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PUBLISHERS:
Terry E. Wood, TSRP
Jack T. Arnold, TSRP
DISTRIBUTION:
Mary G. Campbell

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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

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ODOR OF MARIJUANA AND OTHER CIRCS

Last year, in *State v. Green*, 697 S.W.3d 634, 642 (Tenn. 2024) (See DUI Newsletter Issue # 88), the Tennessee Supreme Court ruled that there is no per se rule of probable cause based upon a positive alert from a drug-sniffing dog in a marijuana case, but the positive alert could be used with other factors, based upon the totality of the circumstances, to form sufficient probable cause to justify a search. In January of this year, the Court of Criminal Appeals applied this ruling to a law enforcement officer's smell of marijuana in the case of *State v. Jones*, No. W2024-00027-CCA-R3-CD, 2025 WL 502064 (Tenn. Crim. App. February 14, 2025).

On January 30, 2023, a Jackson Police Officer was on his way home, at the end of his shift, when he pulled up next to Mr. Jones at an intersection. Mr. Jones was unconscious, sitting in the left turn lane. The officer honked his horn many times, but Mr. Jones remained motionless. After knocking and yelling, Mr. Jones removed his foot from the brake, rolled forward and stopped. When he rolled down his window, the officer smelled marijuana from inside of the vehicle. A rifle could be seen on the passenger floorboard. The officer asked Mr. Jones if he had "smoked weed" and Mr. Jones said yes, earlier that night. A backup officer also smelled marijuana. A search of a backpack revealed 80.7 grams of marijuana, baggies, scales and $729 cash. Mr. Jones was convicted by a jury and appealed the search, and the sufficiency of the evidence.

Mr. Jones argued that the smell of marijuana and the rifle were not enough to establish probable cause to search: especially since the smell of marijuana cannot be distinguished from the smell of hemp, which is lawful. The trial court determined that the odor of marijuana, along with "other circumstances surrounding the stop," provided probable cause for the search of the defendant's vehicle, including the backpack in the vehicle. Specifically, the fact that the defendant was passed out in an intersection, the rifle and the backpack on the passenger side of the vehicle, the smell of marijuana by both officers, the admission of smoking marijuana earlier that night, and admitting that smoking weed earlier was why he was asleep. The CCA applied the ruling in *State v. Green* and determined that the smell of marijuana by an officer, with sufficient other circumstances, such as the admission, will justify a search. *State v. Shrum,* 643 S.W.2d 891, 894 (Tenn. 1982), *abrogated on other grounds by Tuttle*, 515 S.W.3d at 305. The CCA stated, "The possibility of an officer altering to hemp as opposed to marijuana would 'merely affect a fact's weight and persuasiveness [in the probable cause analysis], not its inclusion in the analysis [altogether].' *Colorado v. Zuniga*, 372 P.3d 1052, 1058 (Colo. 2016)".

Mr. Jones also appealed the verdict based upon the sufficiency of the evidence since TBI merely did a presumptive test on the marijuana sample and did not perform a confirmatory test. Mr. Jones argued… (Continued on page 12.)

Recent Decisions

State v. Esperanza Mariaelena Joy Flores, 2024 WL 5233171 (Failure to timely object)

On April 2, 2020, while officers were conducting a DUI investigation of a suspect that had passed out in an intersection, Ms. Flores drove around the officers, almost striking one of them. Ms. Flores stopped her vehicle to apologize and the officer smelled alcohol coming from the vehicle. Ms. Flores also had bloodshot, "glossy" eyes and slurred speech. An open container of Southern Comfort was observed in the back seat. After performing poorly on SFSTs, Ms. Flores was arrested and asked to provide a breath sample, which indicated a BAC of .141%. A jury convicted Ms. Flores of Failure to Yield to an Emergency Vehicle, DUI, DUI Per Se and Open Container. Ms. Flores appealed based upon 1) destruction of evidence, 2) limited cross-examination, 3) limited defendant testimony, 4) improper prosecutor closing, 5) insufficient evidence, 6) no court reporter provided, and 7) cumulative error.

The body cam video of the officer that was almost hit was not preserved. Ms. Flores objected at trial regarding the Failure to Yield count and requested a jury instruction regarding lost or destroyed evidence, which was provided to the jury. Dismissal was not requested until the motion for new trial. The CCA stated that a defendant cannot request one remedy at trial and a different one on appeal. The CCA next ruled that the limited testimony complaints were properly ruled upon by the trial court. Regarding the improper closing argument, Ms. Flores failed to object during the argument and therefore, this argument is waived. The CCA next stated that the sufficiency argument was without merit. Also, the court reporter argument was without merit as there was no evidence of one ever being requested. Finally, there can be no cumulative error if no errors exist. The judgments of the trial court were affirmed.

State v. Ryan Reese Leath, 2025 WL 48201 (Consecutive sentencing—extensive prior history)

Mr. Leath plead guilty to DUI third offense and was sentenced to 11 months, 29 days, suspended to probation, after actual service of six-months. This sentence was ordered to be served consecutive to a six-year sentence in a theft case. Mr. Leath appealed the consecutive sentences, without providing a plea transcript. The CCA determines on a case-by-case basis if the record can provide a meaningful review. In this case, the affidavit of complaint was used. The CCA stated, "This court must give 'deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the ... grounds listed in *Tennessee Code Annotated* section 40-35-115(b).' *Id.* at 861." The trial court stated that due to the defendant's extensive prior history, the sentences would be ordered consecutive. Pursuant to *State v. Perry,* 656 S.W.3d 116 (Tenn. 2022), the trial court's use of "extensive prior history" to run the sentences consecutive was proper. The judgments of the trial court are affirmed.

State v. Dior Armonte Issac, 2025 WL 100651 (Denial of alternative sentencing)

On May 13, 2023, Mr. Issac was stopped for driving 70 mph in a 35 mph speed zone. He had red watery eyes, slurred speech and he performed poorly on SFSTs. His BAC was .135 and a firearm was found in his vehicle. Mr. Issac plead guilty to Unlawful Possession of a Firearm after being Convicted of a Felony Drug Offense and DUI. He was sentenced to six years, suspended to supervised probation after service of one year. On February 23, 2024, Mr. Issac filed an appeal of the court's denial of his full probation request.

On January 15, 2025, the CCA determined that the trial court failed to make appropriate findings with regard to its denial of alternative sentencing. "Although the trial court is afforded wide discretion in sentencing decisions, the trial court retains an affirmative duty to state on the record, either orally or in writing, its findings of fact and reasons for imposing a specific sentence to facilitate appellate review. *See Tenn. Code. Ann*. § 40-35-209(c), -210(e)." The case was remanded back to the trial court for a new sentencing hearing. However, on January 31, 2025, Mr. Issac filed a motion to dismiss the appeal, since he had already served the one-year confinement period and the matter was now moot. … (Continued on page 3.)

Recent Decisions (Continued)

The mootness doctrine generally permits the dismissal of an appeal "when 'by court decision, acts of parties, or other cause occurring after the commencement of the action the case has lost its controversial character." *West v. Vought Aircraft Industries, Inc.*, 256 S.W.3d 618, 625 (Tenn. 2008) (quoting *McCanless v. Klein*, 188 S.W.2d 745, 747 (Tenn. 1945)). The CCA agreed and vacated the January 15, 2025 CCA judgment.

State v. Kyle J. Frey, 2025 WL 251836 (Pro Se/foreign national)

On July 11, 2022, Mr. Frey was stopped for speeding and the THP trooper noticed an odor of alcohol, slurred speech and watery eyes. Mr. Frey described himself as a "foreign national" and provided a passport in lieu of a driver's license. Mr. Frey refused to answer questions, conduct SFSTs, or to provide a blood sample. The Trooper obtained a search warrant and the result was a BAC of 0.173%. A jury convicted Mr. Frey of DUI, DUI per se, resisting arrest and speeding. The trial court sentenced him to 11/29, suspended after service of 60 days in confinement. Mr. Frey represented himself and he appealed, based upon a lack of subject matter jurisdiction.

The CCA ruled that Mr. Frey's brief did not comply with Tennessee Rule of Appellate Procedure 27 and Tennessee Court of Criminal Appeals Rule 10(b), since Mr. Frey did not provide a sufficient trial record, a statement of issues for review, any citations, or any appropriate references to the record. *See State v. Miller,* 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987). The appeal was dismissed.

State v. Bianca Renee Bankston, 2025 WL 801469 (Excessive sentence)

Ms. Bankston worked as a contract nurse. On June 3, 2021, she was called in to work, on an unscheduled day, to work at an assisted care facility in Franklin, TN. Ms. Bankston had been drinking heavily and using cocaine earlier that day. She hit another car, with her Hummer, as she tried to park. The executive director of the facility saw the crash and called the owner of the other car to come to the parking lot. After being confronted, Ms. Bankston backed up, aimed her Hummer at the victim, and drove into a mulch bed and struck the victim. The victim suffered many severe injuries, including a shattered collar bone, broken ribs, a shattered femur, a collapsed lung and many broken teeth. The victim required extensive rehabilitation and mental health counseling. Ms. Bankston was stopped later and her BAC was .251% with cocaine also found in her blood.

Although Ms. Bankston was charged with attempted second degree murder, she plead guilty to aggravated vehicular assault with a BAC of .20% or more and DUI (DUI, DUI per se and DUI over .20 per se were all merged into DUI). After a sentencing hearing, the trial court sentenced her to six-years confinement as a Range I offender. Ms. Bankston appealed the sentence based upon the trial court misapplying an enhancement factor and not considering mitigation factors (Specifically, enhancement factor (6), that the victim's injuries were particularly great. The trial court stated that the victim's psychological injuries supported the application of this enhancement.).

While psychological injuries can constitute serious bodily injury, *see State v. Smith*, 910 S.W.2d 457, 461 (Tenn. Crim. App. 1995), "this Court has previously held that enhancement factor (6) was properly applied where the victim suffered severe psychological injuries separately from the victim's physical injuries inherent in the 'serious bodily injury' element of an offense." *See State v. Messick*, No. M2014-00116-CCA-R3-CD, 2015 WL 2128671, at *9 (Tenn. Crim. App. May 6, 2015), *perm. app. denied* (Tenn. Aug. 5, 2015). The CCA determined that the trial court properly applied enhancement factor (6).

In regard to the mitigating factors, the CCA stated that the trial court's mere disagreement with defendant as to whether mitigating factors applied or the weight to which her proof was entitled, does not amount to an abuse of discretion. The CCA also addressed alternative sentencing and determined that the trial court properly weighed the appropriate factors in denying alternative sentencing. The judgments were affirmed.

Upcoming Training

Lethal Weapon/Vehicular Homicide Seminar - April 29 - May 1, 2025, Pigeon Forge, TN
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 reports, qualifying an expert and a group discussion of current issues.

Cops in Court - June 12, 2025, 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.

Prosecuting the Drugged Driver- July 16 - 18, 2025, Chattanooga, 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.

Tennessee Lifesavers Conference - August 6 - 8, 2025, Nashville, TN
This conference provides instruction and opportunities for law enforcement officers, prosecutors and traffic safety partners to learn and collaborate on many traffic safety issues. The TSRPs will provide a 2025 legal update and a class regarding how to present a strong impaired driving case.

Protecting Lives/Saving Futures - August 26 - 28, 2025, Nashville, 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 driver. A wet lab will be involved to assist the learning process.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
April 1-2, 2025, Bartlett, TN
April 7-8, 2025, Pulaski, TN
May 28-29, 2025, Murfreesboro, TN
June 9-10, 2025, Crossville, TN
July 17-18, 2025, Jackson, TN
September 9-10, 2025, Springfield, TN
October 14-15, 2025, Bristol, TN

DUI Detection & Standardized Field Sobriety Testing
April 7-9, 2025, Martin, TN
April 22, 2025, Crossville, TN (SFST Refresher)
April 28-May 2, 2025, Millington, TN (Instructor Class)
May 12-14, 2025, Gallatin, TN
June 9-13, 2025, Knoxville, TN (Instructor Class)
June 16-18, 2025, Rutledge, TN
August 25-27, 2025, Bristol, TN
October 27-29, 2025, Knoxville, TN

DUI Tracker Report

DUI Tracker this last quarter

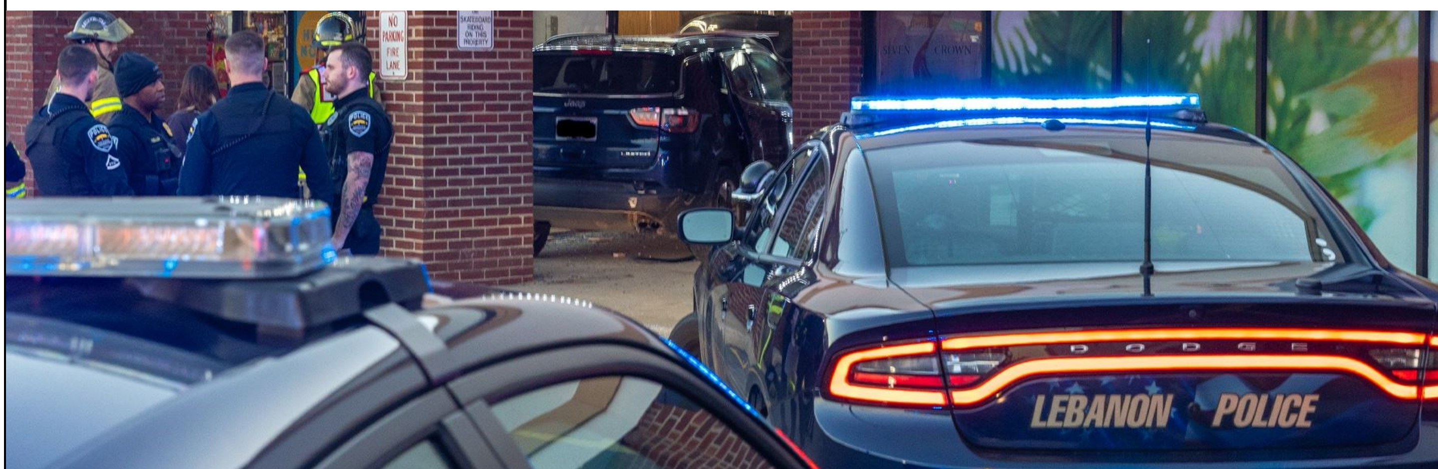
The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2025, through March 31, 2025, and reflect the DUI Tracker conviction report for all judicial districts within the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from January 1, 2025, through March 31, 2025, since the last quarter were 2,103. This number is up from the previous quarter by 57. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has increased. (These numbers only reflect the cases that were entered into the DUI Tracker software. Not all DUI cases are entered into the DUI Tracker.) The total number of guilty dispositions during this same period of January 1, 2025 through March 31, 2025 were 1,612. Across the State of Tennessee, this equates to 76.65% of all arrests for DUI made were actually convicted as charged. Some cases were disposed of to a lesser 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, 2025 through March 31, 2025. During this period, there were a total of 235 fatalities, involving 214 crashes, which is a significant decrease from the previous quarter. Out of the total of 235 fatalities, 35 fatalities involved the presence of alcohol and 25 fatalities involved the presence of drugs, signifying that 26% 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 235. This is less than the 240 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 efforts that we will be able to save lives and permanently lower the number of fatalities that occur on our roadways.

On January 23, 2025, the Traffic Safety Resource Prosecutors, the TNDAGC Education Department and the Lebanon Police Department, jointly conducted a Cops in Court Seminar at the Lebanon Police Department. The Cops in Court seminar provides training 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.



THC AND MATRIX INTERFERENCE

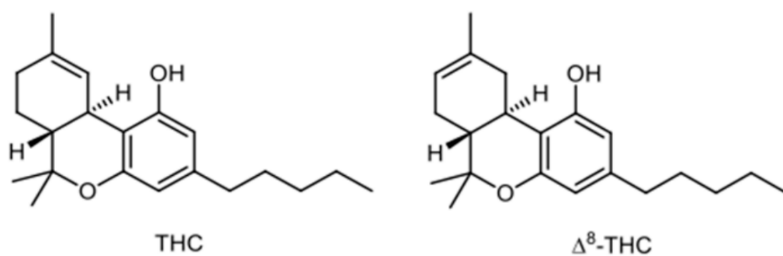
So, you've got a DUI-related case involving suspected marijuana intoxication. The arresting officer obtained a blood sample, and the results come back from TBI looking like this:

RESULTS:	Substance	Amount	Instrumentation
001	Tetrahydrocannabinol (THC)	Positive	LC/MS/MS THC
	Hydroxy-tetrahydrocannabinol (THC-OH) inconclusive		LC/MS/MS THC
	THC-OH analysis was inconclusive due to matrix interference.		
	Carboxy-tetrahydrocannabinol (THC-COOH) inconclusive		LC/MS/MS THC
	THC-COOH analysis was inconclusive due to matrix interference. The TBI Crime Laboratory does not currently have methodology to differentiate between isomers of THC and metabolites (for example, delta-8 and delta-9-THC) in biological samples. These variants of THC have similar psychoactive effects. This sample may contain a mixture of THC variants. Reported qualitative and quantitative results are based upon comparison to delta-9 reference materials.		

If your case is in East Tennessee, it may read "inconclusive due to not meeting acceptance criteria." Does this result really mean that we cannot "see" that the subject's sample contains a certain quantity of THC and/or THC-OH? No, not exactly. Is it really *that* "inconclusive"? No, not exactly. At least not in the way that would affect a DUI prosecution based upon impairment by marijuana. The reality of this result is that it does not significantly change the testimony of the TBI toxicologist at trial from what it would be with a quantifiable result of "pure" Delta-9 THC, except that standards and accreditation will prevent that toxicologist from testifying to anything specific with respect to quantities, and here's why: The sample analyzed in this case contains some mix of Delta-9 THC AND one or more of its isomers (mainly Delta-8 THC and Delta-10 THC, but usually some quantity of Delta-8 THC). These isomers have the same chemical formula as Delta-9 THC but are structurally in a different arrangement.

Delta-8, Delta-9 and Delta-10 THC are all intoxicants. Delta-8 has between 50-75% of the same intoxicating effects on the human user as Delta-9 (depending on which studies you look at), per amount consumed. Because the lawmakers were convinced, some years ago, to define legal hemp as any derivation from the plant containing less than .3% of *Delta-9* THC (singling out Delta-9 THC, specifically, even though Title 39 schedules ALL of the THCs as Schedule VI), Delta-8 was effectively legalized in Tennessee, and producers of marijuana immediately began to release a whole host of Delta-8 products onto Tennessee's "hemp" market. At the time TBI's THC test was developed, nobody considered Delta-8 (because it basically didn't exist as an illegal substance), and so the control sample with which TBI's test was developed contains exclusively Delta-9 THC.

Furthermore, the similarity between these isomers is so strong, their peak locations on the mass spectrometer are nearly indistinguishable. An illustration might help. On the left, we have Delta-9, and on the right, we have Delta-8. The only difference between these isomers is the location of a double Carbon bond.



(Continued on page 7)

THC AND MATRIX INTERFERENCE (Continued)

Separating these two isomers, without matrix interference, isn't just a problem for the Tennessee Bureau of Investigation and its lab. Effective ways to distinguish these isomers in biological samples are having to be developed world-wide. (See "Analysis of Cannabinoids in Biological Specimens: An Update," *International Journal of Environmental Research and Public Health*, Atunes, Monica, Et. Al., January 28, 2023.)

When TBI tests a biological sample that does not contain the exact THC isomers in the Sample Control (remember, it was developed to detect Delta-9) that was used to develop the THC test, the result doesn't yield an accuracy and calculated ion ratio on the mass spectrometer within the fairly narrow range it would have to be in, for the test to be able to produce a quantity (the area under the peak) that meets the test's accreditation standards. There's *something* there, and the scientist can see it, but it's not scientifically possible to say exactly how much. This effect is called matrix interference. In order to meet acceptance criteria, the accuracy and calculated ion ratio has to be in that narrow range that tells the test that what it is looking at is sufficiently similar to the control used to develop the test. (Which would only be the Delta-9 THC presence) The Delta-8 THC and the Delta-10 THC can be seen, but not confirmed. Another way of thinking of this is that it wouldn't be good science for a lab to give a specific quantity of a non-specific or unspecifiable substance (Especially given the reference samples used to develop the test). When an accredited lab gives an answer to "How much?" it *has to* be an answer to "How much *x*?" for a defined or known *x* (Such as Delta-9).

Why doesn't this result significantly change the toxicologist's testimony from a more standard result with nice numbers and without words like "inconclusive" and "interference"? Quite simply, there is not a standard level-of-intoxication result or human reaction assigned to specific quantities of THC in a subject's blood. Even if this sample contained specific and identified quantities of THC and THC-OH, the toxicologist could only testify that the active metabolites of an intoxicant, namely, THC were present in the subject's blood at the time that the blood was taken. The toxicologist could then explain the known effects of this intoxicant on people in general, but they could not testify that the defendant was impaired by those effects at the time of arrest (even if we had a specific number for THC). The toxicologist's testimony would be the same, in the "normal" case of a person whose blood contained Delta-9 and its metabolites in a reportable quantity, just as it would be in the case whose result is pictured here. The main difference is that the toxicologist cannot commit to a (nearly meaningless) quantity number, in the case of matrix interference.

The matrix interference DUI case would then be won or lost based on whether the impairment observed by the investigating officer (including either video evidence of the subject and their driving, or circumstantial evidence of the driving) showed that the driver exhibited the effects of intoxication by THC, matching the toxicologist's general description of those effects and the presence of THC metabolites in their blood.

Probably, the most important advice for a prosecutor is that, if you get a result that looks like the above, in a particular case where you believe it's otherwise prosecutable, call the toxicologist who performed the analysis and get more specific information from them before you proceed to trial. It would be even more important, than in a "normal" type of DUI case, to discuss any questions regarding the results with the toxicologist. The matrix interference described in this article is the most prevalent reason for seeing this type of result, but there could be others. This is based primarily on extensive, prior conversations with TBI's forensic scientists, while preparing for marijuana impaired cases.

Currently, the Tennessee Bureau of investigation is working on a methodology to be able to differentiate and report quantities of Delta-8 THC. In the more serious pending cases, it could be worth seeking out a lab that already has a verified method of quantifying and reporting both Delta-8 and Delta-9 and sending the sample out for further testing. TBI is hopeful that it might implement such a test prior to the end of 2025. In many cases (average DUI cases or ones where the subject exhibits obvious, understandable signs of intoxication), it might make the most sense to prosecute the case, even with a result that looks like the above, now that we understand more about what it does and doesn't mean (of course, Delta–8, -9 and –10 are all impairing).

State v. Faulk: Qualifying an Expert

The Court of Criminal Appeals recently made a noteworthy ruling in a case regarding the qualifying of expert witnesses in the field of "occupant kinetics". *See State v. Richard Faulk,* No. M2023-01218-CCA-R3-CD, 2025 WL 429929 (February 7, 2025, Tenn. Crim. App.).

On April 19, 2018, the defendant, Richard Faulk, was at the home of Rita Pitt. The defendant drank a beer, left the home and returned with a bottle of whiskey. After 30 minutes of drinking on the porch, the defendant and Ms. Pitt left in a Toyota 4Runner, with the defendant driving. Ms. Pitt had not been drinking that morning. The same 4Runner was seen behind a Dominoes building, where many bottles of beer and alcohol were found. The 4Runner was seen by witnesses leaving the Dominoes at a high rate of speed and into on-coming traffic lanes. As the 4Runner approached on-coming vehicles, it swerved into the median and then back into the on-coming vehicles, striking three other vehicles. Ms. Pitt was ejected from the 4Runner and died from her injuries. Many witnesses described Ms. Pitt being ejected from the passenger side of the 4Runner, with one witness stating that she was ejected from the driver's side. The defendant was found with his head on the passenger side and different descriptions as to how far his feet were on the driver's side. The defendant's BAC was 0.227% and there was Zoloft found in his blood sample. The defendant claimed Ms. Pitt was driving.

During the trial, two THP Troopers were called as expert witnesses as to "crash reconstruction" and they both testified as to crash forces and how the forces would affect the passenger and the driver of the 4Runner. Both witnesses testified that the passenger was likely ejected from the passenger side of the 4Runner and that it was highly unlikely that the driver could be ejected from the passenger side and the passenger still remain inside the vehicle. The Jury convicted the defendant of vehicular homicide. After a bifurcated trial, the jury found the defendant guilty of aggravated vehicular homicide, a Class A felony. The trial court sentenced the defendant to twenty-years, in TDOC custody. The defendant appealed his convictions, based upon improperly allowing the two Troopers to testify, regarding 'occupant kinetics,' as crash reconstruction experts; using a Tennessee Department of Safety driving record as proof of priors; and sufficiency of the evidence.

The Court of Criminal Appeals stated, "[D]eterminations regarding the qualifications, admissibility, relevance, and competence of expert testimony fall within the broad discretion of the trial court and will be overturned only for an abuse of that discretion. *State v. Davidson*, 509 S.W.3d 156, 208 (Tenn. 2016) (citing *McDaniel v. CSX Transp., Inc.,* 955 S.W.2d 257, 263-264 (Tenn. 1997); *State v. Scott*, 275 S.W.3d 395, 404 (Tenn. 2009)). As part of its gatekeeping duties, the trial court determined that both Troopers were experts in the field of crash reconstruction. What is noteworthy about the CCA opinion, however, is that the court distinguished between a branch of crash reconstruction referred to as "occupant kinetics" and crash reconstruction, more generally, in terms of expert witness testimony. It gleaned this sub-discipline out of two cases: *State v. McCloud*, 310 S.W.3d 851 (Court Crim. App. June 12, 2009), and *State v. William Earl Murphy* 1990 WL 40995 (Tenn. Crim. App. April 11, 1990). The CCA went even further and discussed the difference between occupant kinetics and occupant kinematics. Occupant kinetics is the study of forces and their effects on occupants in a vehicle, whereas, occupant kinematics is the study of the motion of the body, without consideration of its mass and the forces acting on it. The CCA stated, "Occupant kinetics and occupant kinematics are specialized areas of expertise. They are distinct from accident reconstruction, which involves determining what happened to a vehicle immediately before, during, or after an accident, emphasizing course, speed, and attitude." The issue of body placement in an accident falls squarely within the realm of biomechanics and an accident reconstruction expert will need to state their… (Continue on page 9.)

State v. Faulk: Qualifying an Expert (Continued)

qualifications in that specific field of expertise.

The CCA held that one of the witnesses, Trooper Paul Sanders, which the trial court deemed an expert for the purposes of testifying about crash reconstruction, *was* an expert in occupant kinetics, whereas the other expert crash reconstructionist, Trooper Jamison Benefield, who was deemed an expert in crash reconstruction by the trial court, *was not* an expert in occupant kinetics. They further determined that Trooper Benefield was allowed to testify, in error, to facts concerning occupant kinetics, which were beyond his expertise. However, due to the overwhelming evidence and witness testimony that the defendant was driving the 4Runner at the time of the crash, any error was minimal.

Now, it appears that neither the trial court nor the witnesses themselves, at trial, made the sharp distinction between occupant kinetics and crash reconstruction that was made by the CCA, which pointed out that "the trial court erred in conflating the expertise of occupant kinematics with accident reconstruction". In point of fact, had the witnesses known that the court was going to so carefully distinguish the movement of the bodies in a vehicle during and after a crash, from the movement of the vehicles themselves during and after the crash, as requiring a separate expertise, it appears highly probable that both of the witnesses could have concentrated their preparation for trial and testified in a way that would have satisfied the appellate court. Traffic Safety Resource Prosecutor, Jack Arnold, has personally worked with THP CIRT Trooper Paul Sanders and with THP CIRT Trooper Jamison Benefield; the latter has testified for him at trial more than once. Both men are outstanding witnesses and fully qualified in crash reconstruction, the physics governing crashes and the forces involved, including how bodies would be affected by those forces.

Given the distinction in areas of expertise relied on by the CCA (that was not made by the witnesses or by the State in the same stark terms at trial), preparation of these expert witnesses on the physical laws involved in the crash, *as these specifically apply* to the movement of restrained and unrestrained occupant bodies in a crash, and preparation aimed at teasing out from their crash reconstruction training and experience, the aspects of that training and experience applicable to the subdiscipline of occupant kinetics, would have been necessary for the Trial Court *and* the Court of Criminal Appeals to have found both witnesses to be qualified as experts in occupant kinetics. In point of fact, the witness who was not held to be so qualified, Trooper Jamison Benefield, has a CV that's twice as long as the witness who was held to be so qualified, Trooper Paul Sanders, because Trooper Benefield has been a crash reconstructionist considerably longer, and has all of the extensive training and experience that Trooper Sanders has had, plus some.

What is the take-away for DUI prosecutors and law-enforcement witnesses? Occupant kinetics and occupant kinematics are separate areas of expertise from crash reconstruction, as determined by the CCA. If you look at the aspects of Trooper Sanders' testimony highlighted in the *Faulk* case, THP's CIRT crash reconstructionist training and concentration on Newton's Laws and their experience in reconstructing more wrecks than anyone else on the road (all of which involve occupants, in addition to vehicles), should prepare them to qualify in occupant kinetics, and occupant kinematics. However, qualification will require prosecutors to treat occupant kinetics and occupant kinematics as separate disciplines and to alert the witnesses, in trial preparation, to review and tease out the applicable training on their CVs (which should always be introduced into the trial as evidence). If there's any possibility of a "Who's the driver?" issue at trial, prosecutors should be extra diligent and prepare their experts accordingly. The judgments of the trial court were affirmed.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Richard Faulk, 2025 WL 429929 (Aggravated Vehicular Homicide, 20-years TDOC)
(This case is also discussed on pages 8 and 9)

On April 19, 2018, the defendant, Richard Faulk, was at the home of Rita Pitt (They met on-line and this was their first in-person meeting). The defendant drank a beer, left the home and returned with a bottle of whiskey. After 30 minutes of drinking on the porch, the defendant and Ms. Pitt left in a Toyota 4Runner, with Mr. Faulk driving (Mr. Faulk was the owner of the 4Runner). Ms. Pitt had not been drinking that morning. The same 4Runner was seen behind a Dominoes building where many bottles of beer and alcohol were found. The 4Runner was seen by witnesses leaving the Dominoes at a high rate of speed and it turned into on-coming traffic lanes on a four-lane divided road. As the 4Runner approached on-coming vehicles, it swerved into the median and then back into the on-coming vehicles, striking three other vehicles. Ms. Pitt was ejected from the 4Runner and died from her injuries. Many witnesses described Ms. Pitt being ejected from the passenger side of the 4Runner, with one witness stating that she was ejected from the driver's side. Mr. Faulk was found with his head on the passenger side and different descriptions as to how far his feet were on the driver's side. The defendant's BAC was 0.227% and there was Zoloft found in his blood sample. The defendant claimed Ms. Pitt was driving, after their drinking behind the Dominoes pizza.

A jury convicted the defendant of vehicular homicide. After a bifurcated trial, the jury found the defendant guilty of aggravated vehicular homicide, a Class A felony. The trial court sentenced the defendant to twenty-years, in TDOC custody. The defendant appealed his convictions based upon: improperly allowing the two Troopers to testify, regarding 'occupant kinetics,' as crash reconstruction experts; using a Tennessee Department of Safety driving record as proof of priors; and sufficiency of the evidence. An extensive discussion of the two Troopers testifying as expert witnesses can be found on pages 8 and 9. The other issues are discussed below.

The State proved Mr. Faulk had three prior DUI convictions by submitting a certified copy of Mr. Faulk's driving history from the Tennessee Department of Safety, as a self-authenticating document. Mr. Faulk objected as to the fact that he was not provided a copy of his driving record at arraignment, as required by TCA 55-10-405(d). However, as noted by the CCA, the statute is directory and does not provide a remedy. *See State v. Haddon,* 109 S.W.3d 382, 386 (Tenn. Crim. App. 2002). The CCA also noted that official driver records fall within the public records hearsay exception and are not testimonial and therefore, do not violate the Confrontation Clause.

Mr. Faulk also complained that due to conflicting testimony, the evidence at trial was insufficient to convict him of vehicular homicide. The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn, 2007). The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence ... are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); see *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). The CCA determined that the evidence was sufficient for a rational trier of fact to have heard the evidence and determined that any conflict in testimony could have been resolved as to guilt. The judgments of the trial court were affirmed.

VEHICULAR HOMICIDE MURDERER'S ROW

<u>State v. Marlos LaKeith Tipton</u>, 2025 WL 324246 (Vehicular Homicide by Reckless Conduct/Speeding)

On April 10, 2022, at about 1:00 a.m., Mr. Tipton was driving his 2021 Toyota Camry on I-40 in Henderson County, when he struck the rear of a 2009 H3 Hummer, killing the rear-seat passenger, Maria Ortega. Although Mr. Tipton admitted to smoking marijuana earlier in the evening, the investigating Trooper did not observe any signs of intoxication at the scene, and Mr. Tipton became uncooperative during attempted SFSTs. Mr. Tipton initially agreed to a blood sample, but he refused at the hospital and no sample of blood was obtained for testing.

Using the crash data recorder from the 2021 Camry, a THP CIRT crash reconstructionist was able to demonstrate that Mr. Tipton struck the rear of the H3 Hummer at approximately 101.9 miles per hour, while the H3 Hummer was traveling approximately 70 miles per hour. Both vehicles were travelling in the left lane of travel and the Camry struck the H3 Hummer from behind, causing the H3 Hummer to raise up and turn into a yaw, eventually rolling and hitting a tree on the side of the interstate. Ms. Ortega was not wearing a seatbelt and she became pinned under the H3 Hummer. GPS evidence from the Camry indicated that it had been travelling as fast as 129 miles per hour in the minutes leading up to the fatal crash.

Mr. Tipton repeatedly waived his right to counsel, and he refused to be represented by the district public defender's office, on multiple occasions. He filed a pretrial pro se motion to hire a collision expert for his defense, but after a hearing, the defendant's request was denied. Mr. Tipton represented himself during a bench trial. The State called THP CIRT Trooper Shane Moore and qualified him as an expert in crash reconstruction. Mr. Tipton was convicted of Vehicular Homicide (by Reckless Conduct), a C Felony, and he was sentenced by the judge to serve 15-years incarceration, as a Range III offender (at the time of this offense, given his range, service would be at 45% release eligibility). Mr. Tipton filed a timely appeal, claiming that he was deprived of a fair trial because the trial court denied his request to fund a collision expert. He also claimed that there was insufficient evidence to convict him of vehicular homicide by reckless conduct, based upon speed alone.

The CCA, quoting *Ake v. Oklahoma*, 470 U.S.68 (1985) stated, "[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." Our own Supreme Court recognized this right in *State v. Barnett,* 909 S.W.2d 423, 428 (Tenn. 1995). However, "the right to assistance of state paid experts exists only upon a showing of a particularized need" wherein the defendant "must show that a substantial need exists *requiring* the assistance of state paid supporting services and that his defense cannot be fully developed without such professional assistance." *Id.* at 430. *See Tenn. Sup. Ct. R.* 13. Mr. Tipton's request fell substantially below this standard. Therefore, the trial court did not abuse its discretion in denying the motion.

Regarding Mr. Tipton's sufficiency of the evidence claim, The CCA looked at the statutory definition of Reckless and the Tennessee Supreme Court's ruling in *State v. Wilkins*, 654 S.W.2d 678 (Tenn. 1983). The *Wilkins* court stated, "that under certain facts and circumstances excessive speed can be sufficient to sustain a conviction of reckless driving." The CCA stated that the proof at trial established the defendant was traveling at night, on a public roadway with the potential to encounter other vehicles, and at speeds of thirty to sixty miles over the posted speed limit, for a sustained period of time. This court previously affirmed a conviction for vehicular homicide by reckless conduct in *State v. Meysinger,* 1990 WL 26547. Judgments were affirmed.

ODOR OF MARIJUANA AND OTHER CIRCS (Continued)

that without a confirmatory test, the State could not prove the delta-9 THC level was above 0.3% on a dry weight basis, pursuant to TCA §§ 39-17-402(16)(C), 43-27-101(3). On April 4, 2019, the possession of hemp, both industrial and non-industrial, was legalized in Tennessee. A TBI agent did testify that she completed a presumptive test, which was positive for marijuana. Also, on 40 prior occasions in which she completed confirmed tests on prior presumptive positive samples, all 40 samples were positive for marijuana. The CCA stated, "[T]he State is not required to test the alleged substance for the defendant to be convicted of a drug offense. *See State v. Shutt,* No. M2022-00905-CCA-R3_CD, 2023 WL 6120739, at *7. (Tenn. Crim. App. Sept. 19, 2023)("[C]hemical analysis is not a prerequisite to establish the identity of a controlled substance, and the essential elements of a drug related offense may be established circumstantially."), *no perm. app. filed.* A guilty verdict may be based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Hall,* 976 S.W.2d 121, 140 (Tenn. 2011). The judgments of the trial court were affirmed.

Welcome Jack T. Arnold as our new Traffic Safety Resource Prosecutor!

Jack previously was an Assistant District Attorney in the 23rd Judicial District where he handled many DUI, Vehicular Assault and Vehicular Homicide cases. Jack has won the TNDAGC's DUI Prosecutor of the Year Award and MADD's Tennessee Excellence Award for Middle Tennessee. Jack graduated from Vanderbilt University Law School. He served as a Non-Commissioned Officer in the United States Army's 10th Mountain Division and he has taught Philosophy at Ohio State University.

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 4-6, 2025. Approximately 60 students attended and were instructed by the College staff and guest speakers, regarding the science behind involuntary eye movement, caused by impairment, environmental conditions and medical conditions.

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