

# **TENNESSEE GENERAL SESSIONS JUDGES**

**FEBRUARY 2011**

## **Criminal Law Update Nashville, Tennessee**

**Dwight E. Stokes  
General Sessions Judge  
125 Court Avenue, Suite 109W  
Sevierville, TN 37862  
865.908.2560  
e-mail: [desjd1@aol.com](mailto:desjd1@aol.com)  
Sevier County, TN**



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**CRIMINAL LAW UPDATE**  
**FEBRUARY 2011**

***AGGRAVATED ARSON***

**AGGRAVATED ARSON: SETTING FIRE TO VICTIM'S  
SHIRT CONSTITUTED SETTING THE VICTIM'S  
PERSONAL PROPERTY ON FIRE**

HELD: The evidence was sufficient to convict the defendant of aggravated arson. The Court of Criminal Appeals found that the central issue was whether the victim's shirt constituted "personal property" when she was wearing the shirt at the time the defendant poured alcohol on her and set the shirt on fire.

The court said that the definition of "personal property" includes money, goods, chattels, things in action, and evidence of debt." The court concluded that the victim's shirt constituted personal property under these definitions. The court found that the fact that the victim was wearing the shirt did not transform the character of the shirt from being personal property. The court said that the question was "were the victim's shirt and her person one and the same?" The court found that there were no Tennessee cases on point, but found that cases in other jurisdictions were persuasive and applicable to the case.

The court concluded that the evidence was sufficient to support the defendant's conviction for aggravated arson when the defendant poured alcohol on the victim and her shirt and then struck the lighter. The victim did not give consent to the defendant to set fire to her shirt, and she suffered second degree burns to 60% of her body. The shirt on the victim did constitute personal property under the statute and the conviction for aggravated arson was affirmed.

State v. Robertson, 36 TAM 3-19 (Tenn. Cr. App. 11-18-10)

## ***AGGRAVATED ASSAULT***

### **AGGRAVATED ASSAULT: CONVICTION REVERSED DUE TO FAILURE TO PROVE “SERIOUS BODILY INJURY” TO VICTIM**

FACTS: The victim was an employee of Rent-A-Center who was removing furniture from the defendant’s apartment for his employer. The defendant became angry concerning the furniture’s removal, which resulted in the defendant pushing the victim down the stairs of an apartment building. The victim suffered acute, sharp pain at the time of the injury and underwent three physical therapy sessions within a month following the injury. The victim was also unable to perform his normal employment activities for ten days because he could not do the required lifting. The court noted that he used crutches for only one week and was able to work with limited success through the recuperation. The victim did suffer occasional stiffness from the injury for a period of approximately one year. HELD: The conviction of aggravated assault was reduced from aggravated to simple assault, the court finding that the State had failed to prove beyond a reasonable doubt that the defendant intentionally or knowingly caused “serious bodily injury” to the victim. The court noted that the injury simply did not rise to the level of “serious bodily injury,” and therefore the court was required to modify the conviction to simple assault.

State v. Howell, 35 TAM 34-20 (Tenn. Cr. App. 07-15-10)

### **AGGRAVATED ASSAULT: MENS REA REQUIREMENTS OF “INTENTIONALLY OR KNOWINGLY” DO NOT APPLY TO THE “SERIOUS BODILY INJURY” ELEMENT OF AGGRAVATED ASSAULT**

FACTS: The defendant argued that the evidence failed to show that he intended to cause the serious injury resulting from his striking the victim.

HELD: This is the first time the court has been asked to determine specifically whether the mens rea requirement of the aggravated assault statute applies to both elements of the offense, i.e. (1) that the defendant must intentionally or knowingly commit an assault and (2) that the defendant must cause serious bodily injury.

HELD: It is clear from the statute that the mens rea element of “intentionally or knowingly” is limited in application to whether or not an assault was committed. The mens rea requirements of “intentionally or knowingly” did not apply to the “serious bodily injury” element of aggravated assault.

State v. Jones, 36 TAM 2-17 (Tenn. Cr. App. 11-05-10)

**“ ZONE OF DANGER”: ZONE OF DANGER APPROACH IS APPLICABLE IN RECKLESS ENDANGERMENT CASE BUT NOT APPLICABLE IN AGGRAVATED ASSAULT CASE**

FACTS: The defendant was convicted of aggravated assault and made an argument that the proof was not sufficient for an aggravated assault conviction due to the fact that the victim was not within the “zone of danger” when he displayed his knife and therefore the victim could not have been in “imminent fear of death or bodily harm.”

HELD: The Court of Criminal Appeals declined to apply the “zone of danger” approach to the aggravated assault case. The court found the defendant’s argument confused the “zone of danger” and reckless endangerment with the element of reasonable fear of imminent bodily injury and aggravated assault.

The court found that the point at issue in an aggravated assault case is not whether the victim was within the certain physical area within which he might be harmed even if he was unaware of the danger, but the issue is whether his fear of imminent bodily injury was reasonable. The court found that in order to create reasonable fear, the danger of bodily injury to the victim must be imminent. Imminent danger is immediate, real threat to one’s safety. The court found that the restaurant owner in the present case had to physically remove the defendant from the premises, the defendant

had drawn a knife and shouted that he was going to kill the victim by cutting his throat, and then the defendant tried to enter the restaurant. Only the restaurant owner's own actions kept the defendant from re-entering the restaurant. The court therefore found from all of the foregoing facts that the victim's fear of imminent bodily injury was reasonable and declined the "zone of danger" approach.

State v. Johnson, 35 TAM 46-18 (Tenn. Cr. App. 09-15-10)

## ***AGGRAVATED ROBBERY***

### **AGGRAVATED ROBBERY: SYRINGE QUALIFIES AS DEADLY WEAPON**

FACTS: The defendant, who was bloodied and disheveled, entered a convenient store and approached the store clerk holding a needle with an uncapped syringe. The defendant demanded money, and the victim who was "unsure" if anything was in the syringe, complied with the defendant's demands. The victim testified that she was fearful that the defendant would stick her with the needle and cause a disease.

HELD: The defendant's conviction of aggravated robbery was affirmed. The defendant's use of the syringe placed the victim in fear, enabling the defendant to accomplish the theft. The court also found that the victim reasonably had a belief that the syringe could contain a substance capable of causing death or serious injury. The court found that the use of the syringe in this manner qualified as a deadly weapon.

State v. Burton, 35 TAM 39-17 (Tenn. Cr. App. 08-17-10)

## ***ARREST***

### **PROBABLE CAUSE FOR ARREST: ESTABLISHED BY VICTIM'S STATEMENT TO OFFICER AND CORROBORATION OF FACTS SHE REPORTED TO POLICE**

FACTS: The defendant's girlfriend (Smith) told officers that the defendant had threatened her with a shotgun and gave a certain description of the defendant. The officer saw a man matching the defendant's description walking toward the location of the assault and the man answered to the name "Barry" which was the name of the victim's boyfriend. The court noted that the defendant wore a lightweight shirt despite the colder weather. The defendant had calmly responded when the officer called out his name and had cooperated with the officer.

HELD: The police had probable cause to arrest the defendant based upon information provided by the defendant's girlfriend. The 6<sup>th</sup> Circuit Court of Appeals concluded that even though the defendant had acted calm and had cooperated with the officers that this does not necessarily diminish the other evidence of wrongdoing. Based upon all the circumstances, the officers had probable cause to make an arrest of the defendant based upon the girlfriend's information provided to the officers.

United States v. McKnight, 35 TAM 37-41 (6th Cir. Ct. App. 07-19-10)

## ***ARREST WARRANT***

### **ARREST WARRANT: SUFFICIENCY OF WARRANT IN ALLEGING CRIMINAL OFFENSE**

FACTS: The defendant sought to dismiss a case alleging that the arrest warrant failed to allege a criminal offense of illegal possession of a weapon.

HELD: (a) The court found that the issue of whether the arrest warrant was insufficient was not waived by the defendant's guilty pleas. The court found that the allegations essentially were that the warrant was void for failure to satisfy the requirements of Tennessee Rule of Criminal Procedure 3. The court found that the issue was not waived because a valid criminal warrant would be essential for the General Sessions Court to have jurisdiction. (b) The court found that the affidavit of complaint in the arrest warrant was sufficient to charge a violation of T.C.A. §39-17-1307(a)(1) carrying a firearm with intent to go armed. The court found that the statutory reference together with the factual allegations gave the defendant adequate notice of the charged offense.

The court noted that the requirements for an arrest warrant are no more demanding than those for an indictment. The court found that in Tennessee an indictment as a charging instrument is sufficient if it references the appropriate statute and otherwise meets the statutory requirement. The court found that this is satisfied when the warrant conveys a cause of action with "reasonable certainty of meaning" and "by a fair and natural construction." The court found that the current affidavit satisfies the description.

PRACTICE POINT: There are not many cases in which the sufficiency of the arrest warrant makes it to the appellate court so this is an important case. The court noted the importance of having the statutory reference and then a modicum of facts to support that. The court specifically found that the requirements for a warrant are no more demanding than those for an indictment.

Rigger v. State, 35 TAM 45-34 (Tenn. Cr. App. 09-10-10)

## ***BURGLARY***

### **BURGLARY CONVICTION: DEFENDANT NOT OWNER OF PROPERTY SO AS TO PRECLUDE BURGLARY CONVICTION DUE TO FACT THAT HE IS RESTRAINED FROM PROPERTY BY VALID COURT ORDER OR ORDER OF PROTECTION**

HELD: The defendant was properly convicted of burglary due to fact that statute states that “owner” does not include a person who is restrained from the property by valid court order or order of protection, other than an ex parte order of protection obtained by a person maintaining residence on the property. Since the order in the present case was not an ex parte order of protection, the defendant was not considered an owner and therefore could be found guilty of burglary.

State v. Burgess, 35 TAM 38-26 (Tenn. Cr. App. 08-04-10)

### **SUFFICIENCY OF EVIDENCE: THE PRESENCE OF DEFENDANT’S DNA ON CIGARETTE BUTT INSIDE HOME INSUFFICIENT TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT**

FACTS: Defendant was convicted of aggravated burglary, theft between \$1,000 and \$10,000 and theft between \$10,000 and \$60,000. The evidence established that sometime between 03/27/06 and 04/04/06 that someone had broken into the victim’s home through a bathroom window and taken items totaling more than \$50,000 which included the victim’s 1992 BMW. The detective found a partially smoked hand rolled cigarette on the floor near the kitchen door, and DNA on the cigarette matched the defendant. The only proof that linked the defendant to the crimes was his DNA on the cigarette butt.

HELD: The evidence was not sufficient to convict the defendant of the crimes. Other than the DNA on the cigarette butt inside the residents, none

of the items taken from the residence was discovered in defendant's possession, no pawn tickets or other evidence linked the defendant to the crimes, no finger prints were found in the house or on the BMW that matched the defendant; and no one saw defendant in or near the residence or driving the BMW.

The Court of Criminal Appeals concluded that the mere presence of a single cigarette partially smoked by the defendant was neither sufficient to weave an inescapable web of guilt around the defendant nor to exclude every other reasonable hypothesis except for the guilt of the defendant. The court noted that there were several plausible explanations for the defendant's cigarette butt being inside the residence. The court said that there was no evidence from which a fact-finder could have concluded that the defendant actually took several thousand dollars worth of property from the residence or that he entered the residence with felonious intent.

DISSENT: Judge Thomas dissented, finding that in addition to the partially smoked cigarette with defendant's DNA, the detectives had also testified that the cigarette was not crumpled but that instead it appeared to have been placed in the house by the perpetrator. Judge Thomas also noted that, when officers went to the home of the defendant where he was sitting on his porch, he ran from officers. He felt that a reasonable jury could conclude that the defendant was guilty beyond a reasonable doubt.

PRACTICE POINT: It is interesting to compare and contrast this case with the case of State v. Lewter, 35 TAM 24-1 (Tenn. Cr. App. 06-04-10) a case in which the Court of Criminal Appeals reversed the conviction and the Supreme Court of Tennessee reinstated the conviction. In the Lewter case, the court found that based upon the fact that the defendant's shirt with his DNA was found at the scene of the crime and that the defendant's girlfriend admitted being at the scene of the crime, the proof was sufficient for establishing guilt beyond a reasonable doubt. Nobody connected the defendant to the crime scene, including the girlfriend, and the incriminating aspect of the case was the defendant's shirt being found at the scene. In one case, we have a defendant's shirt with his DNA, and, in the other, the defendant's cigarette with his DNA. Both would appear to have reasonable possibilities about how the incriminating item arrived at the scene of the crime other than establishing guilt beyond a reasonable doubt.

State v. Sisk, 35 TAM 41-19 (Tenn. Cr. App. 09-08-10)

The Tennessee Supreme Court granted permission to appeal

01-18-11, so stay tuned.

## ***CHILD ABUSE***

### **AGGRAVATED CHILD ABUSE: FAILURE TO SHOW THAT DEFENDANT'S DELAY IN OBTAINING MEDICAL TREATMENT HAD "ACTUAL, DELETERIOUS EFFECT"**

HELD: The defendant's conviction for aggravated child neglect was reversed due to the fact that the state had failed to show that the defendant's delay in obtaining medical attention for the victim (an eight year old child) had an "actual deleterious effect" on the child victim's health.

The court did find that the evidence was sufficient to convict the defendant of attempted aggravated child abuse. The court found that mere risk of harm in the neglect context is insufficient. The state must show actual deleterious effect on the victim's health.

State v. Raymundo, 36 TAM 2-18 (Tenn. Cr. App. 11-10-10)

## ***COERCION OF WITNESS***

### **COERCION OF VICTIM WITNESS: PROOF FAILS TO ESTABLISH ACTUAL THREAT TO VICTIM**

HELD: The evidence in the present case was not sufficient to convict the defendant of coercion of a witness. The defendant was convicted of statutory rape of the victim, and the defendant and the victim had agreed to deny that they had a sexual relationship. The defendant also sent letters to

the victim instructing her to deny their sexual relationship.

The court concluded that while the letters presented at trial were disturbing in their content, the defendant does not in fact threaten the victim in the letters, and the victim did not testify at trial that the defendant had ever threatened her. The court concluded that the proof was not sufficient to convict the defendant of coercion of a witness but did uphold the conviction for statutory rape.

State v. Barnett, 35 TAM 38-23 (Tenn. Cr. App. 07-27-10)

## ***CONFESSION***

### **UNEQUIVOCAL REQUEST FOR COUNSEL: NOT ESTABLISHED BY DEFENDANT SAYING “I THINK I NEED TO TALK TO A LAWYER”**

FACTS: The defendant claimed that he said something along the lines of, “I think I need to talk to a lawyer,” “I think I need a lawyer,” or “I might need a lawyer.”

HELD: The trial court properly denied the defendant’s motion to suppress his inculpatory statements to the police. The defendant was in custody and had been given his Miranda rights several times. The court found that despite the defendant’s contentions to the contrary, all three of these statements would have indicated that the defendant was still in the decision-making process and did not clearly make a request for counsel.

The court also found that the statements made by the detective that the defendant had said he would let police arrest him so he could have an attorney because he could not afford one is not an unequivocal invocation of the defendant’s right to counsel. The court found that the statement was not made in isolation but rather was a part of a conversation between the defendant and the detective about rescheduling a polygraph and therefore it was not an unequivocal request for counsel.

The court found that the defendant had given the statement freely and voluntarily.

***CRIMINAL CONTEMPT***

**CRIMINAL CONTEMPT: CONVICTIONS OVERTURNED  
WHEN PROOF DID NOT ESTABLISH MOTHER HAD  
ABILITY TO PAY CHILD SUPPORT DURING  
PERTINENT TIME PERIOD**

FACTS: The trial court found the defendant mother guilty of eighteen charges of criminal contempt.

HELD: The trier of fact could not have found the essential elements of the crime beyond a reasonable doubt, and the eighteen convictions were reversed. The Court of Appeals found that the evidence in the record was sparse, and no direct evidence established that the mother had the ability to pay child support during the pertinent time period. The state witness testified that the mother had made no child support payments and that to her knowledge the mother had not worked in the last three years. The witness testified that she did not know who the last employer for the mother was and she did not know whether the mother had graduated from high school. The witness also testified that she did not know if the mother had a disability or mental condition which would have prevented her from working.

The court found that although the trial court had found the mother's attitude towards securing employment was "lackadaisical" during the time her case was assigned to a problem solving program, the time frame was not germane to the issue of whether the mother had the ability to pay child support when the payments were due. The court noted that the appropriate inquiry is whether the mother had the ability to make payments "at the time the support was in fact due."

## ***CRIMINALLY NEGLIGENT HOMICIDE***

### **CRIMINALLY NEGLIGENT HOMICIDE: PROOF NOT ESTABLISH GROSS DEVIATION FROM STANDARD OF CARE**

FACTS: The proof at trial established that the defendant was driving a tractor trailer truck at a slow rate of speed on both the shoulder and right traffic lane of the interstate due to the fact that the defendant's tractor trailer had blown a tire on the trailer. Witnesses testified that visibility was good and that other vehicles were taking evasive action to move safely around the defendant. The officer had determined that the cause of the accident was the defendant's failure to yield but the officer also acknowledged that the victim's inattention or failure to keep a proper lookout could have contributed to the accident. The defendant was cooperative and there was no indication of alcohol, drugs, or fatigue contributing to the accident.

HELD: The defendant's criminally negligent homicide conviction is reversed and the case is dismissed. The court found that the defendant's failure to perceive the risk of driving at slow rate of speed with his hazard flashers activated did not constitute gross deviation from the standard of care.

State v. Briggs, 35 TAM 51-24 (Tenn. Cr. App. 11-08-10)

## ***CRIMINAL SENTENCING***

### **JUDICIAL DIVERSION: BURDEN ON DEFENDANT TO SHOW HE IS STATUTORILY QUALIFIED FOR JUDICIAL DIVERSION**

HELD: The trial judge did not abuse his discretion in denying the defendant's request for a judicial diversion. The trial court had found that there was no record of the TBI's certification that the defendant did not have a felony or class A misdemeanor which was necessary for the defendant to qualify for judicial diversion.

Tennessee Court of Criminal Appeals found that based on the absence of such certification, the trial judge did not consider the judicial diversion a viable option. The court found that without the proper certification that the defendant was eligible, the trial court could not grant the defendant judicial diversion.

The court concluded that the defendant who is seeking judicial diversion bears the burden of showing the trial court that the defendant is in fact statutorily qualified for judicial diversion.

State v. Sender, 36 TAM 02-27 (Tenn. Cr. App. 11-08-10)

## ***CRUELTY TO ANIMALS***

### **ATTEMPTED AGGRAVATED CRUELTY TO ANIMALS: DEFENDANT GUILTY AFTER SADISTICALLY FILING DOWN DOG'S TEETH**

HELD: The evidence was sufficient to convict the defendant of attempted aggravated cruelty to animals. The defendant arrived home and discovered that his dog had chewed through several wires on his property. The defendant then administered a pre-anesthetic drug and tranquilizer to his dog and then proceeded to file down his teeth. A later examination revealed that many of the teeth were fractured and shattered and that the pre-anesthetic would have removed only some of the sensation of pain, and the tranquilizer would have only immobilized the animal and not have relieved him of pain or rendered him unconscious. The court concluded that the defendant in a depraved and sadistic manner had tortured or maimed his dog.

The court also determined that the sentence of 11 months and 29 days

at 75% with 75 days to be served in the county jail and the remainder on probation was appropriate. The trial court had painstakingly examined all of the factors including the defendant's lack of criminal history, his education, and his previous history of dealing with animals peacefully but ultimately concluded that the conduct was so bad that it justified jail time.

State v. Barnett, 35 TAM 43-22 (Tenn. Cr. App. 05-20-10)

## ***DISQUALIFICATION OF DISTRICT ATTORNEY'S OFFICE***

### **MOTION TO DISQUALIFY DA: FAILURE OF DEFENDANT TO SHOW VINDICTIVENESS**

FACTS: The defendant filed a motion to disqualify the DA's office for prosecuting him based upon the fact that the defendant had sued the DA and the assistant DA in 2002 in a federal court matter in which the defendant alleged violation of his civil rights. The defendant had argued that the DA's office may have had a revenge motive against him.

HELD: The defendant failed to show that the prosecutor acted in order to punish him for pursuing his legal rights and that the record did not establish any likelihood of vindictiveness. The trial court did not abuse discretion in denying the defendant's motion to disqualify the DA's office.

PRACTICE POINT: I have always thought that the better practice was to avoid the appearance of impropriety and have close calls resolved against further participation by a DA or by a judge. We as judges invite complaints in the Court of the Judiciary whenever we stay involved in a case where it would suggest that we should get out of a case and the same can apply to the DA's office. I would suggest that we err on the side of caution and avoid the appearance of impropriety to the public and even to a defendant who can feel that justice is stacked against him.

State v. Bartlett, 35 TAM 45-19 (Tenn. Cr. App. 09-07-10)

## ***DOCTRINE OF COLLATERAL ESTOPPEL***

### **COLLATERAL ESTOPPEL: FINDINGS IN JUVENILE COURT DEPENDENCY AND NEGLECT CASE NOT BINDING ON CRIMINAL COURT**

**FACTS:** Prior to the indictment of the defendant, a juvenile court had made a factual finding in a dependent and neglect hearing that there was no clear and convincing evidence that the defendant had perpetrated the injuries against her daughter. The defendant was subsequently indicted on two counts of aggravated child abuse and two counts of aggravated child neglect associated with leg and wrist fractures of the ten month old child.

The defendant filed a motion to dismiss the indictment in Criminal Court arguing that the indictment should have been dismissed based on the doctrines of collateral estoppel, res judicata, and double jeopardy.

**HELD:** In regard to the applicability of the doctrine of collateral estoppel, the court found that the issue in the juvenile proceeding was whether the child was dependent and neglected. The court found that the State did not have the full and fair opportunity to litigate in the juvenile proceeding whether the defendant was guilty beyond a reasonable doubt of committing criminal offenses. The court found that the issue was not identical to the issue in Juvenile Court and therefore the finality of the Juvenile Court judgment had no effect on the criminal prosecution.

The court also found that the defendant had not established that the state should be precluded from prosecution under the doctrine of res judicata since the issue in the juvenile proceeding was not identical to the issue in the criminal case. The juvenile court's dismissal of the juvenile petition for custody was not conclusive of all the rights that were involved in the criminal prosecution.

State v. Hameet, 35 TAM 46-20 (Tenn. Cr. App. 09-15-10)

## ***DRIVING UNDER THE INFLUENCE***

### **DUI: DEFENDANT'S PHYSICAL CONTROL OF AUTOMOBILE IN CASE INVOLVING ACCIDENT**

FACTS: An officer testified that he received a call from a dispatcher regarding an accident on Bird's Creek Road. The officer arrived at the location of the accident and saw the defendant's vehicle off in a field. The officer noted that the defendant was "at the car in the field" by himself. There were no other cars or people present at the scene.

The defendant admitted that he was intoxicated when the officer found him at the side of the road and was standing by the wrecked vehicle. The defendant argued that the state had failed to prove that he ever had physical control of the automobile.

HELD: The evidence was sufficient to convict the defendant of DUI first offense and violation of the habitual offender statute. The court noted the above facts which have been listed, and the officer had testified that the vehicle belonged to the defendant, the vehicle was damaged on the passenger's side and the front of the vehicle, and that the vehicle was stuck in the field. According to the officer, the defendant had not mentioned that another person was driving the vehicle or even that another person was with him in the accident. The totality of the facts established the defendant's guilt of driving under the influence. The officer had also testified the defendant had admitted that he consumed a few beers that day and there was one beer in the center console of the vehicle. The defendant's blood alcohol content was .28.

State v. Reed, 35 TAM 34-27 (Tenn. Cr. App. 06-22-10)

### **DUI DRUG TEST: IMPAIRMENT ESTABLISHED BY PROOF DESPITE FACT THAT DRUGS ALL TESTED AT THERAPEUTIC LEVELS**

FACTS: The defendant was observed by an officer driving erratically. The defendant rear ended a vehicle which was stopped at a red light. The officer testified that the defendant was staggering around after she exited her vehicle and was in danger of being struck by other vehicles. The officer also testified that the defendant's voice was slurred and that she told him that she would not take any field sobriety test.

HELD: The evidence was sufficient to convict the defendant of DUI. The defendant's blood test revealed the presence of meprobamate, a schedule IV narcotic, along with carisoprodol, bupropion, and metoprolol. The court noted that although all of tests had tested within therapeutic levels associated with each drug, scheduled and non-scheduled drugs can cause impairment, individually or collectively, even when taken within therapeutic levels. The proof was sufficient for the defendant to have been found guilty by the fact finder.

State v. Self, 36 TAM 2-23 (Tenn. Cr. App. 11-09-10)

**IMPEACHMENT OF DEFENDANT BY PRIOR PERJURY  
CONVICTION: FOUND ADMISSIBLE FOR  
IMPEACHMENT PURPOSES**

HELD: The trial court did not err in admitting the defendant's prior perjury conviction for impeachment purposes. The court concluded that a perjury conviction is highly relevant as to a person's credibility and is in no way similar to the offense of DUI. The court also found that the circumstances in the case supported the trial court's conclusion that the conviction's probative value substantially outweighed the prejudicial effect of the conviction. The trial court had found that the defendant's credibility was a crucial issue in the case.

State v. Byington, 35 TAM 36-23 (Tenn. Cr. App. 07-19-10)

**REASONABLE SUSPICION FOR STOP: CALL IN REPORT  
BY BANK TELLER CONFIRMED BY POLICE  
OFFICER'S OBSERVATIONS**

FACTS: The defendant filed a motion to suppress any evidence gathered from the police officer's stop of the defendant's vehicle. The trial court denied the defendant's motion to suppress but noted that the video of the stop alone was not enough to justify the stop.

HELD: The evidence did not preponderate against the trial court's determination that the officer had reasonable suspicion to stop the defendant's vehicle. The court found that the officer had testified that the police received a phone call alerting them that the defendant might have been driving while intoxicated. The officer had spotted the defendant's vehicle and followed the defendant, and while following the defendant, the officer had twice observed the defendant weave his vehicle outside his lane of travel and into the next lane. The officer had also observed the defendant make a right hand turn onto the interstate entry ramp from the center lane.

The Court of Criminal Appeals found that the trial court had noted that while any of the factors alone might not have amounted to reasonable suspicion, the totality of circumstances, including the bank teller's call and corroboration of the phone call and by the officer's undisputed observation, amounted to reasonable suspicion to justify the officer's stopping of the vehicle.

State v. McFarland, 36 TAM 3-25 (Tenn. Cr. App. 12-03-10)

**REASONABLE SUSPICION: STOP SUPPORTED BY  
REASONABLE SUSPICION EVEN THOUGH  
DEFENDANT WAS SITTING IN PARKED, RUNNING  
CAR IN OWN DRIVEWAY**

FACTS: The defendant was observed by Neeley, a firefighter, driving erratically and almost colliding with another vehicle. Neeley had flashed his lights at the defendant resulting in the defendant pulling over. Neeley

noticed that the defendant's speech was slurred and that he smelled of alcohol and that he left the parking lot in a dangerous manner almost striking Neeley. Neeley called in the complaint which resulted in a dispatcher sending an officer. The officer talked with Neeley and got his information including the fact that Neeley was almost struck by the dangerous manner in which the defendant left the parking lot.

The officer obtained information from the license tag given to him by Neeley and ascertained the address of the residence to which the vehicle was registered. The officer went to the scene of the residence and found the defendant's vehicle, matching the description Neeley had given, still running at the residence in the driveway. It appeared that the defendant was sleeping behind the wheel of the running car. The officer walked up the driveway to the car and knocked on the window. The defendant would not let the officer into the vehicle.

HELD: The police officer had reasonable suspicion to stop the defendant's vehicle. The officer had parked in the street, did not activate his blue lights, and had walked up the driveway to where the defendant was sitting in the parked but running car. The court found that based upon the circumstances and the report by the citizen informant, Neeley, the officer had reasonable suspicion to stop the vehicle.

The court also noted that the officer had probable cause to actually arrest the defendant for attempted aggravated assault. The officer had been given information from Neeley, a citizen informant, and the totality of the evidence established probable cause for the arrest of the defendant for aggravated assault.

The evidence was also sufficient to convict the defendant of DUI under all the circumstances.

State v. Patterson, 35 TAM 48-24 (Tenn. Cr. App. 09-30-10)

**SENSING REQUIREMENTS: SENSING NOT REQUIRE  
STATE TO PROVE ABSENCE OF FOREIGN  
MATTER IN MOUTH WITH 100% CERTAINTY**

FACTS: The defendant argued that the trial court committed error in admitting the results of his breath alcohol test. The defendant claimed that

he was chewing gum when the Breathalyzer test was administered. The officer testified that he observed the defendant for twenty-one minutes without any kind of interruption and that during that time the defendant did not eat, drink, chew or smoke anything or regurgitate or belch during that time. The officer testified that the defendant did not chew anything during the twenty-one minutes and that he felt the intoximeter would produce an error message if it had detected foreign matter in the defendant's mouth. HELD: The court did not err in admitting the results of the defendant's breath alcohol test. The court noted that the state is not required to prove the absence of foreign matter in the defendant's mouth with 100% certainty. The court noted that the purpose of the 4<sup>th</sup> Amendment requirement under State v. Sensing is to ensure "that no foreign matter is present in the defendant's mouth that could retain alcohol and potentially influence the results of the test." The court noted that there were two distinct elements of the observation and that was to (1) observe for twenty minutes and (2) establish that the defendant did not smoke, drink, eat, chew gum, vomit, regurgitate, belch or hiccup during the twenty minutes.

The court concluded that the results of the breath alcohol tests were properly admitted.

State v. Greene, 35 TAM 48-25 (Tenn. Cr. App. 10-15-10)

**SENSING TWENTY MINUTES OBSERVATION PERIOD:  
DOES NOT REQUIRE UNBLINKING GAZE ON PART  
OF LAW ENFORCEMENT OFFICER FOR ENTIRE  
TWENTY MINUTE PERIOD**

FACTS: Law enforcement officer administered a breath alcohol test. The officer testified that he was certified by TBI to operate the machine and that he had gone through law enforcement training. The officer also testified he administered breath alcohol test in accordance with TBI standards and with his training. The officer also testified the instrument was regularly tested and certified and copies of the certification by TBI were introduced.

The officer testified that he observed the defendant for the entire

twenty minute period of time prior to administering the breath alcohol test. The deputy testified that although he did not look directly into the defendant's mouth, the defendant did not have any foreign matters in his mouth prior to the test. The officer testified specifically that the defendant did not smoke, regurgitate, or drink any alcoholic beverage, and he knew the defendant had not consumed any alcohol or smoked while in his custody.

The deputy did testify that the last thing he did before administering the test was placing the mouth piece on the machine and he kept his eyes on the defendant for the twenty minutes.

HELD: Even if the deputy had reached in the drawer to remove a mouth piece and place it on the machine during the observation period of twenty minutes, this would not invalidate the entire observation period because the deputy was in close proximity to the defendant and did not lose eye contact with the defendant but for only brief intervals of time. The court found that an unblinking gaze on the part of the law enforcement officer is not necessary to satisfy the twenty minute requirement under the Sensing case. The fact that the officer may have looked away from the defendant for a second to pull the mouth piece from the drawer did not invalidate the entire observation period.

State v. Hale, 35 TAM 50-20 (Tenn. Cr. App. 11-02-10)

**STATUTE OF LIMITATIONS: PROSECUTION  
COMMENCED TIMELY DUE TO FACT THAT  
DEFENDANT WAS BOUND OVER TO GRAND JURY  
WITHIN TWELVE MONTHS OF THE DATE OF THE  
OFFENSE**

FACTS: (1) Defendant was involved in car accident on 09/28/07 and due to injuries the officer was unable to perform field sobriety test. The defendant was charged with failure to give immediate notice of the accident at the time of the accident. (2) On 01/28/08, the officer executed an affidavit of complaint against the defendant charging him with driving under the influence at the time of the accident on 09/28/07. (3) The defendant

subsequently made four appearances in court being on 02/07/08, 03/20/08, 04/07/08, and 06/12/08 and was represented by counsel. (4) Subsequently on 07/24/08, the defendant waived his right to a preliminary hearing and agreed to allow the case to be bound over to the grand jury. (5) The grand jury indicted the defendant on 10/03/08. (6) The defendant filed a motion to dismiss the DUI charge due to the running of the statute of limitations, and the trial court granted the motion and dismissed the DUI charge.

HELD: The trial court improperly dismissed the charges against the defendant when the defendant had waived his preliminary hearing and agreed to allow the case to be bound over to the grand jury prior to the expiration of the statute of limitations. The Court of Criminal Appeals found that the prosecution was timely due to the fact that the defendant was bound over to the grand jury within twelve months of the date of the offense.

State v. Thompson, 35 TAM 40-23 (Tenn. Cr. App. 08-25-10)

### **THIRD OFFENSE DUI: PREVIOUS DUI CONVICTIONS PROVEN BY CERTIFIED JUDGMENTS**

HELD: The trial court did not err in admitting copies of the judgments of the defendant's prior DUI convictions. The court noted the signature by the clerk of the court of Franklin County stating that the documents provided are true copies. That was sufficient to meet the burden of Tennessee Rule of Evidence 902. The certified copies of the judgment in the present case had been signed and certified by deputy clerk of Franklin County as true copies of judgments. The court therefore concluded the judgments met the requirements of Tennessee Rule of Evidence 902(4) and that they were properly admitted by the trial court.

State v. Adkins, 35 TAM 43-24 (Tenn. Cr. App. 08-24-10)

**VEHICLE STOP: OFFICER’S TESTIMONY IN ADDITION TO DUI VIDEO DEEMED SUFFICIENT FOR STOP OF VEHICLE**

FACTS: A video recording of the defendant’s traffic stop depicted the defendant weaving only slightly within his lane. In addition, the deputy testified that he personally observed the defendant’s automobile cross the center line on at least two occasions in addition to the weaving within his lane of traffic shown on the video.

HELD: The officer’s stop of the defendant’s vehicle was supported by reasonable suspicion. The court noted that in addition to the video recording of the defendant’s traffic stop depicting only slight weaving within his own lane, the trial judge was free to determine that the officer’s testimony about further observations outside of the video established reasonable suspicion for the stop.

State v. Wilson, 35 Tam 37-25 (Tenn. Cr. App. 07-26-10)

**VEHICLE STOP: STOP BASED ON SPECIFIC AND ARTICULABLE FACTS KNOWN TO OFFICER DESPITE OFFICER’S TESTIMONY AT THE SUPPRESSION HEARING THAT HE OBSERVED NOTHING TO INDICATE DEFENDANT WAS INTOXICATED**

FACTS: The officer observed the defendant’s vehicle weave in and out of his lane of traffic on the interstate a number of different times and then observed the defendant drive through the “gore area” dividing the exit ramp from the interstate while other vehicles were nearby.

HELD: The manner in which the defendant maneuvered his vehicle gave the officers specific and articulable facts upon which to base reasonable suspicion that the defendant was driving under the influence and violating T.C.A. §5-8-123(a), the statute that requires a vehicle to be driven as nearly as practicable entirely within single lane. The court found that an officer’s

subjective reason for making an investigatory stop is irrelevant and therefore the officer's stop of the defendant's vehicle was constitutionally sound despite the officer's indication at the suppression hearing that before he pulled over the defendant he had observed nothing to indicate the defendant was intoxicated.

PRACTICE POINT: The trial court is to consider the facts testified to and not merely the conclusions made by the officer witness or other witnesses. The subjective basis of the arrest or stop is not what is conclusive but rather the objective facts behind the stop.

State v. Hunt, 35 TAM 38-29 (Tenn. Cr. App. 07-30-10)

**VIDEO EVIDENCE: VIDEO EVIDENCE NEITHER SUPPORTS NOR CONTRADICTS OFFICER'S KEY TESTIMONY AND JUDGE CHOSE TO CREDIT OFFICER'S TESTIMONY**

FACTS: The defendant filed a motion to suppress and claimed that the video tape did not establish the facts claimed by the officer.

HELD: The evidence did not preponderate against the trial court's denial of the defendant's motion to suppress. The trial court relied upon more than just video evidence in making its factual findings in denying the defendant's motion to suppress. The court found that the arresting officer had testified that he had observed the defendant weaving over the lane lines a considerable distance and that the defendant had almost hit another car. The officer also testified that much of what he observed was not depicted on the video due to the camera angle and the fact that the view of the camera was obscured by other cars and the winding nature of the road.

The Court of Criminal Appeals found that the trial court credited the officer's testimony that he saw things that may not have been on the video tape. The court found that the video does not strongly contradict the officer's testimony and is not enough to demonstrate that the record

preponderates against the trial court's findings of fact. The court concluded that the video neither confirms the officer's testimony nor refutes it. The court found that quite simply the video did not contradict the officer's testimony.

State v. Hewitt, 36 TAM 3-24 (Tenn. Cr. App. 11-29-10)

## ***DRUG COURTS***

### **DRUG COURT: EX PARTE INFORMATION RECEIVED BY TRIAL JUDGE PROHIBITS JUDGE FROM ADJUDICATING PROBATION REVOCATION**

HELD: The trial judge in this case, a member of the defendant's drug court team, cannot function as a neutral and detached judge for alleged probation violations when they are based upon the same or related subject matter that has been reviewed by the drug court.

The Court of Criminal Appeals noted that participation in the drug court program necessarily exposes a judge to a considerable amount of information about the defendant's conduct that would not normally be relevant to adjudicating a probation revocation. The court concluded that this leaves the judge's credibility suspect for traditional legal purposes. The Court of Criminal Appeals concluded that due to the fact that the trial judge who presided over the defendant's probation revocation had also participated as a member of the drug court team, the trial judge's decision to revoke the defendant's probation would be reversed, and the case would be remanded for a new hearing in front of a different judge.

State v. Stewart, 35 TAM 39-25 (Tenn. Crim. App. 08-18-10)

## ***DRUG OFFENSES***

### **CASUAL EXCHANGE: SPONTANEOUS PASSING OF SMALL AMOUNT OF DRUGS**

FACTS: The defendant was convicted of delivery of less than .5 grams of cocaine for which he was sentenced to six years and one month in jail. The defendant maintained that the proof did not establish felony possession but only casual exchange of drugs.

HELD: The Court of Criminal Appeals found that the proof had sufficiently established delivery of a controlled substance. The court found that “casual exchange” generally “contemplates a spontaneous passing of a small amount of drugs, for instance at a party. Money may or may not be involved.”

The court found that the facts of this case simply did not show that there was a “spontaneous exchange” of drugs.

State v. Guthrie, 35 TAM 46-23 (Tenn. Cr. App. 09-16-10)

## ***EVIDENCE***

### **ACCOMPLICE TESTIMONY: PROOF FAILED TO CORROBORATE ACCOMPLICE TESTIMONY AND CASE AGAINST DEFENDANT WAS DISMISSED**

HELD: In a case in which the defendant (Eisom) was convicted as a co-defendant of two counts of facilitation of first degree felony murder and especially aggravated robbery, the Court of Criminal Appeals found that the state had failed to produce sufficient evidence to corroborate the accomplice’s testimony to show the involvement of Eisom in the crimes. The proof failed to show that Eisom had participated in the planning of the robbery or that he knew that the defendant intended to murder the victims. The other proof would not lead to an inference that the defendant had participated in the crime, and the court found that as such it could not be

considered corroborative of the accomplice's testimony. The court found that the case against Eison had to be dismissed.

PRACTICE POINT: This case points out the critical importance of the state corroborating the testimony of an alleged accomplice to a crime.

State v. Eison, 35 TAM 52-21 (Tenn. Cr. App. 11-05-10)

## **ACQUITTAL OF CO-DEFENDANTS OF MURDER: INADMISSIBLE AS BEING IRRELEVANT**

FACTS: The trial court allowed the State to bring out evidence that two individuals (Blades and Tate) had been acquitted of the murder of Fisher. The defendant's theory was that Blades and Tate were the ones who actually had committed the murder. The defendant was using testimony of witnesses from the murder trials of Blades and Tate to establish his defense. The trial court denied the defendant's motion in limine and allowed the state to reference the fact that said Blades and Tate had been acquitted of Fisher's murder.

HELD: The general rule is that admission of evidence of a judgement of acquittal is inadmissible as being irrelevant. The reason that evidence of a prior acquittal is not relevant is because a previous acquittal does not prove innocense but rather proves that a prior prosecution failed to meet the burden of proof beyond a reasonable doubt to at least one element of the crime.

The court also noted that even if it was deemed relevant, the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and the possibility of misleading the jury. The defendant's convictions were reversed and the case was remanded for a new trial.

PRACTICE POINT: This type of situation could rear its head in General Sessions Court just as easily as another court since a potential co-defendant could have been previously acquitted of a charge in a previous trial. The evidence of a previous acquittal of a third person should be rejected as being immaterial.

State v. Turner, 35 TAM 34-17 (Tenn. Cr. App. 06-22-10) (Dissent by Judge McMullen)

**ALLOWING VICTIM TO LIFT SHIRT: SHOWING SCARS TO JURY PROPER TO CORROBORATE VICTIM BEING SHOT FIVE TIMES AND ONCE IN BACK**

HELD: The trial court did not err in allowing a victim to lift his shirt and show bullet wounds to the jury. The scars corroborated the victim's testimony that he had been shot five times and that one of the bullets struck him in the back. The court found that the scars were not particularly offensive or likely to stir emotions. The probative value of showing the bullet wounds was not substantially outweighed by the danger of any prejudicial effect.

State v. Hinds, 35 TAM 51-22 (Tenn. Cr. App. 10-27-10)

**CROSS-EXAMINATION OF CO-DEFENDANT: ERROR IN RESTRICTING SAID CROSS-EXAMINATION**

HELD: The trial court restricted the defendant's cross-examination of his co-defendant. The defendant attempted to show by cross-examination that the co-defendant was motivated to give testimony against the defendant by his hope and desire that his testimony for the State might head off a federal indictment against him. The court found that the exclusion of said cross-examination was error as it was clear that the co-defendant's testimony could have been motivated by his fear of the federal prosecution.

The Court of Criminal Appeals found that while this was error it was also harmless error.

PRACTICE POINT: Cross-examination should be allowed by a court when

it genuinely addresses a particular point which actually does or could influence the testimony of the witness against the defendant. Any bias or motivation for wrongful testimony is fair game in cross-examination if it has a reasonable foundation behind it.

State v. Guana, 35 TAM 34-16 (Tenn. Cr. App. 06-29-10)

**DEFENDANT AND THEFT CHARGE: NO ERROR TO ADMIT DEFENDANT'S PAYROLL RECORDS, BANK RECORDS, AND W-2 DOCUMENTS TO SHOW DISCREPANCY IN INCOME OF DEFENDANT AND HER DEPOSITS AND DISBURSEMENTS**

FACTS: The defendant was a “trusted employee” of a small grocery store. The defendant was convicted of burglary and theft between \$10,000 and \$60,000 in connection with money stolen from the store. Trial court admitted into evidence the defendant's payroll records, bank records, and W-2 documents.

HELD: The trial judge did not abuse discretion in admitting the payroll records, bank records, and W-2 documents of the defendant, as such documents were extremely relevant to establish the nearly \$70,000 discrepancy between the defendant's income and her deposits and disbursements.

The court noted that the defendant had been allowed to present evidence showing alternate sources of income and certain specific expenditures from a joint account attributable to other individuals.

State v. Malena, 35 TAM 34-23 (Tenn. Cr. App. 06-28-10)

**EXCITED UTTERANCE: 911 CALL MADE BY WITNESS  
WAS ADMISSIBLE AS EXCITED UTTERANCE DUE  
TO FACT IT WAS CAUSED BY STARTLING EVENT  
OR CONDITION**

HELD: Trial court properly admitted as an excited utterance a recording of a 911 call made by an eyewitness to the accident. The eyewitness (Miller) observed the crash and then made a 911 call that was based upon the startling event or condition. The court noted that the witness was distressed during the call, and it was established that he was initially startled by his observation of the crash and that he continued to be under stress of the excitement caused by the crash while making the phone call.

State v. Craft, 35 TAM 40-21 (Tenn. Cr. App. 08-26-10)

**FAILURE TO RECORD PORTIONS OF FIELD SOBRIETY  
TEST: NO DUTY TO PRESERVE EVIDENCE WHICH  
DID NOT EXIST**

FACTS: Two of three field sobriety tests performed by the defendant were not included on video recording of the stop. The field sobriety test in question were not taped over by the state, but instead the portions of the field sobriety tests were never recorded because of a mechanical malfunction. The deputy believed that the video recorder was recording the defendant's traffic stop.

HELD: The fact that the video recorder malfunctioned and only recorded a portion of the stop does not create a duty on the state to preserve evidence which never did exist.

PRACTICE POINT: The fact finder, including a General Sessions Judge, can find certain actions of the state to be suspicious such as the failure to record all field sobriety tests when a portion of the field sobriety tests are in fact recorded. Persistent mishandling of electronic devices or recording devices may be a fact to be considered by a fact finder including a judge. It can be very frustrating for a law enforcement agency to continuously fail to

have evidence that would have been easy to preserve. Just giving incompetent law enforcement agencies a pass does not necessarily serve the interest of justice. A judge should clearly and closely look at all evidence to see if the state acted in good faith.

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State v. Wilson, 35 TAM 37-25 (Tenn. Cr. App. 07-26-10)

**FLIGHT OF DEFENDANT: FLIGHT WAS PROPER  
CONSIDERATION FOR FACT FINDER WHEN  
DEFENDANT, WHO WAS INITIALLY  
COOPERATIVE, ENDED UP RUNNING FROM  
POLICE AND BECAME ARMED**

HELD: Despite the fact that the defendant initially cooperated with law enforcement personnel and despite the fact that he never really concealed himself, the defendant did leave the scene of the crime and ran from the police upon their arriving to take him into custody. The defendant fled to another area of the house where he holed-up, armed, for an extended period of time. The court concluded that this behavior satisfies the requirement of leaving, evading, and concealing so as to justify a flight factor under the circumstances of the case.

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State v. Dinwiddie, 35 TAM 38-20 (Tenn. Cr. App. 07-23-10)

**HEARSAY TESTIMONY: OFFICER'S TESTIMONY  
REGARDING STATEMENTS OF AN UNNAMED  
PERSON IMPLICATING THE DEFENDANT DEEMED  
INADMISSIBLE HEARSAY**

FACTS: In a murder trial, the defense had suggested on cross examination of a sergeant that the sergeant must have been unaware that the defendant might have been involved in the murder and robbery of the victim at the

time the defendant and his passenger were taken into custody. The sergeant responded that “we had gotten a little information about who may have been responsible, but no, as far as knowing, we didn’t know his complete involvement.”

On redirect examination, the state asked the sergeant, “you didn’t know who was responsible for the homicide, but you stated that you had some information and without revealing who gave you the information, what information did you get?” After defense objection the trial court overruled the objection after the state had argued the defense had opened the door. The sergeant went on to state that “it was a confidential tip that the defendant had expressed to this person what happened and this person called the police.” The prosecutor then replied, “That the defendant had expressed to that person that he had robbed and killed somebody?” The sergeant replied, “Yes. He and his girlfriend.”

HELD: The statements of the unnamed person made during a telephone conversation with the sergeant clearly constituted hearsay. The Court of Criminal Appeals went on to find that in light of the proof at trial which included the defendant’s own statement that he had hit the victim with a shotgun, and due to the limited use of the hearsay statement, the defendant had failed to show that the admission of the statement affected his conviction or prejudiced the result of the trial.

State v. Fullilove, 35 TAM 52-22 (Tenn. Cr. App. 11-02-10)

**OPINION TESTIMONY OF DETECTIVE: COURT ERRED  
IN ALLOWING DETECTIVE TO GIVE OPINION AS  
TO MEANING OF DEFENDANT’S RECORDED  
STATEMENT**

FACTS: Detectives conducting an interview with the defendant, during which the defendant was asked, “So when Rodney did the robbery, you were hoping to get paid from the robbery?” The defendant responded during the interview, “yes.” At the trial, the detective was asked what the defendant’s answer meant to him, and the detective replied, “that means to me that he’s a willing participant.”

HELD: The trial court erred in admitting the detective's testimony as to his opinion of what defendant's answer meant. The court found that since the detective was testifying as a non-expert witness, the detective's opinion regarding the defendant's statement was not admissible under Tennessee Rule of Evidence 701. The detective's opinion was not helpful to clear up any kind of misunderstanding about his testimony, the conversation was also being recorded and was played for the jury and the jury (fact finder) was free to determine the meaning of the defendant's statement on its own. The detective's statement was an intrusion upon the jury's duty to form conclusions after weighing the evidence and is the type of personal opinion by a non-expert witness that Tennessee Rule of Evidence 701 seeks to eliminate.

The Court of Criminal Appeals did find ultimately that the error was harmless, as the defendant was convicted on the theory of criminal responsibility for another's actions and the case against the defendant was strong.

State v. Johnson, 35 TAM 41-16 (Tenn. Cr. App. 08-24-10)

**OPINION TESTIMONY OF NURSE: TESTIMONY THAT  
VICTIM'S VAGINAL INJURIES WERE CONSISTENT  
WITH FORCED, DIGITAL RAPE HELD ADMISSIBLE**

HELD: The trial judge did not abuse his discretion in admitting the opinion testimony of Harrington, a nurse practitioner. Even though the court never actually stated on the record that Harrington was an expert, the admitted proof showed that the trial court treated her as such.

The court found that the record established that Harrington had thirty years of experience as a nurse with seven years of experience specifically related to gynecological care. She also had specific training in clinical experience dealing with sexual assault and her opinion regarding the digital penetration certainly was within her realm of expertise.

State v. Dinwiddie, 35 TAM 38-20 (Tenn. Cr. App. 07-23-10)

**OWNERSHIP OF GUN: EVIDENCE IS ALLOWED TO  
SHOW GUN OWNERSHIP TO SHOW DEFENDANT'S  
MEANS TO COMMIT CRIME**

FACTS: The defendant objected to the trial court's allowing testimony by a witness, the victim's son, that established that the defendant owned a gun prior to the murder. The victim had been killed by a .40 caliber gun.

HELD: The Court of Criminal Appeals found that even though the witness gave no description of the gun owned by the defendant, testifying only that the defendant had owned a gun prior to the murder, that the trial court properly concluded that such evidence was relevant to establish the defendant's means to commit the crime. The court found that the probative value of the testimony about the gun was not outweighed by its prejudicial effect.

State v. Reed, 36 TAM 3-17 (Tenn. Cr. App. 11-10-10)

**RAPE PROSECUTION: NO ERROR BY TRIAL COURT IN  
REFUSING TO ALLOW DEFENDANT TO QUESTION  
VICTIM ABOUT PRIOR ALLEGATIONS OF SEXUAL  
ABUSE AGAINST DEFENDANT'S BROTHER**

HELD: The trial court did not err in refusing to allow the defendant to question the victim and her mother about a prior allegation of sexual abuse purportedly made by the victim against the defendant's brother when the victim was four years old. The Court of Criminal Appeals found that the record was completely devoid of any proof that the victim had alleged she had been sexually abused prior to the current incident. The court also noted that even if a prior allegation of sexual abuse alluded to by the defendant had been attributed to the victim, there was no offer of proof for the trial court or the appellate court to consider to determine if the statement was false. Therefore, the court found that the defendant had failed to establish that the victim had previously alleged sexual abuse or that such allegation was false.

PRACTICE POINT: It can be problematical for a General Sessions Judge in conducting a preliminary hearing on a serious sex offense with a minor victim to have defense counsel bring up questioning about other alleged complaints that the child victim may have made against third parties. Such testimony could possibly be relevant under certain circumstances but Session Judges are having to deal with these issues prior to development of motions for discovery and often prior to the State's having a good grasp of the issues to discuss with minor victims.

This can be an important case for session judges to consider as here the Court of Criminal Appeals notes that the defendant had failed to establish that the victim had previously alleged sexual abuse or that such allegation was false.

A sessions judge could conclude that prior to any evidence being introduced through a defense witness or other witness and particularly in regard to determination of probable cause issues only, the questioning of a child victim is not relevant for probable cause determination and is ripe for potential abuse. Also, Tennessee Rule of Evidence Rule 412 applies to require a written motion by defense counsel accompanied by a written offer of proof ten days before trial (which apparently includes a preliminary hearing under Rule 412).

State v. Kennedy, 35 TAM 41-17 (Tenn. Cr. App. 08-18-10)

**RIGHT OF CONFRONTATION: TESTIMONY BY  
WITNESS TO OUT-OF-COURT STATEMENTS MADE  
BY NON-TESTIFYING CO-DEFENDANT HELD  
ADMISSIBLE IN ORDER TO ESTABLISH  
“CONTEXT”**

FACTS: The trial court allowed the witness (Bogard) to testify about out-of-court statements made by the non-testifying co-defendant (Hampton). Bogard had testified as to certain statements made by Hampton who did not testify at trial, which included how unhappy Hampton and Jones (the defendant) were due to the victim being called to the scene to sell crack cocaine, including threatening statements made toward the victim. There

were general conversations made at the scene which involved a context of drugs, how unhappy the defendants were with the situation, and a general atmosphere of threats and threatening conduct.

HELD: The trial court did not err in admitting Bogard's testimony. The court found that the admission of the non-hearsay statements did not violate the defendant's right to confront witnesses. The court basically found that the statements of the non-testifying co-defendant (Hampton) made at the scene and testified to by Bogard provided a context for the actions and statements of the defendants and were also used to prove the effect that the statements had on the defendant.

The appellate court referred to the opinions of Tennessee v. Street, 471 US 409(1985) and State v. Price 46 SW 3<sup>rd</sup> 785(Tenn. Cr. App. 2000). The court used these opinions to explain that the statements introduced were not hearsay because they were not introduced to prove the truth of the matter asserted but primarily to provide the context of all that occurred.

State v. Jones, 35 Tam 48-16 (Tenn. Cr. App. 09-30-10)

## **SELF SERVING STATEMENTS: STATEMENTS ARE NOT EXCLUDED SOLELY BECAUSE THEY ARE SELF SERVING**

HELD: There is no general rule of evidence which excludes statements merely because they are self serving. The court found that the reason most self serving statements are excluded is not solely because they are self serving but because they constitute inadmissible hearsay. There needs to be a reason for denying evidence other than the fact that such evidence is self serving.

PRACTICE POINT: In fact, a party should not introduce evidence through its own proof unless it is self serving.

Phipps v. State, 35 TAM 50-36 (Tenn. Cr. App. 10-11-10)

## **SUPERMAN SHIRT: “IT’S A BIRD, IT’S A PLANE, NO, IT’S STUPIDMAN”**

FACTS: In a murder case in which a State Trooper was killed by a person with the defendant, the defendant claimed that he was surprised and scared by the shooting and did not anticipate the shooting of the trooper.

HELD: The trial court did not err in admitting into evidence the fact that the defendant had purchased and worn a Superman shirt shortly after the shooting. The court found that the fact that the defendant purchased this kind of shirt from Walmart and his subsequent actions in remaining with the trigger man supported an inference contrary to the defendant’s statement that he was surprised and scared following the shooting. The Court of Criminal Appeals found that the defendant’s shirt suggested a “sense of invulnerability” which when placed before the jury could counter the defendant’s assertions of surprise and fright.

State v. Garcia, 35 TAM 47-17 (Tenn. Cr. App. 09-28-10)

## **TESTIMONY REGARDING BLUES MUSIC AT DEFENDANT’S BIRTHDAY PARTY: RELEVANT TO SHOW STRAINED RELATIONSHIP BETWEEN DEFENDANT AND VICTIM**

FACTS: The defendant objected to the court allowing the state’s witness to testify about music that the defendant played at his birthday party. The witness testified that the defendant was playing “a lot of blues music” pertaining to a person caught between two women. The state had contended that the testimony when taken with other evidence at the trial (about the defendant seeing other women, that the victim was upset by this, and that the victim subsequently moved out of the defendant’s residence), was relevant to establish the state’s theory of premeditated murder. The state claimed that the defendant’s actions at the birthday party were probative of his intent and motive for killing the victim.

HELD: The trial court did not abuse discretion in allowing the witness to

testify about songs she had heard at the defendant's party. The court concluded that this testimony and the defendant's conduct at the party did have a tendency to establish that the relationship between the defendant and victim was strained and relevant to the issue of the defendant's motive and intent.

State v. Reed, 36 TAM 3-17 (Tenn. Cr. App. 11-10-10)

**TRAFFIC CITATION: RELEVANCE ESTABLISHED TO SHOW THAT DEFENDANT IN MURDER CASE RECEIVED TRAFFIC CITATION IN SAME VEHICLE WHICH WAS CONNECTED TO CRIME SCENE**

HELD: The trial court did not abuse its discretion in admitting a traffic citation that the defendant had received two months prior to the murder. The court found that the citation was relevant to connect the defendant to the vehicle that eyewitnesses had seen at the crime scene in the murder case.

State v. McEwen, 36 TAM 3-16 (Tenn. Cr. App. 09-24-10)

**VICTIM'S STATEMENTS TO THIRD PARTIES: TESTIMONIAL VERSES NON-TESTIMONIAL STATEMENTS OF THE VICTIM**

HELD: The Court of Criminal Appeals looked at three different statements made by the victim to third parties. The appellate court differentiated between statements that it concluded were non-testimonial statements by the victim verses testimonial statements made by the victim. The court looked at the following three situations: (1) Trentham testified at trial that the victim had told him as she entered Trentham's apartment, that she had been attacked by a man who worked with her son on the "can crew." This testimony suggested that the victim feared that her assailant remained in her apartment. The Court of Criminal Appeals found that these were hearsay statements but were "non-testimonial." The victim was speaking to her

neighbor directly after escaping an attack and there was no indication that she expected the statements to be used in an investigation or for prosecution of her attacker. Also, the victim's statements were admissible as excited utterances. The victim in this case ended up being a murder victim. (2) The victim also made statements to a deputy who arrived at the scene approximately five to eight minutes after receiving a 911 call from Trentham. The victim told the deputy what had occurred but also added detailed descriptions of the defendant, including his height, appearance, and clothing. The court concluded the victim's statements to the deputy, who was present for investigative purposes, were testimonial. The court found that the trial court had committed error by allowing the deputy's testimony about the victim's statements which identified her attacker and described the attack. The court did conclude that the error was harmless under all of the circumstances. (3) The third issue is in regard to testimony by a nurse practitioner who testified that the victim told her while she was being treated at the emergency room that her son's friend attacked her. The victim had made these statements outside the presence of law enforcement and the statements were made in furtherance of the victim's medical treatment. The Court of Criminal Appeals concluded that these statements were non-testimonial and were admissible.

The court did note that before the trial the State and defense counsel had agreed that only certain portions would be admitted into evidence. The court concluded that any evidence that was admitted in error was harmless error based upon all of the testimony. The court had concluded that the evidence would have been admissible in the absence of agreement by the prosecutor and defense not to allow certain evidence in.

State v. Parker, 35 TAM 45-18 (Tenn. Cr. App. 09-22-10)

**VIDEO TAPE OF TROOPER'S LIFELESS BODY:  
RELEVANT TO SHOW CRIME SCENE NOT  
ALTERED AND TIME FRAME OF CRIME**

FACTS: In a murder case in which a state trooper was killed, the defendant argued that the trial court had erred in allowing a portion of the video tape

into evidence which depicted events after the shooting and after defendant's flight from the scene. The portions of the video depicted the trooper's lifeless body lying on the roadway for a length of time prior to his discovery which the defendant claimed is only prejudicial and offered no probative value.

HELD: The trial court did not err in admitting the video tape into evidence in which the twenty minute portion of tape showed the trooper on the roadway for the entire time up to the point of the discovery of the body. The court found that the entire twenty minute period was relevant as it showed for the state that the crime scene was not altered from the time the defendants left the scene until the body was discovered. The court also found the video was relevant to establish the time frame of the crime and the discovery of the body in comparison to the subsequent actions of the two defendants.

State v. Garcia, 35 TAM 47-17 (Tenn. Cr. App. 09-28-10)

## ***EXPERT WITNESS***

### **FORENSIC SCIENTIST AS EXPERT WITNESS: EXPERT'S TESTIMONY REGARDING "EXEMPLAR GRAPH" DEEMED ADMISSIBLE AND NOT A VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION**

HELD: The trial court's admission of the forensic scientist's testimony regarding an exemplar graph, i.e., a graph of a known standard of cocaine, did not violate the defendant's right of confrontation under the sixth amendment. The court found that Crawford v. Washington was inapplicable because the forensic scientist was an expert witness.

The Court of Criminal Appeals concluded that the trial court properly determined that the data from the exemplar graph was reliable. The scientist testified that the graph was generally accepted within the scientific community and that it had been used by the TBI since 1996. The court also

noted that the exemplar graph itself had not been actually entered into evidence by the court.

State v. Wiggins, 35 TAM 34-26 (Tenn. Cr. App. 06-22-10)

## **EXPUNGEMENT**

### **EXPUNGEMENT: TRIAL COURT'S IMPROPER DENIAL OF PETITION TO EXPUNGE AFTER DISMISSAL OF SEVERAL CHARGES IN A MULTI-COUNT INDICTMENT**

HELD: T.C.A. §40-32-101 provides for the destruction or release of records and provides that all public records of a person who has been charged with a misdemeanor or felony will, upon petition by that person, be removed and destroyed without cost to the person, if the charge has been dismissed.

The Court of Criminal Appeals found that each count of a multi-count indictment represents a separate case, and therefore the trial court in the present case had acted illegally by refusing to grant the petition to expunge the petitioner's dismissed charges. The trial court's judgment was reversed and the case remanded for entry of order of expungement of all cases that had been dismissed.

PRACTICE POINT: A comparable situation for General Sessions Judges is that if several warrants are taken out against a defendant, and several warrants are dismissed after trial or pursuant to a plea agreement, the charges which are in fact dismissed can be expunged.

Fowler v. State, 36 TAM 1-25 (Tenn. Cr. App. 11-04-10)

## ***FACILITATION OF MISDEMEANOR***

### **FACILITATION OF MISDEMEANOR: NOT A CRIME UNDER TENNESSEE LAW**

HELD: T.C.A. §39-11-403, the statute under which the defendant was convicted, makes no reference to facilitation of misdemeanors . The Court of Criminal Appeals therefore concluded that facilitation of a misdemeanor is not a crime under Tennessee law.

Since the jury had determined that the value of the stolen washer and dryer and a ladder was only \$500, the only reasonable conclusion was that the defendant was convicted of facilitation of a misdemeanor, which is nonexistent in Tennessee. The court found that under these circumstances, the defendant's conviction for facilitation of a misdemeanor was reversed and dismissed.

State v. Spicer, 35 TAM 50-19 (Tenn. Cr. App. 10-19-10)

## ***FINANCIAL RESPONSIBILITY LAW***

### **VIOLATION OF FINANCIAL RESPONSIBILITY LAW: OFFICER'S TESTIMONY CREDITED OVER DEFENDANT'S CLAIM THAT HE HAD INSURANCE COVERAGE**

HELD: The Court of Criminal Appeals found that the evidence was sufficient to convict the defendant of violating the financial responsibility law. The trooper who was investigating an accident testified that the defendant showed no proof of insurance on the vehicle at the time of the accident or any time afterward.

The Court of Criminal Appeals found that the jury was free to discredit the defendant's testimony that he had no proof of insurance because he had just purchased the vehicle and the proof had not yet arrived.

The defendant had also claimed that he was under a grace period from his previous automobile insurance policy. The court noted that the defendant did not introduce any evidence of insurance coverage to support his claim and therefore the jury was free to credit the officer's testimony over that of the defendant.

PRACTICE POINT: The claim of the defendant could be found to be reasonable, particularly if the defendant had proceeded to support his claim with a valid showing of insurance coverage. This was a case where the fact finder (jury) had credited the officer, and the Court of Criminal Appeals was merely affirming the fact that the fact finder could choose to credit the officer over the testimony of the defendant.

State v. Pitts, 35 TAM 37-21 (Tenn. Cr. App. 07-22-10)

## ***FORFEITURE OF PROPERTY***

### **FORFEITURE OF PROPERTY: NO CONNECTION WITH ILLEGAL DRUG ACTIVITY ESTABLISHED TO SUPPORT FORFEITURE OF CURRENCY**

FACTS: The petitioner was an Indiana resident who was driving, along with his fiancé and her children, from Atlanta, GA on I-65 through Tennessee. The vehicle came to the attention of Sumner County officer due to tail gating and swerving. When the vehicle was stopped, the fiancé was actually driving. The petitioner ended up being placed under arrest for driving on a suspended license and the vehicle was searched. \$60,317.00 in currency was located in the vehicle. \$2,917.00 was on the petitioner's person but initially the petitioner had denied ownership of the remaining \$57,400.00 dollars. Later, the petitioner did claim that the currency was his.

HELD: There was insufficient evidence to support an administrative law judge's finding that the currency found during the search of the vehicle following a traffic stop was subject to forfeiture. The proof was insufficient to establish that it was drug money, and the inconsistent and implausible statements by the petitioner were not sufficient to demonstrate connection

with illegal drug activity. The evidence used by the administrative law judge for his finding included testimony of an officer that he was told by an Indiana DEA agent that the petitioner's conduct was suspicious for being involved in illegal drug traffic. This testimony was insufficient as it was both hearsay and speculative. The court concluded that there was no evidence to link the currency with any illegal drug activity and the proof was insufficient under Tennessee law to meet the threshold requirement that the seized property was "used in a manner making it subject to forfeiture."

Currie v. State Department of Safety, 35 TAM 37-42 (Davidson Chancery Ct. 06-09-10)

## ***GUILTY PLEA***

### **GUILTY PLEA: DEFENDANT'S FAILURE TO SIGN GUILTY PLEA DOES NOT RENDER GUILTY PLEA VOID**

HELD: The defendant's convictions for aggravated kidnapping, aggravated burglary, aggravated robbery, and theft were held not to be void simply because the defendant had failed to sign the plea agreement. The court found that although Tennessee Rule of Criminal Procedure 11(e) requires that a guilty plea be signed by the defendant, the rule does not specify the effect of the omitted signature. The court found that given the fact that the trial court had properly questioned the defendant at the plea hearing and that the defendant stated he wished to plead guilty, the trial court did not breach a clear and unequivocal rule of law by accepting the plea agreement.

State v. Patterson, 36 TAM 1-24 (Tenn. Cr. App. 11-10-10)

## **GUILTY PLEA: READING OF RIGHTS EN MASSE IN GENERAL SESSIONS COURT**

**FACTS:** The defendant/petitioner in the present case claimed that his pleas of guilt were unknowing and unintelligent based upon the fact that the General Sessions Court used an en masse procedure of reading rights, and the defendant claimed that such was deficient and failed to communicate to the defendant his rights. The defendant further claimed that the court's individually colloquy with the defendant did not inform him of the nature of the charges and were unsatisfactory.

**HELD:** The Court of Criminal Appeals found that even though the petitioner had testified at the evidentiary hearing that he did not understand his constitutional rights that were given to him by the General Sessions Judge at an en masse reading of his rights, the other proof established that the defendant had in fact understood his rights when making his guilty plea. The Court of Criminal Appeals noted that the defendant had responded, "yes, sir" when asked whether he had understood his rights at the en masse reading. The court noted that other proof established that the defendant had familiarity with criminal proceedings which weighed heavily in favor of the conclusion that his guilty pleas were voluntary, knowing, and intelligent. The defendant also signed written waivers indicating that he understood his rights. The court also noted that there was no proof to establish that he was wrongfully denied an attorney as he had signed a waiver of his right to an attorney.

The court noted that a determination of whether or not the defendant has made a voluntary, knowing, and intelligent guilty plea is determined by the court's looking at the totality of the circumstances. The totality in this case included the sessions court's reading rights at en masse procedure, followed up with an individual colloquy with the defendant and a written waiver of his rights. The court also included a discussion of the defendant's familiarity with criminal proceedings and the fact that he had voluntarily waived his right to an attorney.

The court quoted from Howell v. State, 185 SW 3<sup>rd</sup> 319(Tenn.2006) and stated that a trial court substantially complies with the mandates of Boykin, Neal, and Rule 11 of the Tennessee Rules of Criminal Procedure when the "trial court communicates the entire litany of rights and other required information to multiple defendants in the presence of their

respective attorneys so long as the number involved is not so great as to make individual understanding unlikely. The Supreme Court had stated that “while we caution trial courts against conducting group plea hearings, such hearings do not constitute per se violations of Boykin, Neal, and Rule 11.” PRACTICE POINT: I personally like to read the totality of constitutional rights and statutory rights to the defendants en masse at the beginning of court in General Sessions Court. I like to use the occasion to get total quiet in the courtroom, establish the solemnity of the occasion, and go over the rights in some detail without people coming or going. This lets the defendants know their rights and the issues at hand prior to their entering into plea agreements or having final discussions with their attorneys.

In a day and age in which the public defender’s office handles a substantial percentage of the cases along with other appointed counsel, I think it is the best practice to make sure that criminal defendants are well informed even prior to announcing pleas and prior to the final discussions with counsel. Then, when the case is ready for a plea, I think it is important to have an individual colloquy with the defendant, at which time the defendant is questioned in general if he/she understood all the rights that were given by the sessions judge, asked if the defendant has any questions, and then have the defendant specifically addressed about understanding that his plea and written plea evidence that he is specifically waiving his right to a preliminary hearing, grand jury proceeding, jury trial, his right to confront and cross examine witnesses, right to put witnesses on the witness stand, and his right to testify in his own defense, and that he also is waiving his right to an appeal and waiving his right not to incriminate himself.

Rigger v. State, 35 TAM 45-34 (Tenn. Cr. App. 09-10-10)

**WITHDRAWAL OF GUILTY PLEA: WHILE RESTORING  
DEFENDANT’S CONSTITUTIONAL PROTECTIONS,  
COURT NOT REQUIRED TO RESTART THE CLOCK  
AND GIVE ADDITIONAL TIME FOR MOTIONS**

FACTS: The defendant was successful in getting the court to allow him to withdraw his guilty pleas, but the trial court denied the defendant’s motion to be permitted to file additional motions after the pretrial motions deadline.

HELD: The successful withdrawing of the guilty pleas by the defendant did in fact restore to the defendant his constitutional protections that otherwise would have been waived. The 6<sup>th</sup> Circuit Court of Appeals did find that the trial court was not required to restart the clock and give the defendant additional time and opportunity to enforce those rights.

The court found that although withdrawing his guilty plea entitled the defendant to avail himself of the full panoply of 4<sup>th</sup> Amendment protections, the withdrawal did not, standing alone, entitle the defendant to an extension on the pretrial motions deadline.

United States v. Walden, 36 TAM 2-36 (6<sup>th</sup> Cir. Ct. App. 11-17-10)

***IMMIGRATION STATUS OF DEFENDANT***

**NEW RULES OF TENNESSEE RULES OF CRIMINAL  
PROCEDURE: REQUIRE COURT ADDRESS IN OPEN  
COURT EFFECT UPON DEFENDANT’S  
IMMIGRATION STATUS**

NEW RULE: If ratified by General Assembly, Tennessee Rule of Criminal Procedure 11(b) would be amended to add that before accepting a guilty or nolo contendere plea, the trial court must address the defendant personally in open court and inform the defendant of and determine that said defendant understands, that upon a plea of guilty or nolo contendere, that it may have

an effect upon the defendant's immigration or naturalization status and further that the court must determine that the defendant has been advised by counsel of the immigration consequences of the plea.

In Re Amendments to Tennessee Rules of Criminal Procedure,  
36 TAM 3-2 (12-21-10); Effective 07/01/11 if passed.

## ***MANUFACTURE OF METHAMPHETAMINE***

### **ATTEMPT TO INITIATE MANUFACTURE OF METH: INITIATION ASPECT OF STATUTE IS NOT UNCONSTITUTIONALLY VAGUE OR BROAD**

HELD: The language of T.C.A. §39-17-435(c), the portion of the the statute which defines the term “initiate” as beginning the extraction of the immediate methamphetamine precursor from the commercial product, is not unconstitutionally vague or broad. The court found that the statute clearly defines the prohibited conduct and is not susceptible to differing interpretations.

The court concluded that the attempt to initiate the process intended to result in the manufacture of methamphetamine is an offense in the State of Tennessee.

State v. Banks, 35 TAM 37-24 (Tenn. Cr. App. 07-26-10)

## ***OFFICIAL MISCONDUCT***

### **OFFICIAL MISCONDUCT: DEFENDANTS AS EMPLOYEES OF A CORRECTIONS CORPORATION WERE “PUBLIC SERVANTS”**

HELD: The trial court erred in concluding that the defendants, who were

employees of CCA (The Corrections Corporation of America), were not “public servants”. The court noted that “public servant” means a person who is elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of the government, among other things. The court concluded that by operating a correctional facility, a function traditionally performed by the State, that CCA and its employees were engaged in a governmental function, and were thereby public servants. The judgment of the trial court was reversed and the case was remanded to the trial court for further proceedings, and prosecution could resume.

State v. Gilliam, 35 TAM 34-25 (Tenn. Cr. App. 07-06-10)

## ***PHOTOGRAPHIC ARRAY***

### **EYEWITNESS IDENTIFICATION: PHOTOGRAPHIC ARRAY FOUND TO BE ADMISSIBLE AS PHOTOS WERE NOT UNDULY SUGGESTIVE**

FACTS: The defendant had argued that a lineup was unduly suggestive because it consisted of black and white photographs and did not depict the individuals’ size or build. The court noted that the identification procedure which was utilized were photos of a type used on driver’s licenses, which depicted the head and neck area of each man against a neutral background.

HELD: The court found that this was not unduly suggestive as all six men appeared to be young , white males with closely cropped hair. The court noted that there were some variations in hair, eye and skin color but that these details were limited by the quality of the photocopied photos. The court found that there was nothing unduly suggestive about the use of head shots rather than photos which depicted the size and build. The court pointed out that the witness observed the suspect sitting in a car and that the opportunity to observe the size and build of the defendant would have been limited.

The Court of Criminal Appeals held that the trial judge committed error in granting the defendant’s motion to suppress.

The Court also noted that even if the lineup had been unduly

suggestive, the identification of the defendant by the witness was not tainted by the photographic array. The witness testified that he could see two people in the front seat for about 30 seconds and that he had focused on the passenger in the car, i.e. the defendant, who was the person doing damage to the victim's car. The witness testified that he looked the passenger in the eye and that he was 100 % certain in identification of the defendant as the suspect, and that he "could see him as clear as day."

State v. Ciobanu, 35 TAM 34-24 (Tenn. Cr. App. 07-02-10)

## ***PROBATION REVOCATION***

### **PROBATION REVOCATION: IMPROPER WHEN PROBATION OFFICER HAD NO PERSONAL KNOWLEDGE OF ALLEGATIONS MADE IN VOP WARRANT**

HELD: Under the circumstances of the case, the trial judge abused his discretion in revoking the defendant's probation and ordering him to serve the remainder of an eight year sentence in confinement. The court noted that the only testimony offered at the hearing was that of the probation officer who had no personal knowledge of any of the allegations made in the VOP warrant.

The court concluded, however, that the trial court had incorrectly ruled that it could not consider information contained in the arrest warrant. The court noted that the arrest warrants alone, with supporting affidavits, may have been sufficient to support the revocation. The court noted that, nonetheless, the arrest warrants were not in the record and therefore it could not be determined if the records were certified copies or what facts were contained in the arrest warrants.

The case was remanded to the trial court for a hearing to determine whether the preponderance of the evidence justifies revocation of the defendant's probation.

PRACTICE POINT: It is interesting to note that the appellate court

concluded that the trial court had incorrectly ruled that it could not consider the information in the arrest warrants. The court then determined that arrest warrants alone may be sufficient to support a revocation when combined with supporting affidavits. The court noted that the arrest warrants probably need to be placed into the record by the state, at least in a court of record. It is important to note that arrest warrants alone, when certified, could be sufficient to support a revocation.

State v. Winn, 35 TAM 34-36 (Tenn. Cr. App. 06-22-10)

## ***RESISTING ARREST***

### **RESISTING ARREST: VIOLENTLY PULLING AWAY FROM OFFICER ATTEMPTING TO HANDCUFF DEFENDANT SUFFICIENT FOR CONVICTION**

HELD: Evidence was sufficient to convict the defendant of resisting arrest due to the fact that the proof showed the defendant intentionally obstructed the officer's efforts to conduct her arrest. The officer had testified that the defendant pulled away from him "three good times with all her might." The defendant was eventually forced to the ground and was "violently resisting the entire time." The proof showed that her hands were flailing around in the area and she basically would not follow the officer's commands. The court noted that although the defendant did not attempt to hit the officer, the violent resistance of the defendant established circumstances that required force by the police and constituted resisting arrest.

State v. Leke, 35 TAM 48-22 (Tenn. Cr. App. 10-15-10)

## ***RESTITUTION***

### **VICTIM TESTIMONY: SUFFICIENT TO ESTABLISH HOW VICTIM ARRIVED AT VALUE OF STOLEN ITEMS**

FACTS: Although the victim could only guess at the value of certain of the stolen items, the victim did explain how she arrived at the amount of damages requested. The court also noted that although she originally valued the stolen items at between \$10,000 and \$15,000, her later itemized testimony did establish a combined value of between \$19,874 and \$20,874. HELD: The victim adequately established the source of her estimates. The court also noted that the total amount of restitution ordered(\$15,500) was sufficiently below the victim's itemized estimate total so as to account for any inaccuracy in some of the victim's individual estimates.

The court also found that the trial court did not err in ordering the defendant to pay the victim \$323 per month. The court noted that even though the trial court did have a certain combative tone in ordering the restitution, the trial court had allowed the defendant to testify regarding his medical and disability status. The court noted that the trial court had simply found the defendant's testimony to be lacking in credibility and had properly concluded that the defendant was sufficiently capable to pay \$323 per month in restitution.

PRACTICE POINT: There have been several cases recently by the appellate courts which found that trial judges had not done a sufficient job in ascertaining the ability of defendants to pay the restitution. This case appears to give some latitude to trial courts in determining the amount of the damages, reflecting upon the testimony of the victims even when somewhat uncertain, and in determining the amount that the defendant is capable of paying per month.

State v. Bradley, 35 TAM 37-29 (Tenn. Cr. App. 07-21-10)

## ***ROBBERY***

### **ROBBERY: REQUIREMENT OF TAKING OF PROPERTY BEING CONTEMPORANEOUS WITH THE USE OF VIOLENCE OR FEAR**

FACTS: The defendant was attempting to exit the store with two televisions in his shopping cart when he was asked by a store cashier to produce the receipt as he attempted to exit. The defendant began pushing the cart forward in an aggressive manner toward the cashier, at which time the cashier noticed that the defendant had his hands clinched on the handle of the cart and saw a knife blade protruding from the defendant's hand. The defendant moved towards the cashier with the knife and the cashier released the cart and allowed the defendant to exit the store with the two televisions. HELD: The use of the cart and the knife going towards the cashier caused fear in the cashier which was contemporaneous with the taking of the televisions. The state did establish that the taking of the property was contemporaneous with the use of the violence or fear under the circumstances.

State v. Greer, 36 TAM 2-20 (Tenn. Cr. App. 11-12-10)

## ***RULE OF SEQUESTRATION***

### **RULE OF SEQUESTRATION: NO ERROR TO ALLOW DESIGNATED PROSECUTING WITNESS TO REMAIN IN COURTROOM SINCE HE WAS ALSO STATE EXPERT WITNESS**

FACTS: The defendant had claimed that the trial court had committed error in failing to exclude the investigator from the courtroom pursuant to the rule of sequestration. HELD: The investigator was properly allowed to remain in the courtroom pursuant to the exceptions to the rule of sequestration embodied within

Tennessee Rule of Evidence 615. Due to the fact that the investigator was the state's only designated representative, and that he also was the state's expert witness, the investigator was permitted to testify after hearing other witnesses' testimony.

The court noted that the investigator's presence was essential to the state's prosecution, the defendant failed to show any prejudice due to the result of the investigator testifying after other witnesses, and nothing in the record indicated that the investigator changed his testimony after hearing the testimony of other witnesses.

State v. Fowler, 35 TAM 48-18 (Tenn. Cr. App. 09-29-10)

## ***SEARCH AND SEIZURE***

### **CANINE SWEEP OF VEHICLE: NOT DEEMED TO BE A "SEARCH" UNDER THE FOURTH AMENDMENT**

FACTS: The defendant's vehicle was stopped for violation of the "move over law". The officer placed the defendant in the police vehicle based on safety concerns. During a ten minute wait, the officer ran his drug dog around the defendant's vehicle which resulted in the dog alerting on the vehicle.

HELD: A canine sweep of a vehicle is not a "search" under the fourth amendment and is reasonable if performed during the time necessary to effectuate the traffic stop. The court found that the dog sniff in the present case occurred during a reasonable period of time for the officer to complete the traffic stop. The dog's subsequent alerts gave the officer probable cause to search the defendant's car. The court also noted that the defendant was only in the back of the police vehicle for two minutes approximately before the dog had alerted on the car. The court found there was no basis to suppress the drugs discovered as a result of the search.

State v. Cooper, 35 TAM 47-23 (Tenn. Cr. App. 09-29-10)

**CONFIDENTIAL INFORMANT: A DEFENDANT HAS NO EXPECTATION OF PRIVACY REGARDING A CONVERSATION WITH CONFIDENTIAL INFORMANT TO WHOM THE DEFENDANT TALKS FREELY AND VOLUNTARILY**

FACTS: The defendant argued that it was in violation of his constitutional rights in Tennessee Constitution Article 1, Section 7 for the police to invade the privacy of his home by employing an informant to use an electronic surveillance device to record what went on in the defendant's home without first obtaining a search warrant.

HELD: The warrantless recording of a conversation between the defendant and an informant occurring in the defendant's home does not violate either the 4<sup>th</sup> Amendment or the Tennessee Constitution Article 1, Section 7. The court noted that when a suspect allows a confidential informant to enter his or her residence, and he or she freely and voluntarily talks to said informant, the suspect has no expectation of privacy regarding the conversation.

The trial court properly denied the defendant's motion to suppress as the recording of the conversation in the defendant's home was constitutional under both the federal and state constitutions.

State v. Summey, 35 TAM 35-22 (Tenn. Cr. App. 07-21-10)

**CONSENT TO SEARCH: REASONABLE BELIEF BY OFFICERS THAT EX-WIFE WAS STILL CO-OWNER OF PROPERTY WITH RIGHT TO CONSENT**

FACTS: Officers in the present case were involved in a fugitive hunt for Flesher, a known associate of the defendant and the defendant's ex-wife (Johnson). The officers believed that the defendant and Johnson were still married, and the officers approached Johnson to seek consent to search the property during the manhunt. Johnson did in fact grant consent to search, and the officers subsequently located illegal contraband (a marijuana laboratory) in a garage on the defendant's property. The defendant was

subsequently arrested and charged with manufacturing marijuana along with other crimes.

The defendant filed a motion to suppress the drugs found on the property, and the trial judge denied the motion.

HELD: The trial judge properly denied the defendant's motion to suppress marijuana. The trial court had found that Johnson had an actual common authority over the property because she utilized the garage and/or shop for the repair of vehicles under her control and because one of her employees worked in the shop.

The court noted that "common authority" is defined as "mutual use of the property by persons generally having joint access or control for most purposes."

The Court of Criminal Appeals concluded that Johnson did not have common authority over the property in question. The court noted that the mere fact that an employee utilized the shop on rare occasions to repair vehicles is not the type of interest necessary to establish common authority over the property. The court noted that the record clearly showed that Johnson had no actual ownership interest in the property nor was it established that she utilized the property in any way to establish actual authority over the property.

The court went on to conclude that the state may also establish common authority in a second way, which is by demonstrating that facts available to the police officers making the search would have warranted a person of reasonable caution in the belief that the consenting party had authority over the premises. The officers had testified that from working in Cannon County and from hearing things about the defendant and Johnson that they had a reputation in the community as being married and living together and that the property was called the Johnson property. The court found that all of the proof taken together supported the fact that general knowledge in the community was that the defendant and Johnson remained together. The court concluded that the officers could not be faulted for failing to seek additional information about these facts and concluded that if an officer reasonably believes that two people are co-owners of property, then he or she is not required to inquire further of the parties with regard to their actual ownership interest. The court found that even though the ex-wife, Johnson, had no actual common authority over the garage on the defendant's property, the proof did warrant finding that a person of

reasonable caution would believe that the consenting party had authority over the premises. The court concluded that the marijuana was therefore properly admitted at trial.

State v. Johnson, 35 TAM 36-22 (Tenn. Cr. App. 07-22-10)

### **OFFICER'S INQUIRY INTO IDENTIFICATION OF PASSENGERS: NOT RENDERED UNREASONABLE TRAFFIC STOP**

HELD: The trial court properly denied the defendant's motion to suppress. The court found that the officer had reasonable justification to stop the vehicle due to the display of an altered license plate. The court found that once the vehicle was stopped the officer's limited inquiry into the identification of the passengers in the vehicle while in the process of citing the driver for the altered tag did not render the traffic stop unreasonable. The officer had testified that after she asked the defendant for identification, the defendant handed her his identification and she wrote down his name and birth date and returned the license. The court found that given the fact that the officer witnessed the defendant, a passenger in the lawfully stopped vehicle, make furtive movements as she pulled the vehicle over, the officer had the right to seek identification of the passengers and to conduct a warrant check.

State v. Frierson, 36 TAM 3-22 (Tenn. Cr. App. 12-14-10)

### **PLAIN VIEW: OFFICERS INVESTIGATING DOMESTIC SITUATION VIEW DRUGS AND DRUG PARAPHERNALIA IN PLAIN VIEW**

FACTS: Officers were dispatched to the defendant's residence to investigate a domestic situation after being summoned to the residence by a

female who expressed some alarm. Upon arriving at the residence to investigate the domestic situation, the officers observed the defendant carrying shotgun shells and marijuana and also saw marijuana and drug paraphernalia in plain view through a bathroom window.

HELD: The trial court properly denied the defendant's motion to suppress upon finding that there were exigent circumstances to support their entry into the defendant's residence. The court further found that once the officers were there that the testimony supported the fact that the marijuana and drug paraphernalia were in plain view. Since the officers were justified in being at a location where they could see the contraband in plain view, the evidence was admissible. The incriminating nature of the evidence was immediately apparent to the officers.

State v. Arnold, 35 TAM 37-23 (Tenn. Cr. App. 07-26-10)

## **SEARCH OF RESIDENCE: OFFICER ENTRY INTO RESIDENCE JUSTIFIED BY EXIGENT CIRCUMSTANCES OF 911 HANG-UP CALL**

FACTS: Officers received a call from the police dispatcher requesting them to respond to a "911 hang-up". Such a call occurs when the caller dials 911 and hangs up before speaking with the operator and then the operator is unable to reach the caller upon attempt to return the call. The officer approached the house and found that the front door was wide open and announced that police were present. When there was no response, the officer entered the residence with his weapon drawn. Subsequent confrontation resulted in the officer fatally shooting Johnson. Johnson's widow then filed a claim against multiple defendants including the City of Memphis and the Memphis Police Department. The District Court granted summary judgment to the defendants and this appeal resulted.

HELD: The 6<sup>th</sup> Circuit Court of Appeals held that the District Court had properly granted summary judgment to the defendants. The 6<sup>th</sup> Circuit declined to establish a per se rule for all 911 hang-up calls and stated that

instead it rested its decision on the specific facts of the present case. The court found that a combination of the 911 hang call, unanswered return call, and the open door with no response from within the residence was sufficient to satisfy the exigency requirement. The 6<sup>th</sup> Circuit concluded that the District Court was correct in finding that the police were justified in entering the home to sweep for the person in need of immediate assistance under the emergency aid exception. The court found that the response of officers in the present case was objectively reasonable under the circumstances.

It was an unfortunate situation as officers later learned that the deceased was not ordinarily dangerous but was bipolar and was off his medication. The plaintiff, the widow of the deceased, had dialed 911 and then had hung up the phone in order to leave the house. She called back a few minutes later and informed the dispatcher of the deceased's medical condition but the information did not reach the officers on the scene until it was too late.

Johnson v. City of Memphis, 35 TAM 42-43  
(6<sup>th</sup> Cir Ct App. 08-24-10)

**SEARCH WARRANT: AFFIDAVIT ESTABLISHED  
SUFFICIENT NEXUS BETWEEN DRUG DEALER  
AND RESIDENCE EVEN IF HOUSE WAS NOT  
DEFENDANT'S FORMAL RESIDENCE**

FACTS: The affidavit for a search warrant established that an informant contacted the defendant and set up a drug buy. The officers observed the defendant leave the residence (which was ultimately searched), travel to the agreed upon location, make a sale of drugs, and then return to the same residence.

The trial court granted the defendant's motion to suppress the evidence and dismissed the charge against the defendant.

HELD: The trial court erred in granting the defendant's motion to suppress evidence. The Court of Criminal Appeals held that it was not necessary that

an affidavit in support of a search warrant establish that the place to be searched is the drug dealer's formal residence, only that the drug dealer (defendant) is using the home to store drugs or drug related material. The Court of Criminal Appeals noted that the police observed the defendant leave the home, go to the place of the drug sale, and then return to the home. The court found that the observations of the police officers established at a minimum that the defendant was free to come and go from the residence. The court concluded that the affidavit established a nexus between the drug dealing, the dealer, and the residence, and that the magistrate had probable cause to issue the search warrant.

State v. Gleaves, 35 TAM 39-20 (Tenn. Cr. App. 08-13-10)

### **SEARCH WARRANT: FATAL ERROR OF JUDGE IN INADVERTENTLY WRITING "P.M." INSTEAD OF "A.M."**

HELD: The trial court erred in denying the defendant's motion to suppress drugs discovered as a result of an execution of a search warrant of the defendant's residence. The court found that the search warrant failed to strictly comply with the requirements of Tennessee Rule of Criminal Procedure 41(c).

The court found that the trial judge had committed an error in inadvertently writing "P.M." instead of "A.M." on the original and the defendant's copy of the search warrant which rendered the search warrant invalid. Tennessee Rule of Criminal Procedure 41 requires that a magistrate endorse upon the search warrant the hour, date, and name of the officer to whom the search warrant was delivered for execution.

State v. Hayes, 35 TAM 39-19 (Tenn. Cr. App. 08-18-10)

**SEARCH WARRANT: HELD INVALID BECAUSE  
TENNESSEE GENERAL SESSIONS JUDGE WHO  
SIGNED SEARCH WARRANT PRESIDED IN A  
DIFFERENT COUNTY AND LACKED AUTHORITY  
TO ISSUE SEARCH WARRANT**

HELD: The District Court erred in denying the defendant's motion to suppress the evidence found at his home pursuant to the execution of the search warrant. The court found that the Tennessee General Sessions Judge who signed the search warrant application presided in a different county from the defendant's residence. The court therefore concluded that under Tennessee law the judge had no authority to authorize the warrant. The court found that such lack of authority is relevant in a prosecution which occurs in federal court. The search therefore violated the defendant's fourth amendment rights.

The court went on to state that it would address the government's argument that even if the warrant was invalid, the search should be upheld pursuant to the good faith exception to the exclusionary rule. The government argued that the search warrant had been sought in Franklin County in part because the defendant himself had stated on his sex offender registration that his residence was in Franklin County. The court noted that there did not appear to be any improper motivation to seek out the Franklin County Judge as opposed to the Coffey County Judge. The case was remanded to the District Court to consider actions of all the police officers involved and to make a decision on the good faith issue. The court did note that jurisdictional limits placed on a state court judge should be respected and that any intentional attempts to avoid adhering to the jurisdictional limitations imposed by state law is conduct that can and should be considered and deterred by the judiciary.

United States v. Master, 35 TAM 42-44 (6<sup>th</sup> Cir Ct App. 08-31-10)

## **SNIFF BY K-9: ACTIVE SNIFFING IS SUI GENERIS AND DOES NOT IMPLICATE LEGITIMATE PRIVACY INTEREST**

HELD: The “sniff” of a narcotic seeking dog is sui generis and does not implicate any legitimate privacy interest, and therefore a dog sniff does not per se constitute a search under the 4<sup>th</sup> Amendment. The court found that therefore the dog sniff requires neither probable cause nor reasonable suspicion.

The trial court properly denied the motions to suppress filed by the defendants.

State v. Cole, 36 TAM 2-21 (Tenn. Cr. App. 12-06-10)

## **VEHICLE SEARCH: CONSENT TO SEARCH VEHICLE INCLUDED CLOSED KITTY LITTER CONTAINERS**

FACTS: An officer observed the defendant’s car brake and swerve once it saw the patrol car. The officer also saw the car cross the fog line three times within a relatively short period and noted that the defendant was traveling at well below the posted speed limit.

Subsequently, the defendant granted consent to search his vehicle. In the trunk, the officer found several closed cat litter containers which took up most of the trunk. A search of the containers revealed illegal drug contraband.

HELD: The officer’s initial investigatory stop of the vehicle was proper based upon the observations of the officer and the defendant crossing the fog line and the other conduct.

The court also found that the stop was of reasonable duration, lasting approximately 25 minutes, and that the stop was reasonably related in scope to the circumstances of the stop. The 6<sup>th</sup> Circuit Court of Appeals also determined that the consent to search the vehicle extended to the closed cat litter containers. The defendant had consented to a search of the car without expressly limiting the scope, and a reasonable person would have

understood the consent to search to include the closed containers. The court also found that the officer had probable cause to believe that contraband would be found in the containers because of the totality of the suspicious circumstances and the fact that the containers appeared heavier than the 35 pounds that were supposed to be in the container.

United States v. Guajardo, 35 TAM 39-36  
(6<sup>th</sup> Cir. Ct. App. 08-05-10, not to be published)

**VEHICLE STOP: OFFICER PAT DOWN WAS  
REASONABLE AND WAS NOT UNLAWFUL  
PRETEXT**

FACTS: An officer observed the defendant commit a series of traffic violations, which included speeding and running a stop sign. After the stop, the officer had to order the defendant to return to his car at least three times after the pursuit had finally ended. The officer proceeded to do a pat down of the defendant which led to discovery of incriminating evidence.

HELD: The District Court properly denied the defendant's motion to suppress. The court noted that the officer was the only witness called during the suppression hearing and therefore the defendant did not introduce any contradictory testimony regarding the traffic violations. The 6<sup>th</sup> Circuit Court of Appeals concluded that the officer's pat down search of the defendant was reasonable based upon the fact that the officer had recognized the defendant as a suspected crack dealer and had observed the traffic violations and the fact that the defendant was very nervous and did not respond when asked whether he was carrying any weapons.

United States v. Sutton, 35 TAM 40-26  
(6<sup>th</sup> Cir. Ct App. 08-09-10, not to be published)

**“VERBAL SEARCH”: OFFICER QUESTIONING  
DEFENDANT AS TO WHETHER OR NOT HE HAD  
WEAPON NOT AN IMPROPER “VERBAL SEARCH”  
UNDER CIRCUMSTANCES OF CASE**

FACTS: Police officers received a tip from an informant that a methamphetamine sale would take place at a Waffle House at Boone’s Creek. Several facts were given by the informant to the officers who were waiting in a lot adjacent to the Waffle House when the suspects showed up in a black Mustang. The officers noticed that neither the driver nor the passenger were wearing a seatbelt and the officers pulled the vehicle over. The officers asked the occupants to step out of the vehicle and as the defendant was walking toward the rear of the car the officer saw him place his hand in his pocket and grab something. The officer was concerned about the defendant reaching for a weapon and asked the defendant if he had anything in his pocket. The defendant admitted that he had a pistol and the officer proceeded to remove the defendant’s hand from his pocket and retrieved a snub-nosed revolver. The co-defendant was asked to step out of the vehicle and was also frisked for weapons at which time crystal meth was found on him.

HELD: The District Court properly denied the defendant’s motion to suppress the evidence obtained from the search of the defendant’s car in the Waffle House parking lot. The court noted that in regard to the first defendant, the officer had probable cause to stop the vehicle because of the non-use of seatbelts. The court also found that the officers had the legitimate right to ask the driver or other occupant to exit the vehicle. When the officer saw the defendant stick his hand in his pocket and grab something, the officer was within his rights to ask whether or not he had a weapon. The court found that this did not amount to an illegal “verbal search”, a situation in which an officer will direct a defendant to empty his pockets and then disclaim any constitutional violation based upon the ground that he had not touched the suspect or any way searched him. In this case, the officer’s actions in questioning the defendant were proper based upon the defendant’s sticking his hand in his pocket and grabbing something. The subsequent search of the defendant’s pocket was legitimate after the defendant admitted carrying a handgun. All of the evidence was properly seized under the circumstances.

United States v. Street, 35 TAM 36-32 (6<sup>th</sup> Circuit Ct App.07-23-10)

## ***SENTENCING***

### **JUDICIAL DIVERSION: COURT NEEDS TO NOTE ANY ANNOUNCED AGREEMENT ON THE RECORD IF THERE IS AGREEMENT**

**FACTS:** The defendant had argued that the state violated its agreement not to oppose judicial diversion. The defendant claimed that when the case was before the General Sessions Court that the state had refused diversion but had agreed not to oppose judicial diversion at the Circuit Court level.

**HELD:** The record had several documents from General Sessions Court but there was no mention of any agreement by the state not to oppose judicial diversion at the Circuit Court level. The court found that no agreement could be enforced at the Circuit Court level because the record contained no proof regarding the existence of an agreement.

**PRACTICE POINT:** While it is certainly up to the parties, being the state or the defense, to document any agreement that they have, it is important for General Sessions Courts to note any announcements made on the record as part of any court action. For instance, if an announcement is made that the defendant is waiving his right to a preliminary hearing and that the parties have agreed to a resolution in which judicial diversion will not be opposed by the state, the court could request that an agreed order be signed to that effect, or that the parties enter into a letter to that effect with a copy to the clerk, or that a notation be made by the clerk on the warrant to note the announcement. If it is important enough to state such a fact on the record, it is important enough to document it in some way.

State v. Willis, 35 TAM 46-27 (Tenn. Cr. App. 09-15-10)

## ***SEX OFFENDER REGISTRATION***

### **CONVICTION FOR STATUTORY RAPE: STANDING ALONE SAID CONVICTION WAS INSUFFICIENT TO REQUIRE REGISTRATION AS A SEX OFFENDER UNDER THE SEX OFFENDER ACT**

HELD: The defendant's conviction for statutory rape, standing alone, was insufficient to require his registration as a sex offender under the sex offender and violent sexual offender registration act. The act only requires registration as a sex offender if the defendant has been convicted of statutory rape and has one or more prior convictions for either mitigated statutory rape, statutory rape, or aggravated statutory rape.

State v. Smith, 35 TAM 38-28 (Tenn. Cr. App. 07-29-10)

## **STALKING**

### **STALKING: FACTUAL EVIDENCE SUFFICIENT TO CONVICT DEFENDANT OF STALKING 18 YEAR OLD WALMART PHARMACY TECHNICIAN**

HELD: The facts were sufficient to convict the defendant of stalking the victim. The defendant repeatedly showed up at the 18 year old victim's place of employment, Walmart Pharmacy, for a period of approximately three months. He would stare at her, attempt to engage her in conversation, which she attempted to ignore. During one month (December), the defendant approached the victim and attempted to give her a gift and card which she refused. The victim's coworker told the defendant to leave her alone. The defendant ran up to the victim one time as she was entering Walmart and attempted to speak to her at which time the victim informed the defendant that she was married and to leave her alone. The victim one time noticed the defendant behind her at the Valentine's Day aisle, following which she quickly left the store and walked to her truck. She

found a card, a rose with a ring inside, and teddy bear on the windshield of her vehicle. The defendant had indicated on the card that he loved the victim and wanted to marry her and expressed his desire to take her to Mexico.

The court found that the proof established reasonable fear on the part of the victim and that the defendant's actions constituted stalking.

State v. Iniguez, 36 TAM 3-21 (Tenn. Cr. App. 11-15-10)

## ***TAMPERING WITH EVIDENCE***

### **TAMPERING WITH EVIDENCE: NO REQUIREMENT THAT STATE ESTABLISH "EXACT THING" WHICH ACCUSED ALLEGEDLY TAMPERED WITH**

FACTS: Officers were executing a search warrant on the defendant's apartment and yelled out search warrant and police as they entered the apartment. The officers could see the defendant seated at a kitchen table and that the defendant took off running and disappeared from view. The officers then heard the instantaneous sound of a toilet flushing. The defendant was coming out of the bathroom fully clothed and was taken into custody.

HELD: The circumstantial evidence substantiated the charge of tampering with evidence. The Court of Criminal Appeals found that the defendant had knowledge of the investigation in progress when he rushed from his place at the kitchen table to the bathroom and immediately flushed the toilet. The court found that all of the facts were sufficient for a reasonable trier of fact to conclude that the defendant had knowledge of the investigation and rushed to the bathroom and flushed something down the toilet.

The court also found that the language of T.C.A. §35-16-503, tampering with evidence, does not require that the state establish the exact thing which the accused allegedly tampered with. The court said that the legislature could require the exact identity of the evidence that was

tampered with but that the legislature had not done so under the current statute.

State v. Majors, 35 TAM 37-1 (Tenn. Supreme Ct. 09-03-10)

## ***TENNESSEE RULES OF EVIDENCE***

### **LEADING QUESTIONS: AMENDMENT OF TENNESSEE RULE OF EVIDENCE 611(c)**

NEW RULE: If ratified by the General Assembly, Tennessee Rule of Evidence 611 (c) will take effect on 07-01-11 and would be amended to allow an attorney to ask leading questions when calling “witness identified with an adverse party” in all civil and criminal proceedings.

In Re Amendments to Tennessee Rules of Evidence,  
36 TAM 3-3 (12-21-10)

## ***THEFT***

### **THEFT OF SERVICES: FAILURE TO REPORT TO HOUSING AUTHORITY EARNINGS THAT COULD INCREASE THE AMOUNT OF RENT IS NOT THEFT OF SERVICES UNDER STATUTE**

HELD: The definition of “services” in the T.C.A. §39-11-106(a)(35) does not include public housing. The court found that the listing of services in the statute does not include a listing for public housing and that public housing was readily distinguishable from most of the statutes specifically listed terms and categories.

State v. Marshall, 35 TAM 37-2(Tenn. Supreme Ct. 09-03-10)

## **UNAUTHORIZED USE OF VEHICLE: “JOY RIDING” IN A ROTO-ROOTER VAN**

HELD: The defendant’s conviction for theft of the Roto-Rooter van was reversed due to error in instructing the jury on the lesser included offense of unauthorized use of a vehicle, i.e., “joy riding”. The defendant testified that his intent in taking the vehicle was to take the vehicle to his home and place his tools at home, before returning to his employment to exchange the van for his own vehicle. The Court of Criminal Appeals found that a reasonable fact finder could have convicted the defendant of the offense of unauthorized use of a vehicle instead of theft of a vehicle. The defendant had also testified that he felt threatened in the fenced-in lot because it was dark and three other men were approaching him.

State v. Harrison, 35 TAM 39-18 (Tenn. Cr. App. 08-17-10)

## **VALUE OF TIRES: JURY ALLOWED TO USE RETAIL VALUE RATHER THAN WHOLESALE PRICE**

FACTS: The defendant admitted to stealing the tires and the only issue before the jury was the value of the tires. The jury heard evidence that the retail price of the tires was \$79 per tire for eight tires. The jury also heard evidence that the wholesale price was \$55.

HELD: The jury by its verdict determined that the fair market value of the tires was \$79 per tire. The court concluded that the evidence was sufficient for a rational trier of fact to find that the fair market value of the property was over \$500(79 X 8).

State v. Leverette, 35 TAM 38-25 (Tenn. Cr. App. 07-26-10)

## ***TRANSFER FROM JUVENILE COURT TO ADULT COURT***

### **JUVENILE COURT TRANSFER: JUVENILE JUDGE PROPERLY CONSIDERED FACT THAT DEFENDANT WAS SUSPECT IN SEVERAL OTHER CRIMINAL OFFENSES**

HELD: Juvenile Court Judge properly considered the fact that the defendant was a suspect in several other serious criminal offenses in making his decision whether the defendant should be treated as an adult. The court noted that this factor is not specifically enumerated in the list of statutory factors that a Juvenile Court is to consider when deciding whether to transfer a juvenile to Circuit Court, but the Court of Criminal Appeals found that this factor is relevant to many of the enumerated factors in the statute.

This includes demonstrating the juvenile's inability to respond to treatment and rehabilitation.

The court had already found that the defendant had prior delinquency records in juvenile court including convictions for aggravated sexual battery, theft, evading arrest, and assault.

State v. Reed, 35 TAM 40-22 (Tenn. Cr. App. 08-31-10)

## ***VANDALISM***

### **ACCUSED WITH POSSESSORY INTEREST IN PROPERTY DESTROYED: NO DEFENSE TO CHARGE OF VANDALISM**

HELD: It is no defense to a charge of vandalism that the accused has a possessory interest in the property destroyed. The court found that instead, the state is required to prove only that the defendant caused damage to or destruction of any real or personal property of another knowing that the person does not have the owner's effective consent.

State v. Birdwell, 35 TAM 38-21 (Tenn. Cr. App. 07-29-10)

## ***VEHICLE STOP***

### **BROKEN TAIL LIGHT: OFFICER WITH ARTICULABLE AND REASONABLE SUSPICION THAT TAIL LIGHT VIOLATED STATUTE**

FACTS: A police officer had observed a bright light shining from the passenger's side tail light area of the vehicle that was driven by the defendant. The officer proceeded to stop the vehicle since it was obvious to the officer that the tail light was broken. The trial court denied the defendant's motion to suppress, finding that it was a legal stop. The Court of Criminal Appeals reversed the trial court and found that the tail light was in good condition and operationally under the provisions of T.C.A. §55-9-402 since the defendant had repaired it with red tail light tape.

HELD: The Tennessee Supreme Court reversed the holding of the Court of Criminal Appeals and found that the officer had reasonable suspicion to believe that a traffic violation had occurred.

The Supreme Court held that the Court of Criminal Appeals had erred by considering only whether the tail light on the defendant's automobile was in good condition and operational for purposes of T.C.A. §55-9-402(c). The court found that the proper inquiry should have been whether or not the officer had articulable and reasonable suspicion that the defendant's tail light violated T.C.A. §55-9-402, not whether the defendant's tail light had in fact violated T.C.A. §55-9-402. The court found that even though the defendant may have attempted to repair the broken tail light, the officer could still see white light coming through to establish an articulable and reasonable suspicion that the tail light violated the statute.

State v. Brotherton, 35 TAM 40-6 (Tenn. Supr. Ct. 09-27-10)

## **VEHICLE STOP: NO REASONABLE SUSPICION TO STOP VEHICLE WHEN LANE CHANGE OR TURN DID NOT CREATE HAZZARD**

FACTS: Officer testified that there was a medium amount of traffic on the interstate at the time of the stop and that the defendant's vehicle had other vehicles around it. The officer initially stopped the defendant's vehicle based upon his belief that she had violated T.C.A. §55-8-143(a), the failure to give a signal when intending to start, stop, turn, or partly turn from a direct line. The officer could not recall any nearby vehicle using its brakes or leaving the interstate as a result of the defendant's lane change.

HELD: The officer's testimony was insufficient to support a violation of T.C.A. §55-8-143(a). The court noted that in order to establish a violation of the statute, the evidence must show that the vehicle had turned or changed lanes without signaling and this failure to signal at least threatened to create a hazard involving other vehicles.

The court found that since the officer did not have probable cause to stop the defendant's vehicle, the defendant's conviction must be reversed.

This case also presents the issue of a statutory right to be cited and released under T.C.A. §40-7-118(b)(1). The court noted that while the defendant is correct that misdemeanants have the "presumptive right to be cited and released" under the statute, the statute only requires a cite and release "in lieu of effecting a custodial arrest for the misdemeanor at issue." It does not require police to avoid taking any action other than the issuance of a citation.

The court noted that in the present case the officer had completed the defendant's citation before he had verified her identity and driver's license, two legitimate reasons for a brief additional detention.

The Court of Criminal Appeals also used this case to reaffirm the proposition that police officers are only obligated to administer Miranda warnings prior to a "custodial interrogation." The defendant had argued that Miranda warnings were required because the officer had directed her to stand in front of the police vehicle and intermittently questioned her for approximately seven minutes. The court noted that these actions are entirely typical of a traffic stop in which the officer is attempting to confirm a driver's identity. The court also noted that such activity does not establish any deprivation of freedom of movement to a degree associated with a formal arrest. Therefore, the reading of Miranda Rights was not required.

State v. Feister, 35 TAM 35-21 (Tenn. Cr. App. 07-21-10)

## ***VIOLATION OF PROBATION***

### **PROBATION REVOCATION: PROOF NOT ESTABLISH VIOLATION OF PROBATION BY USING ALCOHOL TO EXCESS**

HELD: A trial court committed error in revoking the defendant's probation as the evidence in the case did not establish violation of probation by the defendant by using alcohol to excess and committing the offense of public intoxication.

The Court of Criminal Appeals concluded that the video tape from the police cruiser was inconsistent with the officer's testimony that the defendant's speech was slurred and that his gait was unsteady. The tape also clearly established that the defendant told the officer that he had consumed two beers and not several like the officer testified. The court found that the officer's mere testimony that the defendant's eyes were glassy and that he smelled of alcohol was not sufficient to establish by a preponderance of the evidence that the defendant had consumed alcohol to excess in violation of a specific rule of probation.

State v. Farrar, 35 TAM 45-27 (Tenn. Cr. App. 09-14-10)

### **VIOLATION OF PROBATION: ERROR IN REVOKING DEFENDANT'S PROBATION WHEN HE HAD NO ACTUAL OR WRITTEN NOTICE OF THE ALLEGED VIOLATION**

FACTS: The defendant was ordered to serve four years after his probation was revoked based upon violation of probationary Rule 10. Rule 10 was the alleged failure of the defendant to consent to a search of his residence.

HELD: The trial court erred in revoking the defendant's probation when there was no actual or written notice to the defendant of an alleged violation

of Rule 10. The defendant's due process rights were violated when the probation revocation warrant did not even allege a violation of Rule 10. The defendant was never given notice that his probation would be revoked on the basis of Rule 10 of his probation order, and the conviction for violation of probation must be reversed.

State v. Baker, 35 TAM 38-33 (Tenn. Cr. App. 07-26-10)

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Dwight E. Stokes  
General Sessions/Juvenile Judge  
125 Court Avenue, Suite 109W  
Sevierville, TN 37862  
865.908.2560  
e-mail: [desjd1@aol.com](mailto:desjd1@aol.com)  
Sevier County, TN

Judge Stokes was elected Judge of the Sevier County General Sessions and Juvenile Court for an eight year term which began on September 1, 1998. He was re-elected for a second eight-year term which began September 1, 2006. Prior to his judgeship, he practiced criminal and civil law in Sevier County, Tennessee, for more than twenty years. He holds a B.A. from Carson-Newman College in political science and received his Doctor of Jurisprudence degree from the University of Tennessee at Knoxville. He is a member of the Tennessee Council of Juvenile and Family Court Judges, Tennessee General Sessions Judges, and the National Council of Juvenile and Family Court Judges.