Tennessee common law, if something was alleged in an indictment and was described… (Continued on page 3)

RECENT DECISIONS (Continued)

with greater particularity than requisite, the thing had to be proven exactly as described in the indictment. *Bolton v. State*, 617 S.W.2d 909, 910 (Tenn. Crim. App. 1981). However, some forty years ago, the Tennessee Supreme Court relaxed the rule for modern times. *State v. Moss*, 662 S.W.2d 590, 592 (Tenn. 1984). Tennessee law now states that the essential elements of a crime that must be alleged and proven are those set forth in a statute. *State v. March*, 293 S.W.3d 576, 589 (Tenn. Crim. App. 2008). Any additional language is considered "surplusage." *State v. Mayes*, 854 S.W.2d 638, 641 (Tenn. 1993). The evidence was sufficient.

Regarding the chain of custody, the state must have a witness identify the evidence or establish an unbroken chain of custody. *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000). The purpose of the rule is "to insure 'that that there has been no tampering, loss, substitution, or mistake with respect to the evidence.'" *State v. Daniels*, 656 S.W.3d 378, 389-90 (Tenn. Crim. App. 2022). However, the State is not required to call every witness that handled the blood sample to establish a proper chain of custody. *State v. Singh*, 684 S.W.3d 774, 784 (Tenn. Crim. App. 2023). The chain of custody evidence was determined to be sufficient. The judgment of the trial court was affirmed.

State v. Michael J. Hite, 2024 WL 3913193 (Excessive sentence)

On June 7, 2021, Mr. Hite was observed driving a very damaged silver Cadillac SUV. The rear bumper was dragging, the left rear wheel was "on its rim" and many windows were broken out. After being stopped by a deputy, the strong odor of alcohol was observed. Mr. Hite was confused and unaware of where he was at. He performed poorly on field sobriety tests and was arrested for DUI. Mr. Hite consented to a blood sample and his BAC was 0.117%. Mr. Hite was convicted of DUI, first offense, by a jury and was sentenced to 11 months and 29 days suspended, after actual service of 60 days. A timely appeal followed.

Mr. Hite complains that service of 60 days for a DUI, first offense, was excessive. Although Tennessee's Supreme Court has not specifically considered whether the *State v. Bise*, 380 S.W.3d 682 (Tenn. 2012) sentencing standard applies to misdemeanor sentencing determinations, (*State v. Jones*, 2023 WL 3451553, any sentence within the appropriate range is in compliance), the CCA determined that the proper standard is "the abuse of discretion standard of appellate review accompanied by a presumption of reasonableness," which applies to all sentencing decisions. *State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014) (citing *State v. Pollard*, 432 S.W.3d 851, 864 (Tenn. 2013). A sentence imposed for a misdemeanor offense must be specific and in accordance with the principles, purposes, and goals of the Sentencing Act. T.C.A. §40-35-104, 302(b); *State v. Cooper*, 336 S.W.3d 522, 524 (Tenn. 2011). However, "the legislature has specifically excluded DUI offenders from the provisions of the Act when the application of the Act would serve to either alter, amend, or decrease the specific penalties provided for DUI offenders." *State v. Palmer*, 902 S.W.2d 391, 394 (Tenn. 1995).

Ultimately, in sentencing a defendant, a trial court should impose a sentence that is no greater than deserved for the offense committed and is the least severe measure necessary to achieve the purposes for which the sentence is imposed. *Jones*, 2023 WL 3451553, at *3 (quoting T.C.A. §40-35-103(2), (4)). However, a person convicted of a misdemeanor offense has no presumption of entitlement to a minimum sentence. *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999). The trial court has more flexibility in misdemeanor sentencing than in felony sentencing. *Id.* at 518.

The CCA stated that in this case, the trial court imposed a within-range sentence that was consistent with the principles of sentencing. The trial court cited Mr. Hite's prior criminal record, the circumstances of the offense, his lack of credibility, his refusal to appreciate the seriousness of his conduct, and the need for deterrence, regarding both Mr. Hite and society in general. The judgment of the trial court was affirmed.

CHRYSTAK AND IMPLIED CONSENT REFUSALS

State v. Kevin Cortez Chrystak. 2014 WL 3954040 (Tenn. Crim. App. Aug. 13, 2014) is an interesting case that is often referred to in motions to dismiss an implied consent refusal. Although the case is unreported and has never been cited, it has been argued as supporting a dismissal of an implied consent refusal, when a blood sample is obtained without the defendant's consent. Mr. Chrystak argued that the mandatory blood draw provision within T.C.A. § 55-10-406, was unconstitutional, and if a blood sample is mandatorily taken by statute, without the consent of the defendant, then the defendant did not violate the implied consent statute. (T.C.A. § 55-10-406 has since been amended and the statute no longer has a mandatory blood draw provision).

On April 30, 2012, Mr. Chrystak was stopped for driving without functioning taillights. The officer smelled the odor of alcohol, Mr. Chrystak admitted to drinking and he performed poorly while conducting field sobriety tests. He was read the implied consent form, but he was instructed that since he had prior DUI convictions, the blood test was mandatory. After being so advised, Mr. Chrystak refused consent and he refused to sign the implied consent form. He later stated that he did not believe that he had a choice in the matter. Mr. Chrystak was then arrested and charged with DUI and violating the implied consent law. Mr. Chrystak was convicted of the implied consent violation in general sessions court and thereafter, appealed his conviction to the circuit court. The CCA agreed with Mr. Chrystak and dismissed the implied consent violation, based upon the mandatory blood draw provision in the statute, as it was written in 2012.

Since the ruling in *Chrystak*, the United States Supreme Court redefined the meaning, purpose and legal scope of the different State's implied consent laws, with their ruling in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). The *Birchfield* court stated, the Fourth Amendment permits warrantless breath tests incident to arrests for impaired driving, but it does not permit warrantless blood tests, including mandatory blood draws. Also, motorist cannot be deemed to have consented to submit to a blood test after being threatened with a criminal offense for refusing an implied consent statute. The U.S. Supreme Court reiterated that, "[T]he States and the Federal Government have a 'paramount interest … in preserving the safety of … public highways.'" (citing *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979). Also, they reiterated their approval of implied consent statutes, stating, "[O]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorist who refuse to comply. (citations omitted) Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id*. at 2185.

The result of the *Birchfield* ruling on Tennessee's implied consent statute was the complete revision of the statute in 2017 and again in 2019. The mandatory blood draw provisions in the Tennessee implied consent statute, that existed at the time of the *Chrystak* ruling, no longer exists in the implied consent statute. As stated in the *Birchfield* ruling, the U.S. Supreme Court still approves of implied consent statutes, that impose civil penalties and evidentiary consequences on motorist who refuse to comply. It would follow that the *Chrystak* ruling is no longer applicable to the current version of Tennessee's implied consent statute, which imposes civil penalties and evidentiary consequences on motorist who refuse to comply. (A blood draw is only allowed by consent, search warrant, or when exigent circumstances to the search warrant requirement exists).

(Continued on page 5)

CHRYSTAK AND I/C REFUSALS (Continued)

Mr. Chrystak argued that the mandatory provision of § 55-10-406, in existence at the time, was unconstitutional and alternatively, that the implied consent statute did not apply to him, because the blood draw was mandatory. The CCA determined that the constitutional claim was waived and that plain error did not exist. However, while looking at the legislative intent of the mandatory blood draw provision in the implied consent statute, the CCA determined that the statute was satisfied when the blood sample was compelled by the mandatory provision of the statute. Since the mandatory provision within the implied consent statute no longer exists, it would follow that the *Chrystak* ruling no longer applies to an implied consent refusal.

The U.S. Supreme Court recently stated in *Mitchell v. Wisconsin,* 139 S.Ct. 2525, 2533, (2019):

> "[w]e have based our decisions on the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving. That scheme is centered on legally specified BAC limits for drivers—limits enforced by the BAC tests promoted by implied-consent laws. Over the last 50 years, we have approved many of the defining elements of this scheme. We have held that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination. See *Schmerber v. California*, 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Nor does using their refusal against them in court. See *South Dakota v. Neville*, 459 U.S. 553, 563, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). And punishing that refusal with automatic license revocation does not violate drivers' due process rights if they have been arrested upon probable cause, *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979); on the contrary, this kind of summary penalty is "unquestionably legitimate." *Neville, supra*, at 560, 103 S.Ct. 916." *Id.*

There are legitimate legal and safety reasons for penalizing an implied consent refusal. Now that mandatory blood draws are no longer statutorily applicable, a dismissal of an implied consent refusal, merely because the sample was later obtained by a search warrant or exigent circumstances would defeat the entire purpose of the implied consent statute and the "wider regulatory scheme" developed over the years to combat impaired drivers. The argument that a mandatory blood draw satisfies the implied consent statute is now moot.

The Traffic Safety Resource Prosecutors presented their Protecting Lives, Saving Futures seminar on July 17-19, 2024. This seminar was a joint training exercise with prosecutors and law enforcement officers learning about the specific aspects of investigating and prosecuting a drugged driving case. The seminar was hosted at Montgomery Bell State Park. The classes included a wet lab and presentations by a Drug Recognition Expert and a Toxicology Expert. This is one of the seminars that is offered every year by the District Attorneys General Conference's Training Department. Please look for next year's date and plan now to attend this great training opportunity.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

TNDAGC Fall Conference - October 15-18, 2024, Chattanooga, TN
The DUI training department will offer a DUI training session on October 17, 2024, during the District Attorney's Fall Conference, Thursday breakout session. The class will cover Drug Trends in DUI cases.

Cops in Court - October 23, 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 assist in the mock trial presentation from 1 p.m. to 4 p.m.

Cops in Court - December 16, 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 assist in the mock trial presentation from 1 p.m. to 4 p.m.

Victim Issues in DUI Cases - December 6, 2024, Virtual 12:30pm—3pm CST
The DUI training department will offer 2.5 hours of training focused on victim issues in DUI cases. This training will cover victim issues and DUI specific issues. This training will be provided for prosecutors, DUI Coordinators, and Victim-Witness Coordinators.

How to Conduct a Local Cops in Court Training- January 31, 2025, Virtual 1pm—3pm CST
This course teaches all District Attorney Offices how to conduct a Cops in Court training that is fully staffed by regional prosecutors, and provided for your local law enforcement officers. This presentation will be recorded, so that each District Attorney's Office can review the training before providing a local Cops in Court Training. This resource will benefit the way law enforcement officers and prosecutors prepare for court. This program is designed to help the officer communicate throughout the judicial process so that their investigation is effectively understood by the prosecutor, the judge and the jury. The goal is to improve communication and presentation of evidence so that all cases are treated appropriately.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

DUI Detection & Standardized Field Sobriety Testing
October 21-25, 2024, Chattanooga, TN
October 29-31, 2024, Kingsport, TN
November 18-20, 2024, White House, TN

Advanced Roadside Impaired driving Enforcement (ARIDE)
November 4-5, 2024, Jonesborough, TN

Drug Recognition Expert School (DRE)
October 14-24, 2024, Brentwood, TN

DUI TRACKER (THIS QUARTER)

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from July 1, 2024, through September 30, 2024, and reflect the DUI Tracker conviction report for all judicial districts in the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from July 1, 2024, through September 30, 2024, since the last quarter were 2,135 (These numbers only reflect the cases that were entered into the Tracker software. Many DUI cases are handled in jurisdictions that do not have access to the DUI Tracker).

This quarter's total number is down from the previous quarter by 37. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has been consistent. We have had a busy quarter with all Judicial Districts working to prosecute impaired driving cases. Our DUI prosecutors have continued to be vigilant in the prosecution of impaired driving cases and in the protection of their citizens within their districts. The total number of guilty dispositions during this same period of July 1, 2024 through September 30, 2024 were 1,537. Across the State of Tennessee, 72% of all arrests for DUI related charges were actually convicted as charged. This percentage is moderately lower than the last quarter, ending on June 30, 2024. Also, during this same period of time, only 325 of the total DUI cases disposed of, were to different or lesser charges. Therefore, only 15.22% of the total cases were disposed of to another charge. We must continue to contribute when and where we can within this process. Impaired driving is a preventable crime.

Fatal Crashes this quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from July 1, 2024 through September 30, 2024. During this period, there were a total of 338 fatalities, involving 308 crashes, which is an increase from the previous quarter. Out of the total of 338 fatalities, 57 fatalities involved the presence of alcohol, signifying that 16.86% of all fatalities this quarter had some involvement with alcohol. This percentage is lower than the previous quarter. Further, there were a total of 41 fatalities involving the presence of drugs, signifying that 12.13% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 868. This is down by 161 fatalities from the 1,029 fatalities incurred last year at this same time. For most of the year, we have experienced a significant decrease from last year in the number of fatalities on our roadways. Also, during the summer months, the fatality rate slightly increased. Currently, the number of Tennessee drivers on our roadways is higher than last year and the number of fatalities is significantly lower. Speed is always a factor in the increasing the number of fatalities in our state and it is important to drive safely and at safe speeds to arrive safely to your destination. Combined with an impairing substance, speed has a synergistic effect on the fatality rates of involved crashes. With the increase of polydrug (multiple drugs and/or alcohol combined) use, we are experiencing a greater potential of crashes and fatalities on our roads and highways. It is only with a united effort between law enforcement, prosecutors and other community leaders that will we be able to stem the tide of our rising fatality crashes. Please slow down, drive responsibly and arrive home safely.

THP Ignition Interlock Device Enforcement

The Tennessee Highway Patrol Cracks Down on the Circumvention of Ignition Interlock Devices

As a result of recent amendments to ignition interlock device legislation (TCA 55-10-411, TCA 55-10-417, and TCA 55-10-425), the Tennessee Highway Patrol now has the enhanced ability to investigate and bring forth criminal charges on anyone who attempts to circumvent or tamper with the ignition interlock device installed in their vehicle. This new legislation brought forth several changes that will encourage the accountability and compliance of everyone who, by statute, are required to participate in the Ignition Interlock Program in Tennessee, including:

- Requiring that every ignition interlock device installed on or after January 1st, 2024 be equipped with GPS technology capable of geotagging the motor vehicle's location whenever an initial startup test, a random retest, or a skipped test occurs, or when circumvention of the device has been detected. (TCA 55-10-411)

- A person possessing an ignition interlock restricted driver's license, who is required to only operate a motor vehicle equipped with a functioning ignition interlock device, when found to be operating a motor vehicle without a functioning ignition interlock device installed, is subject to being charged criminally with a Class A Misdemeanor and if convicted, will have their ignition interlock requirement extended an additional year. (TCA 55-10-417)

- If someone other than the restricted driver is found to be providing a breath sample to start a vehicle for the restricted driver, that person is also subject to being charged criminally with a Class A Misdemeanor. (TCA 55-10-417)

- Any evidence of tampering or circumventing the ignition interlock device, failure to report for the required 30-day calibration and inspection of the device, or any unauthorized removal of the device, will now result in a mandatory restart of the driver's entire ignition interlock usage period. (TCA 55-10-425)

- Criminal investigations have revealed that interlock restricted drivers many times are utilizing their own minor children to provide the passing breath samples needed to start their vehicles. This is a criminal offense, and the driver is subject to being charged with a Class A Misdemeanor of TCA 55-10-417 (f). This violation of circumventing the ignition interlock device, will now result in a mandatory restart of the driver's entire ignition interlock usage period. (TCA 55-10-425)

(Continued on page 9)

THP Ignition Interlock Device Enforcement (Continued)

To increase the state-wide efforts of enforcing the ignition interlock-related statutes, members of the Tennessee Highway Patrol Ignition Interlock Unit are providing ignition interlock related training and educational support to other law enforcement agencies and judicial systems in all jurisdictions in Tennessee.

With the recent amendments to the ignition interlock device legislation, the Tennessee Highway Patrol is actively investigating and prosecuting violations of the ignition interlock statutes to deter the criminal circumvention and tampering of ignition interlock devices in an effort to further increase the safety of all motorists traveling on the roadways in Tennessee.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Tara D. Allen, 2024 WL 3649783 (Motion to Suppress warrantless blood draw/consent)

On November 25, 2017, Ms. Allen was speeding, twice the posted speed limit, and crossed into opposing lanes, striking a vehicle driven by Cynthia Heine. Ms. Heine was ejected from her vehicle and died at the scene of the crash. As Ms. Allen was being treated by EMS, officers noticed an odor of alcohol. Ms. Allen was transported to Skyline Hospital and was treated for her injuries, including being administered fentanyl. An officer tried to speak with Ms. Allen, but all of her responses were unintelligible. After hearing Ms. Allen speak to a nurse, the officer asked Ms. Allen if she would submit a blood sample for legal purposes. Ms. Allen said yes. The officer and the nurse both asked Ms. Allen again if she would submit to a blood test and she said yes to each request. A blood sample was taken. Ms. Allen filed a motion to suppress the blood result based upon her consent not being voluntary. The trial court denied the motion to suppress.

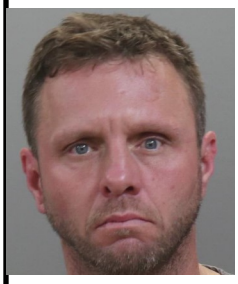
After the first blood sample was obtained, an officer obtained a search warrant for a portion of a blood sample that the hospital obtained for medical purposes. The BAC result from the first blood sample was 0.143%. The BAC result of the hospital blood sample was 0.156%. A drug analysis of the first blood sample also indicated the presence of Delta-9 THC and morphine. (There was an insufficient amount of the hospital blood sample to conduct a test for drugs). A search of Ms. Allen's vehicle indicated the presence of a razor blade, cut straws, a pill crusher and pills (oxymorphone and gabapentin). A jury convicted Ms. Allen of vehicular homicide by intoxication and possession of drug paraphernalia. Ms. Allen was sentenced to an effective ten years to serve. Ms. Allen filed this appeal.

The first issue addressed by the Court of Criminal Appeals was whether or not Ms. Allen's consent to the warrantless blood draw was the product of an essentially free and unconstrained choice. "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 174, 185 *(Tenn. 2005).* The determination of a defendant's capacity to consent is a question of fact to be determined from the totality of the circumstances. *See id.* at 184. "The burden is on the prosecution to prove that the consent was given freely and voluntarily." *State v. Blackwood*, 713 S.W.2d 677, 680 (Tenn. Crim. App. 1986). Due to the very lengthy period of Ms. Allen being incoherent and unintelligible, the evidence preponderates against Ms. Allen possessing the mental capacity to consent. Even in light of the trial court's finding that Ms. Allen was "essentially coherent" when she said yes to the blood draw request, "essentially coherent" does not meet the legal requirement that "[t]o be valid, consent must be 'unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.' " *State v. Ingram*, 331 S.W.3d 746, 760 (Tenn. 2011). The CCA also noted that the statutory requirements of T.C.A. §55-10-406, that were in effect, at the time of the crash, were not followed. (T.C.A. §55-10-406 has since been substantially amended). The CCA determined that the Motion to Suppress was denied in error. However, due to the hospital obtained blood sample, for which a search warrant was lawfully obtained, the evidence of the first blood sample did not contribute to the verdict and Ms. Allen is not entitled to relief.

The CCA then addressed the issue of the sufficiency of the evidence to prove possession of drug paraphernalia. Drug paraphernalia is defined by statute as "all equipment products and materials of any kind which are used, intended for use, or designed for use in ... ingesting, inhaling or otherwise introducing into the human body, a controlled substance." T.C.A. § 39-17-402(12). A rational trier of fact could have determined that the items found were objects used for the ingestion of a controlled substance. The trial court judgments were affirmed.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Timothy Dewayne Pinion, 2024 WL 4287443 (Double Jeopardy)



After a jury trial, Mr. Pinion was convicted of vehicular homicide by recklessness, reckless endangerment with a deadly weapon, two counts of DUI, driving with a revoked license, failure to drive on the right side of the roadway, and violation of the financial responsibility law. The DUI counts were merged into a DUI second offense and Mr. Pinion was sentenced to an effective 14 years, 11 months and 29 days in confinement. (10 years for vehicular homicide by recklessness, consecutive to 4 years for reckless endangerment with a deadly weapon, consecutive to 11 months and 29 days for DUI 2nd offense. This sentence was also consecutive to 6 years for violation of a prior probation.) Due to Mr. Pinion's criminal history, he was sentenced as a Range II, multiple offender. Mr. Pinion appealed, arguing that the vehicular homicide by recklessness count and the reckless endangerment count violated principles of double jeopardy.

On November 15, 2020, Mr. Pinion drove his Saturn sedan into opposing lanes, on a two lane highway, while attempting to pass multiple vehicles. Vincenzo Cinelli was driving a motorcycle and traveling in the opposite direction, when he was hit by Mr. Pinion. Mr. Cinelli died at the scene of the crash. Mr. Pinion claimed that the vehicles in front of him slammed on their brakes and he slid into on-coming traffic, but the physical evidence was consistent with the testimony of witnesses that he was attempting to pass multiple vehicles. Mr. Pinion was transported to a hospital and a Trooper obtained Mr. Pinion's consent for a blood sample. A drug test revealed the presence of buprenorphine (Suboxone) and methamphetamine, with metabolites of both substances.

Mr. Pinion filed a motion for new trial and argued that the trial court erred by ordering consecutive sentences. Defense counsel withdrew and appellate counsel was appointed to argue the motion. No amended motion was filed. At the motion for new trial hearing, appellate counsel argued the sufficiency of the evidence and relied upon the brief for the remaining issues, referring to the consecutive sentencing arguments. The trial court denied the motion for new trial and Mr. Pinion filed an appeal arguing double jeopardy. The State responded that the double jeopardy issue had been waived, as it was not raised in the motion for new trial. Tennessee Rule of Appellate Procedure 3(e) states that "in all cases tried by a jury, no issue presented for review shall be predicated upon .... [a] ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." *Id.*

By raising an issue in a motion for new trial, it allows the trial court to consider or reconsider the issues and make an appropriate ruling. *State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018). By arguing the contents of a motion for new trial, it brings to the trial court's attention the asserted error and allows the movant to specify the issues with sufficient certainty to enable the appellate court to determine whether the issue was first raised in the trial court. *Id.* at 164 (citing *Waters v. Coker*, 229 S.W.3d 682, 689 (Tenn. 2007)). Although broad statements in a motion for new trial can be sufficient to preserve the issue for appeal, the CCA determined that Mr. Pinion's motion for new trial argued against consecutive sentencing and did not fairly raise a double jeopardy issue, as required by Rule 3(e). The CCA stated that, when even viewed in the light most favorable to Defendant, the motion for new trial identified the circumstances giving rise to the alleged error as the trial court's imposing consecutive sentences in Counts 2, 3, and 9, which does not implicate double jeopardy. The CCA ruled that the double jeopardy issue was not sufficiently preserved for appeal. The judgments of the trial court were affirmed.

STATE V. GREEN – CANINE ALERTS (Continued)

With the passage of the Federal Farm Bill in 2018, "hemp" was no longer included within the definition of "marijuana." In 2019, Tennessee also removed hemp from the definition of marijuana. Currently, marijuana is defined as Cannabis Sativa containing greater than 0.3% THC. Hemp is defined as Cannabis Sativa containing not more than 0.3% THC. The Supreme Court accepted the trial court's factual finding that the canine could not distinguish between illegal marijuana and legal hemp. However, the TSC was not bound to the trial court's conclusion that, due to the lack of distinguishability, the canine was unreliable for purposes of establishing probable cause.

The Supreme Court first addressed whether the ruling in *State v. England*, 19 S.W.3d 762 (Tenn. 2000), established a per se rule that a positive alert from a trained and reliable drug-sniffing canine provides sufficient probable cause for a search. It does not. Rather, the *England* case based its overall probable cause determination on the totality of circumstances: "*Coupled* with the deputy's testimony with regard to the defendant's demeanor, the canine's positive alert provided probable cause." *Id.* at 769 (emphasis added). The TSC then overruled any CCA opinions that imply or provide a "per se" rule of probable cause based upon a positive alert in this context. "Both this court and the United States Supreme Court have held that determining whether probable cause exists is a totality-of-the-circumstances inquiry."

In the *Green* case, the TSC stated that, "a positive alert from a drug-sniffing canine may continue to be considered in a totality-of-the-circumstances analysis and may continue to contribute to a probable cause determination." While it is true that the legalization of hemp "may add a level of ambiguity to a [dog sniff's] probative value in a probable cause determination, . . . It does not destroy the fact's usefulness outright and require it to be disregarded." citing *Colorado v. Zuniga*, 372 P.3d 1052, 1058 (Colo. 2016). A positive alert from a canine trained to detect cannabis, methamphetamine, cocaine, and heroin "still give[s] rise to a high probability that a controlled substance is in the car," citing *United States v. Deluca*, No. 20-8075, 2022 WL 3451394, at *5 (10th Cir. Aug. 18, 2022).

The court even pointed out that before hemp became illegal, the probable cause based upon the canine sniff did not demand absolute certainty. The canine could be smelling residuals, a well hidden source, or quantities too small to locate. The standard continues to be, whether all the facts surrounding the canine's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. Therefore, a positive alert from a reliable and trained canine should be considered in a totality-of-the-circumstances analysis.

The TSC then moved its analysis to the other facts that contributed to the probable cause determination. With the strong fragrance smell coming from the many air fresheners, the presence of the backpack that everyone denied owning, the positive canine alert, and the further suspicious statements regarding the backpack, the court determined that all the facts available to Officer Trescott, would warrant a person of reasonable caution in the belief that contraband or evidence of a crime [was] present. Therefore, Officer Trescott possessed probable cause to satisfy the automobile exception to the warrant requirement. Judgments were affirmed.

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