

TENNESSEE GENERAL SESSIONS JUDGES
CONFERENCE

SEPTEMBER 2022

Criminal Law Update
Chattanooga, Tennessee

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CRIMINAL LAW UPDATE

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CLOSING ARGUMENTS

LENGTH OF CLOSING ARGUMENTS: CLOSING ARGUMENT IS SUBJECT TO THE DISCRETION OF THE TRIAL JUDGE AND THE TRIAL COURT HAS WIDE DISCRETION IN CONTROLLING THE COURSE OF THE ARGUMENTS

FACTS: In a case involving charges of aggravated stalking and aggravated assault along with other charges, the defendant maintained the trial court erred when it limited the time allowed to the defendant to present his closing argument to the jury. The defendant maintained that this deprived him of the opportunity to fully present his defense to the fact finder. The state responded that the trial court allowed the defendant to fully make his case in his closing argument and that any limitations on the length of the closing argument was an appropriate exercise of the trial court's discretion.

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in regard to the defendant's closing argument because the trial court merely gave the defense counsel instruction to conclude within a certain time frame and the defendant was afforded the opportunity to fully present his closing argument.

The court noted that the record reflected that during the defense counsel's closing argument, a juror requested a break and at that point the trial court instructed defense counsel to limit the remainder of his argument to five minutes. No objection was made at that time but the defendant raised the issue in his motion for new trial.

The Court of Criminal Appeals noted that closing argument is a valuable privilege for both the state and the defense and generally wide latitude is given to counsel in arguing their cases to the court. The Court of Criminal Appeals also stated that since it is a valuable privilege it should not

be unduly restricted. Nonetheless, the Court of Criminal Appeals stated that closing argument is subject to the discretion of the trial judge and must be temperate, predicated on evidence introduced during the trial, and relative to the issues being tried. The Court of Criminal Appeals also stated that the trial court has wide discretion in controlling the course of the arguments and will not be reversed absent an abuse of that discretion.

The court noted that looking at the facts of this case it appeared from the record that the state and the defendant both presented closing argument for a comparable amount of time and defense counsel was afforded the opportunity to spend considerable time summarizing the facts, discussing the victim's and the officers' credibility and inconsistencies, and then laying out the elements of the criminal offenses. The court also noted that after the trial court instructed defense counsel to conclude within five minutes, defense counsel made additional points about the officer's testimony, questioned the security of the crime scene, and then reiterated the presence of reasonable doubt.

Based upon the totality of the facts, the court concluded that the trial court did not abuse its discretion when it gave defense counsel an instruction to conclude within a time frame because the defendant had been afforded the opportunity to fully present his closing argument.

State v. Gibson (Tenn. Cr. App. 4/27/22)

CONFESSION

CONFESSION OF SEVENTEEN-YEAR-OLD DEFENDANT: UNDER TOTALITY OF CIRCUMSTANCES, DEFENDANT DID NOT FREELY AND VOLUNTARILY GIVE HIS STATEMENT AFTER A KNOWING AND INTELLIGENT WAIVER OF HIS CONSTITUTIONAL RIGHTS BASED UPON THE DEFENDANT'S YOUTH, INEXPERIENCE, AND HIS INCLINATION TO GIVE DEFERENCE TO AUTHORITIES, ALONG WITH OTHER FACTORS

FACTS: In a case involving murder and robbery, the detectives escorted the seventeen-year-old defendant and his mother to a small interview room. The defendant was not physically restrained, but the detectives entered the room with guns visible. Detective Kendrick told the defendant that the detectives had “some questions we want to ask” and that they “wanted to hear what’s going on.” The detective also advised the defendant that his signature on the waiver of rights form was “solely to acknowledge that the detective had in fact read the form” to the defendant. In fact, Detective Arms read only the warnings from the form to the defendant and neglected to read the statement of waiver at the place where he indicated the defendant was to sign. The defendant had never been interrogated before and had no prior experience with Miranda warnings. The defendant was in high school and in the custody of his mother and his academic records established that he was “respectful of and obedient to authority.”

HELD: The Court of Criminal Appeals held that the trial court erred by admitting the defendant’s statement into evidence and since the error was not harmless beyond a reasonable doubt, the defendant’s convictions were reversed and remanded for a new trial.

The Court of Criminal Appeals stated: “In light of the defendant’s youth, inexperience, and deference to authority, his mother’s instructing him to tell the detectives what he knew, and the detectives’ indicating that they expected him to talk to them, we conclude that the defendant would not have understood his right to stop the interview or decline to answer the detectives’ questions.” The Court of Criminal Appeals also stated that “this is especially so considering that Detective Arms told the defendant to sign the waiver of rights form ‘just to say that I read this.’”

As another factor, the Court of Criminal Appeals noted that when Detective Arms gave the defendant the waiver form to sign, Detective Kendrick was engaging Ms. McKinney, his mother, in conversation about her other children. The court found that this deprived the juvenile defendant of the opportunity to actually confer with his mother within the realm of social norms. The court found that the defendant would have

found himself interrupting a conversation between adults with the indication that might not be natural for him considering social norms for juveniles. The court also noted that the defendant had documented difficulty with reading comprehension for which he was placed in special education classes, and that the defendant's academic records showed that he "earned a failing grade of twenty-five in English at West Creek High School in the Spring semester of 2017." The court concluded that "considering the defendant's difficulties with reading and the distracting conversation between Detective Kendrick and Ms. McKinney, it is unreasonable to expect the defendant to have been able to read and understand the waiver of rights form in that environment."

The court therefore stated that, based upon the totality of circumstances, CCA concluded that the defendant did not freely and voluntarily give his statement after a knowing and intelligent waiver of his constitutional rights. Therefore, the statement should have been suppressed and the court found that the trial court's error was not harmless beyond a reasonable doubt.

PRACTICE POINT: The court's opinion is excellent in going into some detail about the confusion and difficulty that the juvenile defendant would have had, due to his problems with reading comprehension, a distracting conversation between Detective Kendrick and his mother while he was being talked to by another detective, and the general information conveyed at trial about the defendant's issues with being able to read and his special education status.

State v. McKinney (Tenn. Cr. App. 1/5/22)

STATEMENT OF DEFENDANT: WHETHER THE DEFENDANT WAS IN CUSTODY AT THE TIME OF THE STATEMENT IS A THRESHOLD QUESTION BECAUSE MIRANDA APPLIES TO THE QUESTIONING OF AN INDIVIDUAL WHO HAS BEEN TAKEN INTO CUSTODY OR OTHERWISE DEPRIVED OF HIS FREEDOM

FACTS: In a case involving rape of a child, the defendant moved to suppress the contents of the statement he gave to Detective Taylor, claiming that he did not knowingly and voluntarily waive his constitutional privilege against self-incrimination and that the totality of the circumstances indicated that his statement was not voluntary.

Neither party presented any live evidence at the 6/20/17 hearing on the defendant's motion but instead the parties relied entirely on the contents of the video recording of Detective Taylor's interview of the defendant. During the interview, which lasted less than two hours, it was made clear Detective Taylor had driven the defendant to the sheriff's department for questioning only because the defendant did not possess a valid driver's license. The defendant agreed during the interview that he was "here on his own free will". The interview took place at a table, and the defendant was not restrained at any point. Detective Taylor told the defendant he was not under arrest and was free to leave, and she also told the defendant that he could terminate the interview at any time. At the conclusion of the interview, the defendant was not arrested.

HELD: 1) The Court of Criminal Appeals held that the record clearly established that the defendant was not in custody, and therefore Detective Taylor was not required to provide the defendant with Miranda warnings.

The Court of Criminal Appeals did note that the trial court did not make a decision about whether defendant actually was in custody or not but instead the trial court concluded that the defendant's statement was admissible because the defendant did exercise a knowing and voluntary waiver of his constitutional rights. The Court of Criminal Appeals stated, however, that "whether the defendant was in custody, is a threshold question because, by its own terms, Miranda applies to the questioning of an individual who has been taken into custody or otherwise deprived of his freedom by the authorities in any significant way." The court then noted that since the record clearly established the defendant was not in custody the detective was not required to give Miranda warnings.

2) The Court of Criminal Appeals also concluded that the defendant voluntarily waived his constitutional rights and provided a voluntary statement to Detective Taylor. The court noted that even though the defendant was not in custody and it was not required for the detective to read him the Miranda warnings, Detective Taylor did in fact read the Miranda warnings to the defendant and the defendant nodded along as she did so. The court noted that the detective painstakingly went through the entire process of the defendant's rights with the defendant, which included the following:

1. She specifically read the Miranda rights to the defendant.
2. She then provided the defendant with the written rights waiver form and encouraged him to read along as she read it to him.
3. She specifically asked the defendant if he understood the rights waiver form and, after a negative response, she then went through each of his constitutional rights again and explained the contents of the form a second time.
4. She then asked the defendant if he understood and he nodded in agreement.
5. The detective then explained the nature of her investigation and reiterated that he was free to leave before asking if he understood or if he had any other questions. She stated that she did that "cause I want you to be crystal clear." The defendant then replied, "I understand it".
6. The detective encouraged the defendant to "please" take the time and read every line of the waiver and then to initial it, which he did.
7. She then asked him if he understood everything or if he had any trouble reading the form, to which he responded, "No. No, I understand it. All of it."

The court therefore concluded that the defendant voluntarily waived his constitutional rights and provided a voluntary statement to Detective Taylor.

The court noted that the defendant indicated more than once that he understood his rights; that the defendant was offered food and drink during the interview; that the interview lasted only two hours; and the defendant was allowed to leave at the conclusion. The court concluded by stating that “absolutely no evidence suggested that the defendant’s will was overborne.” The court did not err in denying the motion to suppress.

3. In one other issue, the Court of Criminal Appeals rejected the argument of the defendant that the video recording of the interview should not have been admitted into evidence as it was not properly authenticated due to the incorrect time and date stamp.

The Court of Criminal Appeals noted that Detective Taylor identified herself and the defendant on the video and testified in court that the video recording being offered into evidence was the video recording of her interview of the defendant. The court noted that having testified to those facts, the accuracy of the time stamp was irrelevant to the determination of whether the recording was properly authenticated. The court found that it was enough to authenticate the video that Detective Taylor testified the recording was what it purported to be which was the video recording of her interview with the defendant.

The Court of Criminal Appeals noted that Tennessee Rule of Evidence 901 controls the issue of authentication of evidence and that the rule states, “Authentication can be properly established by the testimony of a witness with knowledge that the matter is what it is claimed to be.” The rule and the common law, stated the Court of Criminal Appeals, designate the trial court as the “arbiter of authentication issues,” and the court’s ruling will not be disturbed absent a showing that the court clearly abused its discretion.

State v. Gonzalez-Martinez (Tenn. Cr. App. 5/2/22)

**WAIVER OF MIRANDA RIGHTS: TOTALITY OF THE
CIRCUMSTANCES SUPPORTS THE TRIAL COURT’S
CONCLUSION THAT THE DEFENDANT KNOWINGLY,**

VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS

FACTS: In a case in which the defendant was convicted of felony murder and multiple other charges, the defendant claimed that his age, lack of education, and mental ability, his reduced capacity to understand the Miranda warnings, and the absence of a parent or interested adult supported his argument that he had not knowingly, voluntarily, and intelligently waived his rights under Miranda.

HELD: The Court of Criminal Appeals held that the totality of the circumstances supported the trial court's conclusion that the defendant had knowingly, voluntarily, and intelligently waived his Miranda rights and concluded that the trial court did not err in denying the motion to suppress the defendant's statement.

Importantly, the court of criminal appeals noted that the due process voluntariness test is distinct from the issue of whether or not the defendant waived his Miranda rights. The court noted that the essential inquiry under the "voluntariness test" is whether a suspect's will was overborne so as to render the confession a product of coercion, an issue that is totally separate from the issue of whether or not the defendant knowingly, voluntarily, and intelligently waived his rights under Miranda.

The Court of Criminal Appeals noted that the trial court never made any ruling regarding the voluntariness of the defendant's statement and because the defendant had failed to argue or provide any case law in support of his claim that his statement was not voluntarily, the court concluded that particular issue was waived.

In regard to the issue regarding Miranda rights, the Court of Criminal Appeals noted that any trial court must examine the "totality of the circumstances" in determining whether a juvenile has made a knowing, intelligent, and voluntary waiver of his or her Miranda rights. The totality of the circumstances test requires consideration of the following factors:

(1) consideration of all circumstances surrounding the interrogation including the juvenile's age, experience, education, and intelligence;

(2) the juvenile's capacity to understand the Miranda warnings and the consequences of the waiver;

(3) the juvenile's familiarity with Miranda warnings or the ability to read and write in the language used to give the warnings;

(4) any intoxication;

(5) any mental disease, disorder, or retardation; and

(6) the presence of a parent, guardian, or interested adult.

The court noted that courts must "exercise special care in scrutinizing purported waivers by juvenile suspects," but that "no single factor such as mental condition or education should by itself render a confession unconstitutional absent coercive police activity." The court noted that the absence of a parent at the interrogation does not render a confession inadmissible.

In considering the first factor, the court noted that the defendant was 15 years old and no longer enrolled in high school but he had claims he was pursuing his GED. The defendant's school records show that while he was enrolled in the ninth grade, the defendant had an individual education program (IEP), was reading on a third-grade level, and was receiving instruction from both regular education staff and special education staff. The court noted that the defendant's records reflect that he had a learning disability that affected his reading comprehension, that he had an IQ score of 92, which fell in the average range. The court also noted that the interview of the defendant established that Investigator Loeffler was polite, friendly, non-confrontational, and concerned about the defendant's health. Investigator used appropriate language for a fifteen-year-old and never threatened or intimidated the defendant. The court noted that even though the defendant became emotional and expressed concern about being incarcerated when he had finally admitted that he was the shooter at the end of the interview, the defendant's demeanor throughout the interview was cooperative.

In regard to the second factor, the defendant's capacity to understand Miranda warnings and the consequences, the defendant was

able to follow along as the investigator read rights to him, the defendant initialed that he understood each of his rights and that he had no questions, and the defendant provided a self-serving reason for why he wanted to provide a statement. The circumstances demonstrated, said the CCA, that the defendant knew he would likely need an attorney, understood that he did not have to talk to an investigator, and that he had an appreciation of the consequences of speaking with the investigator, including that his statement could be used against him.

In regard to the third factor, the court noted that the records show the defendant was able to read and write in English, but he was thoroughly advised of his rights, and that he had had involvement previously with law enforcement in the Criminal Justice System.

Regarding the fourth factor, the audio recordings show the defendant was not under the influence of any toxicants and the defendant conceded that intoxication was not a factor.

Regarding the fifth factor, the defendant admitted that he did not suffer from any mental disease or disorder, and the recordings show the defendant did not display or report any mental issues. The defendant provided clear, responsive responses to the investigator's questions.

Regarding the sixth factor, the Court of Criminal Appeals agreed with the trial court that the investigators should have attempted to contact the defendant's parents before conducting the interview, but the court noted the law was clear the absence of a parent at the interrogation does not itself render a confession inadmissible.

After reviewing all of the factors, the court admitted that the case presented a close question, but the CCA agreed with the state that the totality of the circumstances supported the trial court's conclusion that the defendant did in fact knowingly, voluntarily, and intelligently waive his Miranda rights and found that the trial court properly denied the motion to suppress the defendant's statement.

The court further noted that even if the defendant's statements somehow should not have been admitted, the record contained

considerable evidence of the defendant's guilt, including eye witness identification of the defendant as the shooter and with the defendant's clear involvement in the scheme to rob the victims.

State v. Cook (Tenn. Cr. App. 2/7/22)

COVID-19 HEALTH PROTOCOLS OR EMERGENCY HEALTH PROTOCOLS AND DUE PROCESS CONSIDERATIONS

HEALTH PROTOCOLS AND DUE PROCESS VIOLATIONS: SAFETY PROTOCOLS OF THE TENNESSEE SUPREME COURT IN FACING THE COVID-19 PANDEMIC DID NOT VIOLATE DUE PROCESS CONSIDERATIONS UNDER THE TENNESSEE CONSTITUTION

FACTS: The defendant contended that the "critical aspects of the fact-finding function of a trial were impeded by the health protocols" of the pandemic which included certain requirements imposed by the Tennessee Supreme Court.

The defendant's claims were as follows:

1. The trial court abused its discretion in denying his motion to continue as he claimed that the case should have been continued due to the pandemic and that failure to do so resulted "in a tremendously flawed trial."
2. That the defendant's Sixth Amendment right to right to confrontation was violated by the requirement that the defendant wear a mask during the trial which undermined the defendant's right to face his accusers.
3. The defendant contended that requiring counsel and the jurors to wear masks and maintain social distancing interfered with his right to effective assistance of counsel.

HELD: (1) The Court of Criminal Appeals found that the trial court's denial of the defendant's request for a continuance did not deny the defendant a fair trial. The court noted that the grant or denial of the continuance rests within the sound discretion of the trial court and that an abuse of discretion is only demonstrated by showing that the failure to grant a continuance

denied the defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted.

The court noted that the defendant had not shown that the denial of a continuance denied the defendant a fair trial. The Court of Criminal Appeals noted that the U.S. Supreme Court in the case of Morris v. Slappy (1964) stated: “Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates due process.”

The court specifically found that the defendant never presented a “justifiable request for delay,” as it was never based upon the defense counsel’s inability to prepare a defense, the unavailability of a witness, or some other reason that would establish conducting the trial was unfair. The court noted that the defendant’s only claim had been that conducting a fair trial during the pandemic was unfair, and the defendant simply “did not present any testimony or other evidence at the hearing on his motion for a new trial to support a showing of actual prejudice.” The court noted that it would not presume that a delay in the trial would have produced a different result.

(2) The Court of Criminal Appeals also concluded that the trial court’s enforcing a face mask requirement, as directed by an order of the Tennessee Supreme Court, did not violate the defendant’s right to confront witnesses. The court noted that the Tennessee Supreme Court has taken a strong position in regard to the defendant’s right to confront witnesses against him or her, which includes the “right to physically face witnesses and the right to cross-examine witnesses.” The court also stated, “The Confrontation Clause is designed to ensure the reliability of the evidence

against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”

The court also noted that the right of confrontation is not absolute and must occasionally give way to considerations of public policies and the necessities of the case. For instance, the court had previously found that the courts would “not be inclined to remove the requirement of physical presence of a witness in the courthouse, save for instances in which the most necessary public policy considerations arise.”

The court noted that the public policy considerations present at the time of the defendant’s trial in this case were to ensure the health and safety of those present in the courtroom in the midst of a global pandemic. The court noted that the trial court had ordered the defendant to wear a mask consistent with the Supreme Court mandate of face coverings. The court noted specifically that every witness who testified against the defendant testified in his physical presence, and only the defendant’s nose and mouth were obscured. The courts held that it was “unpersuaded by defendant’s argument that the requirement that he wear a mask during trial prevented the witnesses from perceiving his presence.”

Specifically, the court noted that Tennessee courts had not yet addressed these issues, but that federal courts have addressed the issues and have repeatedly found that requiring participants at trial to wear face masks due to the COVID-19 pandemic does not violate a criminal defendant’s constitutional rights.

(3) The Court of Criminal Appeals also found that requiring counsel and jurors to wear masks and maintain social distance did not interfere with his right to the effective assistance of counsel. Again, the court noted that the trial court has broad discretion in controlling the course and conduct of trial proceedings, and the defendant had cited no authority supporting the proposition that the constitutional right to the effective assistance of counsel includes the right of a defendant to have his defense counsels’ and the jurors’ noses and mouths uncovered. The court found that observation of the demeanor of a witness by the fact-finder includes “the language of the entire body,” and that in the present case jurors and

attorneys could observe the eyes and movements, facial and body movements, hesitation in speech, and many other languages of the body in developing perceptions about the witness. The court found that it did not believe that any alleged impediment to defense counsel's ability to have nuanced communication with the jury rises to the level of a Sixth Amendment violation.

PRACTICE POINT: If any sessions judge faces concerns raised by attorneys about the requirements imposed by the Supreme Court during the pandemic or by the local court during the pandemic or other health care situations, this is a good case to review.

State v. Daniels (Tenn. Cr. App. 6/29/22)

EVIDENCE

AUTHENTICATION OF CELLULAR TELEPHONE AND FACEBOOK OF

DEFENDANT: THE DEFENDANT'S CELL PHONE AND FACEBOOK MESSAGES WERE PROPERLY AUTHENTICATED BY THE EVIDENCE PRESENTED BY THE STATE AND WERE PROBATIVE OF THE STATE'S THEORY THAT THE DEFENDANT PLANNED TO ROB THE VICTIM, AS THE AUTHENTICATION WAS SUFFICIENTLY CORROBORATED BY CIRCUMSTANCIAL EVIDENCE

FACTS: In a case involving first degree felony murder and aggravated robbery, the defendant maintained that the trial court erred by allowing the state to introduce evidence from a cellular telephone and a Facebook account, claiming the evidence was not admissible pursuant to Tennessee Rules of Evidence 403 and 901.

The state had obtained search warrants for four cellular telephone numbers, including a telephone number ending in "7463." It also obtained a search warrant for the Facebook account of "Delo Berry." In the affidavits attached to the search warrants, Sergeant Ewing set out facts of the shooting, which included an interview with a person named Gough, in

which Gough explained the involvement of “Delo Berry,” the defendant. Gough had consented to a search of his own cellular telephone which revealed communications between Gough and the victim and Gough and “Delo” taking place before the shooting. The telephone number for the defendant in Gough’s telephone was the one which ended in “7463.” The police also showed a photograph of the defendant to Gough, and Gough confirmed that the defendant was the person he knew as “Delo.” Other testimony reflected information that was on the Facebook account including a profile picture that appeared to be the defendant.

The defendant filed a motion in limine seeking to prohibit any evidence associated with the telephone number ending in “7463” and the Facebook account of “Delo Berry.” Specifically, the defendant asserted that the records obtained for the telephone number showed that the telephone number was actually registered to a person named Esmine Reese, and not the defendant. The state acknowledged that the telephone records show that the telephone number was registered to Esmine Reese and the state further advised the trial court that it had been unable to locate Reese and that the state did “not know that she even exists for that matter.” The state also noted in its presentation to the judge that the number ending in “7463” was listed in Gough’s telephone under the defendant’s nickname Delo, and that Gough would testify at trial that he used that telephone number to contact the defendant.

At the conclusion of the hearing on the motion, the trial court found that the text and Facebook messages had probative value and concluded that they should not be excluded under Tennessee Rule of Evidence 403.

HELD: In regard to the telephone number (7463), the Court of Criminal Appeals concluded that the state authenticated the telephone as belonging to the defendant. The court also found that the text messages on the cell phone sent before and after the shooting were probative to the state’s case. The Court of Criminal Appeals therefore concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice and that the trial court did not err by admitting the text messages from the telephone into evidence.

1. The Court of Criminal Appeals noted that one method of authentication is testimony by a witness with knowledge “that a matter is what it is claimed to be.” See Tennessee Rule of Evidence 901(b)(1). The court noted that whether evidence has been sufficiently authenticated within the trial court’s discretion and that the decision will not be overturned absent an abuse of discretion. Specifically, Gough testified that he had known the appellant about six months at the time of the shooting and that he had communicated with the defendant by cellular telephone at that specific number. Sergeant Beebe testified he searched Gough’s telephone and found text messages exchanged between Gough and the victim and exchanges between Gough and “Delo” before the shooting. The text messages occurred around the same time period and appeared to be related to a drug transaction Gough was arranging with the victim. The defendant’s sister also testified that the defendant came to visit her in Chicago after the shooting, and proof was introduced that showed that the cellular telephone activity for “7463” was in Clarksville on the afternoon of 12/24 but in Chicago on the morning of 12/25, both significant dates in regard to the dates of the crime. The Court of Criminal Appeals therefore concluded that the state authenticated the telephone as belonging to the defendant and that the messages were probative to the state’s case.

2. In regard to the Facebook messages, the Court of Criminal Appeals concluded that there was ample evidence to authenticate the messages, that the evidence was probative to the state’s theory that the defendant planned to rob the victim, and that the probative value of the evidence was not substantially outweighed by the danger of its prejudicial effect.

Regarding this issue, the Court of Criminal Appeals referred to prior case decisions which indicated that “evidence from social media and emails” is authenticated when, “the prosecution offers corroborating circumstantial evidence.” The court noted that in prior cases the corroborating circumstantial evidence consisted of a witness that knew the defendant’s social media account, and testimony from witnesses who had seen certain postings on social media pages. Similarly, in the present case, relatives or friends testified that information could be read on the Facebook account which directly related to the defendant, that the

Facebook account included the photograph of the defendant, and the fact that the defendant advertised marijuana for sale shortly after the victim in this case had been robbed of marijuana. The court therefore concluded that there was ample evidence to authenticate the messages, the relationship to the defendant, and the fact that the evidence was probative of the case.

State v. Berry (Tenn. Cr. App. 2/10/22)

AUTHENTICATION OF FACEBOOK MESSAGES: “DISTINCTIVE CHARACTERISTICS” OF THE FACEBOOK ACCOUNT WHICH CONTAINED NUMEROUS DETAILS RELATED TO DEFENDANT’S LIFE SUFFICIENTLY AUTHENTICATED THE FACEBOOK MESSAGES OF THE DEFENDANT

FACTS: In a case involving murder and robbery, the defendant maintained that the trial court erred in admitting the Facebook messenger messages into evidence against the defendant, claiming that the messages were not properly authenticated and that the messages contained hearsay. The state claimed that the records had been properly authenticated and were admissible pursuant to the hearsay exception for business records.

HELD: The Court of Criminal Appeals held that the proof of the state established that the substantive content of the messages contained numerous details relating to the defendant’s life which established the “distinctive characteristics” of the Facebook account as belonging to the defendant. The court noted also that Agent Scarbro testified that he obtained the defendant’s Facebook messenger records through a search warrant for the defendant’s Facebook account and that Facebook authenticated the records as coming from the defendant’s account, and the witness identified a copy of the certificate of authenticity of domestic records of regularly conducted activity which was admitted as an exhibit to his testimony. The records from Facebook showed that the name on the targeted account was “Alain Benitez.” The court noted that most of the messages were sent to or received from an account displayed in the name

of the defendant's girlfriend and a few other messages were sent to an account in the name of the defendant's friend.

The Court of Criminal Appeals found that the jury could have reasonably accepted that the messages were what the proponent claimed, i.e., messages from the defendant's Facebook account. The court concluded that the trial court did not abuse its discretion in finding that the evidence was sufficiently authenticated.

The Court of Criminal Appeals also held that the business records submitted were appropriately entered into evidence pursuant to Tennessee Rule of Evidence 803(6), "records of a regularly conducted activity." The court noted that in lieu of in-court testimony, the business record may be introduced through a self-authenticating affidavit by a custodian or other qualified person if that person certifies that the record was: (1) Made at or near the time of the occurrence of the matter set forth by, or from information transmitted by, a person with knowledge of and a business duty to record or transmit those matters. (2) "kept in the course of the regularly conducted activity," and (3) made by the regularly conducted activity as a regular practice.

The court found that as required by Rule 902 of Tennessee Rules of Evidence the state introduced a self-authenticating affidavit and in the affidavit the custodian certified that the records were made at or near the time the information was transmitted; that the records were made and kept by the automated systems of Facebook in the course of regularly conducted activity; and the affidavit also stated that the records for the targeted account were saved in an electronic format after searching Facebook's automated systems. The court found that the certification was sufficient to satisfy the requirement for the business records hearsay exception.

The court also noted that the hearsay exception for party-opponent admissions applies to messages sent by the defendant, which established the substantive content of the Facebook records. The CCA concluded that the trial court properly determined that the messages sent from Ms. Barrios and Mr. Binkley were not hearsay because they were not offered

for the truth of the matter asserted but to put defendant's messages into context. The state did not offer the messages from the witnesses for their truth but because the defendant's messages would have been nonsensical without the context of the other half of the conversations.

Therefore, the court concluded that the records were properly authenticated, a hearsay exception allowed for the content of the Facebook records, and in addition the messages were not actually admitted for the truth of the matter but to establish context.

State v. Benitez (Tenn. Cr. App. 4/27/22)

EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS OF

DEFENDANT: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TEXT MESSAGES FROM THE DEFENDANT'S CELL PHONE AS EVIDENCE OF PRIOR DRUG SALES WAS PROBATIVE OF THE DEFENDANT'S KNOWLEDGE AND INTENT TO POSSESS DRUGS FOR RESALE

FACTS: In a case in which the defendant was convicted of possession with intent to sell heroin and other drug charges, the defendant maintained that his convictions for possession of Xanax and heroin should be reversed because the trial court erred by admitting a text message exchange from his cell phone made two days before his arrest concerning a previous drug sale. The defendant asserted that intent was not a material issue in the case because the defendant denied that the drugs belonged to him and therefore argued that the trial court should not have admitted the messages to show his intent to distribute drugs.

The state argued that the text message exchange was admissible for a purpose unrelated to character since the state was required to prove the essential element of intent at trial regardless of the defendant's trial strategy.

HELD: The Court of Criminal Appeals held that there was no abuse of discretion by the trial court in admitting the text messages from the defendant's cell phone. The court noted that the text messages in question

contained an exchange between defendant and someone named “Danielle” in which Danielle asked defendant to meet for some “h” and also asked him to bring a “xanx.” In another message, Danielle texted among other things that “I need 80 please hook it up I beg you my tolerance is sky high.” Danielle also asked where to meet the defendant, and he responded that he was at the Weigel’s on Summit Hill.

The court noted the following principles of importance when evaluating this type of case:

1. Trial courts have broad discretion in determining the admissibility of evidence, and rulings will not be reversed absent an abuse of discretion.
2. Tennessee Rule of Evidence 404(b) “permits the admission of evidence of prior conduct if the evidence of other acts is relevant to a litigated issue such as identity, intent, or rebuttal of accident or mistake, and the probative value outweighs the danger of unfair prejudice.”
3. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait.
4. Before admitting evidence under Rule 404(b), the Rule provides that
 - (i) upon request the court must hold a hearing outside the jury’s presence;
 - (ii) the court must determine that the evidence is probative on a material issue and must, if requested, state on the record the material issue and the reasons for admitting or excluding the evidence;
 - (iii) the court must find proof of the other crimes, wrongs, or acts to be clear and convincing; and
 - (iv) the court must exclude the evidence if the danger of unfair prejudice outweighs the probative value.

The court noted that the trial court in this case complied with TRE 404(b).

The court also noted that the defendant’s assertion that intent was not a material issue because the defendant denied that the drugs belonged

to him, and the court responded that “intent was a material issue regardless of the defense asserted by defendant at trial.” Previous cases have held that “where the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove the defendant acted with specific intent notwithstanding any defense the defendant might raise.”

State v. Tate (Tenn. Cr. App. 2/28/22)

IMPROPER IMPEACHMENT OF A DEFENSE WITNESS: TRIAL COURT’S DECISION TO ALLOW THE STATE TO CROSS-EXAMINE A KEY WITNESS REGARDING PRIOR BAD ACTS (THAT THE WITNESS WAS A PURPORTED DRUG DEALER) VIOLATED TRE 404(b) BECAUSE THE PRIOR BAD ACTS HAD NOT BEEN PROVEN BY CLEAR AND CONVINCING EVIDENCE, THE EVIDENCE WAS NOT RELEVANT TO ANY MATERIAL ISSUE, THE EVIDENCE WAS NOT ADMISSIBLE TO GIVE THE “COMPLETE STORY,” AND THE EVIDENCE COULD NOT BE USED TO ESTABLISH BIAS

FACTS: In a case in which the defendant was convicted of attempted second degree murder and other charges, the defendant maintained that the trial court had improperly concluded that the state would be allowed to cross-examine the witness regarding prior bad acts when the witness (Mr. Woods) was questioned by the state about whether he sold methamphetamine out of his trailer. Defense counsel objected to the line of questioning and the trial judge excused the jury. The state maintained during the trial that Mr. Woods had been indicted for selling drugs to a confidential informant three months prior to the incident involved in the case and the evidence about the sale of methamphetamine would show that Mr. Woods had the “motivation not to be completely honest with what happened that day.” The state told the trial court that the fact that Mr. Woods was a drug dealer selling drugs from that location would suggest that he was not going to be fully cooperative with the police.

Without any additional proof, the trial court found the evidence relevant and that any potential unfair prejudice was outweighed by the

probative value. At that point of the trial, the state then proceeded to introduce the indictments against Mr. Woods for identification purposes only, and the trial court instructed Mr. Woods about the possibility of him implicating himself in a crime. When the trial resumed, Mr. Woods invoked his Fifth Amendment privilege against self-incrimination regarded the indicted drug sales. The trial court noted that its earlier ruling about allowing the evidence was based on prior bad acts that had been proven by clear and convincing evidence pursuant to Rule 404(b).

[Note should be taken that the Supreme Court noted that TRE 404(b) had basically been applied only to criminal defendants but the type of issue involved in the present case falls under TCA 24-7-125 (2017), which applied basically the same rules involved in 404(b) to witnesses in the position of Mr. Woods, so that a 404(b) analysis would be appropriate.]

The Court of Criminal Appeals therefore determined that the trial court had erred in allowing the prior bad act evidence pertaining to Mr. Woods and his sale of methamphetamine to be in error because the prior bad acts had not been proven by clear and convincing evidence, the evidence was not relevant to any material issue, the evidence was not admissible to give the complete story, and the evidence could not be used to establish bias.

The Court of Criminal Appeals however proceeded to then determine that while the introduction of the prior bad acts regarding Mr. Woods was in error, that the error was harmless. The Court of Criminal Appeals determined that the error was harmless due to the fact that the jury had an opportunity to review the testimony of all witnesses including state witnesses and defense witnesses and had determined that the testimony of the officer and the state witnesses was more credible than the defense witnesses.

The case was appealed to the Tennessee Supreme Court.

HELD: The Tennessee Supreme Court concluded that the Court of Criminal Appeals correctly determined that the trial court had inappropriately admitted the “bad acts” evidence because the prior bad acts had not been

proven by clear and convincing evidence, but the Supreme Court went on to hold that the Court of Criminal Appeals was in error in its harmless error analysis.

The Court of Criminal Appeals noted that the improper impeachment evidence “arguably sullied the reputations of multiple defense witnesses – not just that of Mr. Woods – by emphasizing the witness’ association with the alleged drug dealer and their proximity to his trailer. The state presented the issue of the witness being a “drug dealer” on multiple occasions and in the questioning of three different witnesses and the defendant himself.

The Supreme Court also concluded that the evidence used to convict the defendant was not overwhelming, and four separate eyewitnesses in close proximity to the incident testified that they never saw the defendant holding a gun, including Detective Pyrdom, one of the fellow officers of the officer who claimed the defendant was wielding a gun.

The Supreme Court stated, “The line between harmless and prejudicial error is in direct proportion to the degree by which the proof exceeds the standard required to convict.” Here, the Supreme Court found that the state’s proof was not overwhelming and the defendant had presented multiple witnesses who gave consistent accounts undermining the officer’s testimony that the defendant did wield a gun. The Supreme Court stated that it agreed with the defendant that the evidence of bad acts against Mr. Woods was not trivial or harmless and that the improper impeachment of defense witness Larry Woods more probably than not affected the judgment and therefore the trial court committed reversible error.

State v. Moon (Tenn. 4/20/22)

PORNOGRAPHIC EVIDENCE FOUND ON ELECTRONIC DEVICE: IN CASE INVOLVING RAPE AND SEXUAL EXPLOITATION OF A CHILD, THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY FROM THE DETECTIVES REGARDING THE FINDING OF PORNOGRAPHIC MATERIAL ON THE

DEFENDANT’S ELECTRONIC DEVICE AS THE PORNOGRAPHIC MATERIAL WAS DIRECTLY RELATED TO THE ACTUAL CHARGES LEVELED AGAINST THE DEFENDANT

FACTS: The defendant was convicted of multiple counts of rape of a child and solicitation of sexual exploitation of a child. On appeal the defendant contended that the trial court erred when it admitted adult pornographic material found on electronic devices that law enforcement confiscated pursuant to a search of his home. The defendant claimed that the videos were not relevant because none of the pornography found on the electronic devices “exactly matched the victim’s description.” The defendant claimed that even if relevant, the probative value was outweighed by the prejudicial effect of the evidence.

HELD: The Court of Criminal Appeals held that the trial court did not abuse its discretion when it determined that the detective’s testimony about the pornographic material was relevant. The court noted that the victim was eight years old at the time that the charges rose against her father, the defendant.

The Court of Criminal Appeals noted that the victim testified at trial that the defendant, her father, had twice shown her videos on a cell phone that depicted a girl and a boy engaged in the same acts as she and the defendant. The court noted that on one of the occasions the victim was anally penetrated while watching the video and on another occasion the victim was shown a girl in a video participating in oral sex while the same was happening to her.

The court made the following findings in regard to its decision:

1. The evidence was clearly relevant pursuant to TRE 401 which defines relevant evidence as any evidence having a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The CCA found that the detective’s testimony that the pornography substantially comported with the victim’s testimony had a

tendency to make her version of the events more probable and therefore the evidence was relevant.

2. The court pointed out that even if evidence is relevant, it may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The court noted that substantial compliance with TRE 404(b) requires (1) a hearing outside the jury's presence; (2) that a material issue exists other than conduct conforming with the character trait; (3) that the court must find proof of the other crime wrong or act to be clear and convincing; and (4) the court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. The court also noted that "propensity evidence" (evidence offered for the purpose of showing conformity with a particular character trait) must be closely scrutinized because fact finders tend to ascribe undue relevance to such evidence.

3. The pornography about which the defendant testified was legal, so the Court of Criminal Appeals noted that generally the admissibility of evidence concerning a defendant's pornography is governed by TRE 404(b).

4. The Court of Criminal Appeals then concluded that the evidence which was being offered was directly related to the charges against the defendant, including the fact that the victim testified the defendant showed her pornography depicting sexual activity on two occasions. The court therefore determined that the testimony was not about "other wrongs," but rather it was "testimony directly related to the actual charges leveled against the defendant." Based upon TRE 404(b), the court therefore concluded that the trial court did not err in its admission of the detective's testimony about the videos that substantially comported with the victim's testimony and supported the two solicitations of a minor charges.

The Court of Criminal Appeals did conclude that the trial court should have limited the detective's testimony to the video that substantially supported the victim's recollection and the court erred to the extent it

allowed the detective to testify that law enforcement found “lots” of videos with oral and anal sex. The court did find that this error was harmless based upon the amount of evidence which supported the defendant’s guilt.

State v. Willingham (Tenn. Cr. App. 4/20/22)

PRIOR INCONSISTENT STATEMENT: TRIAL COURT PROPERLY ALLOWED THE STATE TO INTRODUCE THE TRANSCRIPTS OF A WITNESS WHO PREVIOUSLY TESTIFIED IN FEDERAL COURT AS ADMISSIBLE UNDER TENNESSEE RULE OF EVIDENCE 803(26) AS THE PRIOR FEDERAL TESTIMONY WAS DETAILED WHILE THE TESTIMONY AT TRIAL WAS TO THE EFFECT THAT SHE COULD NOT “REMEMBER ANYTHING”

FACTS: In a case involving felony murder and other charges, the defendant contended that the trial court had erred by admitting the prior testimony of Adrienne Mathis from the federal proceeding against the defendant as substantive evidence, claiming such evidence was inadmissible pursuant to TRE 803(26). Specifically, the defendant maintained that the transcript lacked trustworthiness and should have been excluded.

Ms. Mathis testified that she could not “remember anything” and her testimony was “just repeating what she had seen on paper.” She claimed that she had been “prepped” prior to her testimony in federal court and that her federal testimony was probably not truthful. She did not recall previously testifying that she had loaned her car to the defendant on the weekend of the murders and also could not recall the defendant calling her on a Sunday to tell her that her car was broken down in front of his mother’s apartment along with other details important to the case.

HELD: The Court of Criminal Appeals concluded that the trial court did not err in admitting the prior testimony as substantive evidence as all of the conditions of TRE Rule 803(26) were met.

The Court of Criminal Appeals found that the federal testimony met the following elements of Rule 803(26):

1. The declarant witness testified at the trial and was subject to cross-examination concerning the prior statement in federal court;
2. The statement was a statement that had previously been given under oath which satisfied the requirement that any such statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath;
3. The court conducted a jury-out hearing and determined by preponderance of the evidence that the prior statement was given under circumstances indicating trustworthiness.

The court also specifically noted that the Tennessee Supreme Court has made clear that “for the purposes of TRE 803(26), a prior statement about events that a witness claims at trial to be unable to remember is ‘inconsistent’ with the witness’s trial testimony.”

State v. Boyd (Tenn. Cr. Appeals 12/1/21)

TESTIMONY OF A CHILD: TRIAL COURT COMMITTED REVERSIBLE ERROR BY CONDUCTING AN IN CAMERA INTERVIEW WITH A CHILD WITHOUT COUNSEL OR A COURT REPORTER PRESENT AND THEREAFTER WITHHOLDING THE COURT’S SUMMARY OF THE TESTIMONY OF THE CHILD UNTIL ENTRY OF THE FINAL JUDGMENT

FACTS: In a civil case in which the trial court was ruling on competing petitions for adoption of a minor child and using a comparative fitness analysis of the parties, one of the parties asked if the child could testify and the other party did not object. The Guardian Ad Litem advised that the child’s request was that she be allowed to speak to the trial court judge in private. The trial court originally expressed reluctance to do so but then granted the request and stated that when the judge came back he would tell exactly what was expressed to him by the child so that everybody

would know what the child said and that it would be on the record. The parties basically agreed to this procedure.

The trial judge proceeded to interview the child in chambers without counsel or a court reporter present, following which the court announced to the parties that the trial would not be concluded that day and he was going to wait to tell the parties what happened until a later time, since he did not want any stress or pressure being placed on the child during the pendency of the hearing.

The trial reconvened and ultimately the trial judge rendered a written memorandum opinion without any intervening announcement of the content of the child's testimony. In expressing the court's opinion, the court noted that the child was a credible witness and proceeded to tell what the child had said about the parties without giving the parties any further opportunity to address what the child had stated or to present any other evidence in light of what the child had stated.

HELD: The Court of Criminal Appeals concluded that it was reversible error for the court to withhold its announcement of the substance of the child's testimony until the court issued its memorandum opinion when the parties no longer had an opportunity to offer evidence in response to the testimony. The court further noted that it determined that the child's testimony "influenced the trial court's best interest analysis to the point that we cannot find that the other evidence in the record definitely would have preponderated in favor of the court's judgment in favor of (the prevailing party) without the child's testimony."

The court noted that "although it is clear that the parties agreed to have the child interviewed by the trial court judge in private, it is not at all clear from the record that the parties agreed to be uninformed as to the content of the child's testimony until it was written into the final judgment." The court, therefore, found that the failure to object by any party did not insulate the trial court from committing reversible error.

PRACTICE POINT: Even though this is a civil case, I included it in this outline to reflect the dangers that can occur in any kind of hearing in which

the judge elects to proceed to a private meeting with a witness, particularly a child witness, without the parties present, without the attorneys present, and without a court reporter. Here, the trial court did not even tell what the child's testimony was so that there would be an opportunity by any of the parties to rebut the testimony of the child by other proof.

In Re Lyric N. (Tenn. Court of App. 7/29/22)

TEXT MESSAGES RECEIVED OR WRITTEN BY DEFENDANT: IN A CASE INVOLVING A DOUBLE MURDER, THE COURT OF CRIMINAL APPEALS HELD THAT THE TEXT MESSAGES TESTIFIED TO BY A DETECTIVE THAT WERE SENT OR RECEIVED BY THE DEFENDANT WERE NOT HEARSAY BECAUSE THEY WERE NOT INTRODUCED FOR THE TRUTH OF THE CONTENT AND WERE NOT VIOLATIONS OF THE CONFRONTATION CLAUSE BECAUSE THE TEXTUAL MESSAGES WERE NON-TESTIMONIAL

FACTS: Detective Gish testified as an expert in the field of digital forensic analysis and testified that he had received an evidence bag containing the defendant's mobile cell phone devices from which he was able to extract certain text messages. The defendant objected to the text messages on the grounds of relevancy and hearsay. The text messages sent by and to the defendant's mobile cell phone occurred on 9/25/16 and 9/26/16 "within hours" after a double homicide. Some of the text messages were the defendant's reaction to text messages he received and other text messages came from the defendant instructing other people what they needed to do.

The text messages testified to by Detective Gish were as follows:

3:43:07 p.m. To: Waynetta	Don't talk to nobody
3:43:27 p.m. To: Jennifer	Don't talk to nobody
3:45:26 p.m. From: Waynetta	I have been acting stupid I haven't said anything

3:45:48 p.m. To: Waynetta	Tell mom the same thing
4:25:35 p.m. From: D Dog	Close ur Facebook account
4:25:37 p.m. From: D Dog	Tell Gooch to stop talking
4:31:57 p.m. To: Gooch	Stop talking so much
6:23:20 p.m. From Axles	When u gonna be good
6:23:33 p.m. To: Axles	It over
6:34:01 p.m. From: Jennifer	The news got your picture
6:34:20 p.m. From: Jennifer	They just released your picture
9:41:23 p.m. From Cece	They got you on camera
10:55:47 p.m. From: [Unknown]	I just watched the news
10:56:02 p.m. To: [Unknown]	Ok
11:44:43 p.m. To: Nic	Between us that me (sic) delete please.

The trial court allowed the text messages into evidence and the defendant on appeal claimed the trial court erred by allowing the admission of hearsay evidence and violated his right to confront witnesses against him.

HELD: The Court of Criminal Appeals held that the text messages did not violate the hearsay rule because the text messages were not offered for the truth of the matter and therefore did not constitute hearsay.

The court found that the messages from Waynetta were not offered to prove the truth of the messages but was instead to provide the context to the defendant’s text message, which was, “Don’t talk to nobody.”

The text messages from D Dog, “Close ur Facebook account and Tell Gooch to stop talking” were orders or instructions to the defendant. The court noted that “orders or instructions” are often not hearsay because they are not offered to prove the truth of their content. The court noted

that D Dog's instruction to stop talking was heeded by the defendant, who a few seconds later sent a text message to Gooch telling him to stop talking so much. The text therefore gave a context to the defendant's text messages. They were not designed to prove the truth of the matter asserted and were not hearsay.

The Court of Criminal Appeals found that other texts involved were questions, and "questions, like commands, are not generally considered hearsay because they are not offered for the truth of the matter asserted." The court noted that other text messages whereby people notified the defendant that he was on television news were for the purpose of notifying the defendant that his identity had been made public and not specifically offered to prove the defendant's picture was on the news. The court found that these were not specifically for the truth of the matter asserted but to advise him of the status of the situation.

In regard to the defendant's claim that he was denied his right to confront his accusers because the text messages were testimonial, the Court of Criminal Appeals noted that the Tennessee Supreme Court has stated that a "statement is non-testimonial if the primary purpose is something other than establishing or proving past events potentially relevant to prosecution." The court noted that the primary purpose for introducing the text messages sent to the defendant was to provide the context to the defendant's text messages and were not sent by individuals who were acting in the roles of witnesses at the time the messages were sent. Therefore, the text messages sent to the defendant were not testimonial and therefore there was no confrontation clause violation.

State v. Perry (Tenn. Cr. App. 4/22/22)

“WOULD YOU HAVE SHOT THE VICTIM?”: COURT RULES THAT TESTIMONY IN THE FORM OF AN OPINION IS NOT OBJECTIONABLE SIMPLY BECAUSE IT EMBRACES AN ULTIMATE ISSUE TO BE DECIDED BY THE TRIER OF FACT, PLUS THE RESPONSE TO THE QUESTION WAS REALLY “NONRESPONSIVE”

FACTS: In a case in which the defendant was found guilty of second-degree murder, the defendant argued that the trial court erred in admitting speculative and irrelevant testimony from the witness (Mr. Heatherly) about whether he would have shot the victim. The defendant argued that the testimony was irrelevant and the error was not harmless. The state responded by arguing that the response of Mr. Heatherly to the question was at most “equivocal” and the trial court did not err in permitting counsel to question the witness.

HELD: The court held the defendant was not entitled to relief on the issue because it appeared that counsel for the state “likely asked this question to ascertain whether defendant, who is relying on a theory of self-defense, reasonably feared imminent death or serious bodily injury at the time he shot the victim.”

The Court of Criminal Appeals noted that the threshold issue with regard to evidence is relevance and the question was likely asked in regard to the state attempting to show that the defendant did not reasonably fear imminent death or serious bodily injury. The court also noted that in general, the “testimony of the witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

The court ultimately decided that, in its opinion, the response was nonresponsive and the defendant failed to articulate how the testimony could have affected the jury, and therefore the defendant did not show any entitlement to relief.

PRACTICE POINT: Is this the type of question that you would really want to open the door to as a judge? It seemed to open the door to having all state witnesses take the witness stand and say, “I absolutely would not have felt threatened or entitled to shoot due to self-defense,” and all defense witnesses to say “absolutely, I would have shot him.”

State v. Ford (Tenn. Cr. App. 5/19/22)

FERGUSON ISSUE

**FAILURE TO PROVIDE WRITTEN STATEMENT OF WITNESS:
DEFENDANT’S CLAIM OF A VIOLATION OF FERGUSON WAS
FOUND TO BE MISPLACED IN A RULING BY THE CCA DUE TO
THE FACT THAT NOTHING IN THE RECORD INDICATED THAT
THE STATE HAD EVER ACTUALLY POSSESSED ANY WRITTEN
STATEMENT MADE BY THE WITNESS OTHER THAN HER
PRELIMINARY HEARING TESTIMONY, EITHER THROUGH
ACTUAL OR CONSTRUCTIVE POSSESSION**

FACTS: In a case involving a charge of second-degree murder, the defendant maintained that the trial court had erred in not granting a mistrial or at a minimum striking the testimony of the witness (Samuels), the defendant claiming that the failure to provide the statement was a violation of Tennessee Rule of Criminal Procedure 26.2. The defendant maintained that the prior statement of the witness was of extreme importance “as far as the potential of it containing inculpatory or exculpatory evidence.”

The state responded that the trial court properly determined that such a statement did not exist based on the testimony given at trial.

HELD: The Court of Criminal Appeals held that the defendant’s reliance on TRCP Rule 26.2 was misplaced because, in the instant case, “nothing in the record indicates that the state ever actually possessed any written statement made by Samuels, other than her preliminary hearing testimony, either through actual or constructive possession.”

The court noted that Rule 26.2 is “Tennessee’s version of the “Jencks Act,” which was created as a result of the United States Supreme Court’s decision in Jencks v. United States. (1957). The court noted that the rule provides that “after a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant’s attorney to produce, for the examination and use of the

moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony."

The Court of Criminal Appeals noted that "the determination of what constitutes a producible statement is a matter that rest purely within the discretion of the trial judge and can be set aside by the appellate courts only if his decision is clearly erroneous."

The court noted that any Ferguson claims are controlled by the following principles:

1. Ferguson governs claims regarding the state's duty to preserve potentially exculpatory evidence.
2. The proper inquiry is whether a trial conducted without the lost or destroyed evidence would be fundamentally fair.
3. When a defendant makes a Ferguson claim, the trial court first must determine whether the state had a duty to preserve the evidence.
4. The state has a general duty to preserve all evidence subject to discovery and inspection under TRCP Rule 16 and other applicable law, including Brady.
5. The state's duty to preserve evidence is limited to constitutionally material evidence described as "evidence that might be expected to play a significant role in the suspect's defense."
6. If the proof establishes existence of a duty to preserve and further shows that the state has failed in that duty, the trial court must consider the following factors to determine whether a trial without the missing evidence would be fundamentally fair: (i) the degree of negligence implicated, (ii) the significance of the destroyed evidence, (considered in light of the probative value and reliability of secondary or substitute evidence that remains available), and (iii) the sufficiency of the other evidence used at trial to support the conviction.

The Court of Criminal Appeals then reiterated that nothing in the record suggested that the state was ever in possession of a written statement from Samuels. The court noted that the state is not required to

investigate cases in any particular way. The court also noted that the “mere possibility of exculpatory content” does not trigger a finding that the state failed in its general duty to preserve evidence. The court noted that nothing suggested that any such evidence would have exculpated the defendant or changed the outcome of the trial.

PRACTICE POINT: While this case relates to the principles of Ferguson issues, the advisory commission, to its Rule 26.2 of the Tennessee Rules of Criminal Procedure makes clear that Rule 26.2 “in no way applies to a preliminary hearing or any other hearing conducted in General Sessions Court.” The commission comments that Rule 26.2 applies only in criminal court.

If a General Session judge is conducting a criminal trial by agreement of the parties, I believe it would be appropriate for the General Sessions judge to consider whether or not a party possesses a statement made by a testifying witness, and, if the same does exist, the court could require the party which possesses such a statement to produce such statement to the requesting party. As anticipated by TRCP Rule 26.2, this can make for a more fair result if the party that is introducing the testimony is required to produce a statement made by the witness. If a request has not been made by the party prior to the hearing, and the statement is not available at the time of the hearing, then the presiding judge could just note that the parties had agreed to a trial in Sessions Court and did not raise the issue prior to the trial and therefore that the request came late. It is clear that the rule itself states that the rule does not apply in General Sessions Court, and the judge can simply determine what fairness would dictate in any particular situation.

State v. Bobo (Tenn. Cr. App. 3/17/22)

INSANITY OR DIMINISHED CAPACITY DEFENSE

DEFENSE OF INSANITY AND/OR DIMINISHED CAPACITY: THE EVIDENCE, WHILE NOT OVERWHELMING, WAS SUFFICIENT FOR A JURY TO REASONABLY CONCLUDE THAT THE DEFENDANT ACTED WITH A KNOWING INTENT WHEN IT

CONVICTED HIM OF SECOND-DEGREE MURDER AND AGGRAVATED ASSAULT

FACTS: In a case involving second-degree murder and aggravated assault which arose from the defendant's attacking his parents with a hunting knife, the defendant maintained that the evidence was insufficient to support his convictions based on his insanity and diminished capacity defenses.

The facts established that on the morning of 6/26/16, the defendant's mother, who survived the attack, and the defendant's father, who was killed, were in the kitchen after fixing breakfast for the family, when the mother heard a commotion and then saw the defendant with a hunting knife in the process of stabbing his father. The defendant then continued to stab his father multiple times, before turning his attention to his mother, the defendant ultimately stabbing his mother under her left arm pit. Testimony of the granddaughter was to the effect that after stabbing his mother, the defendant said, "How does it feel to be stabbed in the back?" The defendant later picked up the victims' eight-year-old granddaughter, carrying her outside the house, and telling her that he was not going to hurt her and that she needed to run away.

Officers from the Englewood Police Department were dispatched to the scene, and when Officer Gotsey arrived, the defendant walked out of the house towards him and said, "I stabbed the M.F. er's because they're pedophiles and they're hurting that little girl in there." The defendant complied with the order to put his hands in the air, and upon being questioned the defendant told the officer the knife was in the kitchen, that the defendant did not know the people in the house, but that they were trying to hurt his niece. The officer testified that the defendant appeared to know that he was an officer and that he followed his instructions. Officer Gotsey detained the defendant in the back of his police car and stated his opinion that the defendant "really believed that the people inside the house were not his mother and father."

Multiple people testified about events that occurred, including other police officers and medical personnel who basically testified that to them

the defendant never exhibited paranoid or delusional behaviors. The defendant ultimately tested positive for barbiturates, benzidines, cannabinoids, cocaine, and opiates.

There was testimony from friends and acquaintances of the defendant who testified that in the weeks leading up to the attack they had witnessed abnormal behaviors from the defendant, including the defendant looking up at the sky, mumbling, and walking around in circles. Testimony was presented that sometimes the defendant could appreciate reality from unreality and sometimes he could not. The defendant presented Dr. Stephen Montgomery as a specialist in the field of psychiatry who testified that after interviewing the defendant and viewing multiple exhibits including police reports, witness statements, and places of prior treatment, their records indicated that the defendant had been using drugs, experiencing psychosis, and that he had been prescribed antipsychotic medication. Dr. Montgomery explained psychosis as “a loss of contact with reality,” where a person is “believing something to be true, and it’s not true,” or “they could be hallucinating,” or hearing things when “there’s not really anybody making noise.” Among other things, Dr. Montgomery conducted a screening test to indicate whether an individual is “feigning mental illness.” The defendant scored probable for malingering on two scales, indeterminate on four scales, and not malingering on two scales. Dr. Montgomery indicated that such test results were therefore “indeterminate”. Dr. Montgomery indicated that the defendant felt remorse for his actions which was considered to be “a common behavior after an individual’s mental state stabilizes.”

Dr. Montgomery concluded that he believed the defendant “was suffering from a severe mental disease, a drug induced psychosis” at the time of the stabbing.

The state presented Dr. June Young, a clinical psychologist, as an expert in the field of psychology and she found that the defendant’s actions during the test that she conducted in a one-hour interview as suggesting that the defendant was “malingering.” Dr. Young did admit that there was

evidence that the defendant was suffering from drug-induced auditory hallucinations and paranoia around the time of the stabbing.

The state also presented Dr. Edward Kovach as an expert in the field of forensic psychology. Dr. Kovach reviewed the defendant's records, the affidavit of complaint, Dr. Montgomery's evaluation, and Dr. Young's evaluation, and testified that in his conclusion the defendant was "able to appreciate, you know, the nature or wrongfulness of his actions in relation to his alleged crimes." Dr. Kovach testified that he believed the statement "how does it feel to be stabbed in the back?" to be suggestive of the defendant's understanding that he attacked his parents.

This is a brief summary of some of the significant testimony, which included multiple officers, multiple additional witnesses, and the specialists mentioned. The defendant himself did not testify.

HELD: The Court of Criminal Appeals concluded that "viewed in the light most favorable to the state, we conclude defendant failed to prove insanity by clear and convincing evidence." The court noted that the jury had rejected the insanity defense when it convicted defendant of second-degree murder and aggravated assault.

The Court of Criminal Appeals also found that "the evidence, while not overwhelming, was sufficient for a jury to reasonably conclude that defendant acted with a knowing intent." The court noted the proof which included the defendant's statement to his mother about how it felt to be stabbed in the back, the testimony of a fellow inmate who testified that defendant told him he planned to "play crazy" for a lesser sentence, Dr. Young's testimony that the defendant's behavior suggested a "malingered memory," Dr. Kovach's testimony that the defendant was likely to exaggerate his symptoms of mental illness and was able to appreciate the wrongfulness of his actions, and noted that the jury had accredited the state's experts and rejected the defendant's proof, including the testimony of Dr. Montgomery that the defendant suffered a drug induced psychosis.

PRACTICE POINT: I mainly include this opinion in the outline because it is not rare for General Sessions Courts to deal with preliminary hearings

involving cases that include possible defenses of insanity or diminished capacity. This case gives a good overview of a close case in which the fact finder had to consider numerous factors. These can be difficult cases for all courts, including General Sessions Judges, and this can be a good case to review in regard to the nature of issues that can even be addressed in a preliminary hearing.

Most of the time it is appropriate for the General Sessions Court to defer to later rulings by court of record who can delve into the issues to a much more thorough extent, and after the proof has been further addressed by medical experts. Still, there can be issues raised as to whether the state has established probable cause for the case to go forward, and it can be helpful to review cases like this case in order to establish a solid foundation for any rulings, and to feel comfortable in doing so.

State v. Elrod (Tenn. Cr. App. 3/28/22)

JUVENILE DELINQUENCY

RAPE OF A CHILD AND INCEST: A RATIONAL TRIER OF FACT COULD FIND BEYOND A REASONABLE DOUBT THAT S.L. COMMITTED RAPE OF A CHILD AND INCEST AS THERE IS NO REQUIREMENT THAT THE VICTIM'S TESTIMONY BE CORROBORATED IN A RAPE OF A CHILD CASE AND FORENSIC EVIDENCE IS NOT REQUIRED TO ESTABLISH PROOF OF RAPE

FACTS: The defendant, S.L., and Jane Doe are half-siblings, both adopted by the same family. They shared a bedroom because of a mold issue in the home, and on 7/5/16, Jane told her mother that S.L. raped her in his bed the night before. She was nine-years-old and S.L. was seventeen.

Jane's mother called 911 which resulted in a response by law enforcement and an examination by Dr. Christensen. The next day Jane gave an interview at New Hope Children's Advocacy Center where she detailed what S.L. had done to her. This resulted in S.L. being charged in

juvenile court with being delinquent for committing rape of a child and incest. The juvenile court found the defendant guilty beyond a reasonable doubt, and S.L. appealed to the circuit court for a trial de novo. In this case, the procedural history included a delay of two years after which the state filed a motion to dismiss for failure to prosecute the appeal which the circuit court granted, but the Court of Appeals reversed holding that the circuit court had the duty to set the case for hearing.

On remand, the circuit court held a de novo trial, and the victim Jane testified that S.L. penetrated her orally, vaginally, and rectally. The defendant denied that he had any kind of sex with his sister.

The circuit court found the defendant guilty beyond a reasonable doubt, following which the defendant appealed to the Court of Appeals.

HELD: The Court of Appeals held that, in the light most favorable to the state, the evidence was sufficient to support the circuit court's finding that S.L. committed rape of a child and incest.

The court noted the following laws and principles regarding rape and sexual crimes:

1. An adjudication of delinquency requires proof beyond a reasonable doubt, and both the juvenile court and the circuit court found the defendant guilty beyond a reasonable doubt.

2. A finding of guilt destroys a presumption of innocence and imposes a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient.

3. The state is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn from the evidence.

4. Evidence is sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

5. Rape of a child is the unlawful sexual penetration of a victim by the defendant, if the victim is more than three years of age but less than thirteen years of age.

6. Incest occurs when the defendant engages in sexual penetration with a person, knowing the person to be the defendant's brother or sister of the whole or half blood or by adoption.

After reviewing these principles and the law, the Court of Appeals noted that Jane testified that S.L. sexually penetrated her, the state had played the tape of the interview Jane gave at New Hope Children's Advocacy Center, which corroborated her testimony. Dr. Christensen's examination of Jane revealed bruising and swelling in Jane's private areas and her diagnosis was "sexual molestation of a child." The facts established that Jane was nine years old and that she was S.L.'s sister of the half blood and by adoption.

The court noted that the defense argued that Jane's credibility was severely undercut because she remembered bleeding on items collected for evidence, but yet no blood was found on the items.

The court noted that forensic evidence is not required to establish proof of rape and the evidence may be sufficient to sustain a conviction for rape of a child when the only evidence is the testimony of the victim. There is no requirement that the victim's testimony be corroborated. The court also noted that credibility determinations are made by the jury, and the court found that a rational trier of fact could in fact find beyond a reasonable doubt that S.L. committed rape of a child and incest.

State v. S.L. (Tenn. Civil Appeals 3/1/22)

MISTRIAL

POOR CONDUCT BY PROSECUTION: AFTER THE TRIAL COURT HAD CLEARLY INSTRUCTED THE STATE TO NOT BRING OUT ANY PROOF OF THE DEFENDANT'S STATUS AS A SEX OFFENDER, THE ISSUE WAS BROUGHT UP BY THE STATE IN THE PRESENCE OF THE JURY RESULTING IN THE COURT OF

CRIMINAL APPEALS HOLDING THAT THE “EXPLOSIVE REVELATION” REQUIRED A MISTRIAL

FACTS: In a case in which the defendant was charged with drug and firearm charges, the defendant filed a motion in limine to prevent the state from making any reference to the fact that the defendant was a sex offender. The trial court granted the defendant’s motion and ruled very clearly and explicitly that there was to be no proof introduced by the state which would refer to the defendant’s sex offender status. The trial court went into extensive detail about what not to do and how to allow witnesses to introduce themselves as officers or probation officers. Despite the explicit instructions, the following exchange occurred after Mr. Miller testified that he was a probation and parole officer for the Tennessee Department of Corrections:

Prosecutor: What exactly are your job responsibilities?

Officer Miller: I am an – I work in the PSU unit which supervises registered sex offenders.

The defendant objected and the prosecutor apologized stating it was “not his intent to try to back door the ruling.” The trial court did not find that the prosecutor had intentionally introduced the issue of the defendant being a sex offender but told the prosecutor that when he asked a general question about the officer’s duties he should have expected that could have happened. The trial court offered to instruct the jury to disregard the comment but the defense declined the instruction because the information was “very prejudicial” and an instruction would only serve to emphasize the issue. The defendant demanded a mistrial but the judge refused to grant the same.

HELD: The Court of Criminal Appeals found that the trial court erred in failing to grant a mistrial in the case due to the state’s poor conduct. The Court of Criminal Appeals stated, “Evidence of the defendant’s criminal history hung like a cloud over the entirety of the trial. Given the timing of Mr. Miller’s testimony, the fact that the testimony came in response to a question by the state and in direct contravention of the trial court’s recent

and explicit ruling, and the explosive nature of a revelation that the defendant was a sex offender, it is our view that the trial court abused its discretion by denying the defendant’s motion for a mistrial.” The CCA reversed the judgment of the court and remanded the case for a new trial.

The Court of Criminal Appeals noted that normally a mistrial should be declared only if there is a “manifest necessity” for such action. The court noted that in the present case, the challenged testimony came in direct response to the prosecutor’s request that Mr. Miller describe “exactly” his job responsibilities. The court noted that the prosecutor had been warned by the trial court for the state not to get into the employment responsibilities of the officers who conducted the search of the residents and it noted that the prosecutors had certainly been aware that the probation officer would respond as he did. The Court of Criminal Appeals could not disagree with the defendant’s conclusion that a limiting instruction would simply reemphasize the bad proof. The court found that the testimony was “so irrelevant and inflammatory” that any further reference would have only drawn more attention to the issue, and there was no fault on the part of counsel for not wishing to draw more attention to the problem.

PRACTICE POINT: This case serves as a good illustration of bad conduct or poor choices on the part of prosecution which may call for drastic action in a case. While General Sessions Judges do not try cases with juries, poor conduct or overbearing or aggressive actions by a prosecutor or by an attorney in a case may require drastic action by the court.

State v. Higgins (Tenn. Cr. App. 5/2/22)

MOMON HEARING

MOMON HEARING: MOMON HEARING IS NOT REQUIRED IN CASES IN WHICH THE DEFENDANT ELECTS TO TESTIFY AT TRIAL

FACTS: In a case involving felony theft, the defendant claimed that the trial court should have granted his motion for a new trial “due to the

defendant's lack of understanding of his Constitutional rights during the Momon hearing." The defendant pointed to evidence adduced at the hearing on the motion for new trial that established that he had been diagnosed with a concussion on the same evening that the Momon colloquy took place.

The trial court in the present case did conduct a Momon hearing, at which time the defendant was advised by both his attorney and the trial court that the decision whether to testify is up to the defendant alone. The defendant acknowledged that he had discussed the issue with his attorney, and the defendant expressed that he felt he had "no choice" but to testify and that he was not mentally and physically prepared to testify. The record in the case was clear that the defendant wanted to testify because he did not want the officer's testimony to go unchallenged.

Subsequently, the defendant was convicted by a jury of felony theft of property. At his hearing on motion for new trial, the defendant testified that he suffered an injury prior to the trial and that as a result he only remembered "bits and pieces" of the trial and specifically could not recall having discussed his testifying at trial with trial counsel. He maintained that he did not recall the trial court's informing him that the decision to testify was his decision alone, and he insisted he did not recall the Momon hearing at all and did not remember anything after his arrival at the courthouse. The defendant insisted that he lacked the capacity to make the decision to testify at trial, and he also testified at the new trial motion hearing that he went by ambulance to the emergency room after the conclusion of his trial.

HELD: The Court of Criminal Appeals held that the defendant had failed to establish by a preponderance of the evidence that he was incompetent to stand trial or to act as a witness in his own defense. The trial court found that the defendant did not exhibit any indication that he had been struck in the head by a jackhammer and was in pain. The court also noted that at the Momon hearing to explain the nature of his health problem, the defendant did not tell the trial court that he had been injured at work before coming to court and did not describe any health problem.

Specifically, in regard to the Momon issue, the Court of Criminal Appeals noted that the Supreme Court had specifically declined to extend the ruling in Momon to those instances when, as in the present case, the defendant elects to testify at trial. The court noted that “because the defendant elected to testify, no Momon hearing was required.”

The Court of Criminal Appeals noted that in Momon v. State, 18 S.W. 3d 152 (Tenn. 1999) the court held:

“When a defendant elects not to testify and to waive his fundamental constitutional right to do so, counsel must hold a colloquy with the defendant on the record, out of the presence of the jury, in which counsel should question the defendant to ensure that the defendant understands that:

(1) the defendant has the right not to testify, and if the defendant does not testify, the jury (or court) may not draw any inferences from the defendant’s failure to testify;

(2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;

(3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify.

The Court of Criminal Appeals emphasized that the Momon procedure is not required when the defendant elects to testify at trial.

PRACTICE POINT: In cases where a trial is conducted by the General Sessions Judge, and the defendant elects not to testify, it is certainly appropriate for the General Sessions Court to go over the Momon procedure with the defendant, advising the defendant that he or she has the right not to testify and that no inferences will be drawn from the failure to testify; the defendant has the right to testify and if he or she wishes to exercise that right, no one can prevent the defendant from testifying; and that the defendant has consulted with his or her counsel in making the decision whether or not to testify, and is voluntarily and personally waiving the right to testify.

State v. Dawson (Tenn. Cr. App. 1/10/22)

POSSESSION OF DRUGS, WEAPON, OR OTHER CONTRABAND

NEXUS OF POSSESSION: NO EVIDENCE WAS ESTABLISHED BY THE STATE WHICH WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO CONCLUDE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS CONSTRUCTIVELY IN POSSESSION OF OXYCODONE OR OF THE GUN FOUND IN THE VEHICLE

FACTS: A jury convicted the defendant of simple possession of oxycodone, simple possession of marijuana, and possession of a firearm after having been convicted of a felony crime of violence, and the defendant received an effective ten-year sentence. The convictions were the result of a search of the vehicle in which the defendant was a passenger and the discovery of marijuana and oxycodone in the center console, a marijuana cigarette on the passenger floorboard, and a weapon under the passenger's seat. The defendant challenged the sufficiency of the evidence, claiming that the state had failed to establish that the defendant possessed controlled substances or the firearm beyond a reasonable doubt.

HELD: The Court of Criminal Appeals held that the proof of the state was sufficient to allow rational trier of fact to conclude beyond a reasonable doubt that the defendant was in constructive possession of the marijuana. The Court of Criminal Appeals also found, based on the same standard, that the state had failed to establish sufficient proof to allow rational trier of fact to conclude beyond a reasonable doubt that the defendant was constructively in possession of the oxycodone or in constructive possession of the weapon.

(1) In regard to the simple possession of marijuana charge, the CCA noted that Officer Barker testified he discovered a small bag of marijuana in the center console of the vehicle and a marijuana cigarette on the floorboard of the front passenger's area. Officers also testified they could smell the scent of marijuana emanating from the vehicle and that a marijuana cigarette was located on the floorboard in the area in which the defendant was sitting. Based upon the "open and obvious nature of the contraband" the court found that the circumstances were sufficiently incriminating to conclude beyond a reasonable doubt that the defendant was in constructive possession of the marijuana, even though the proof was not overwhelming.

The court did note that Agent Depew had conceded that at the time of testing, he could not distinguish marijuana from hemp, which the court noted "certainly weakens the state's case" but the court concluded that the totality of the proof in creating an officer's testimony that the substance was in fact marijuana and the introduction of the marijuana cigarette into evidence was sufficient for the conviction on the marijuana charge.

(2) In regard to the conviction for possession of the weapon found underneath the front passenger's seat, the court noted that the state failed to meet the beyond reasonable doubt standard. The court noted there was no attempt to obtain fingerprints from the gun and the ownership of the gun was not established. The defendant was neither the owner nor the driver of the vehicle, and the gun was not in plain view. One of the officers acknowledged that the defendant never made any movements indicative of reaching under the seat, and the court concluded: "In short, there is

absolutely nothing beyond the defendant's physical proximity to the weapon to establish any kind of nexus of possession." The court therefore concluded that under the facts of the case a rational trier of fact could not have found beyond a reasonable doubt that the defendant possessed the weapon when there was no evidence linking him to the weapon or suggesting that he was aware of its presence in the vehicle.

(3) In regard to the conviction for possession of oxycodone, the court also found that the state's proof failed to establish guilt beyond a reasonable doubt of the defendant passenger. The court noted that the oxycodone was validly prescribed to the mother of the driver. The court noted that the pills were in the center console of the vehicle, which was neither on nor driven by the defendant, and the pills were underneath a pile of papers and other items. There was no evidence that the defendant ever accessed the console, that he knew of the existence of the pills, or that the presence of a bottle of prescription medication was in some way obviously unlawful. The court also noted that the pills were in a small quantity and not in plain view. The court noted that "beyond the defendant's presence, the state failed to introduce any incriminating circumstances which connected the defendant to the pills. No rational trier of fact could have concluded beyond a reasonable doubt that the defendant constructively possessed the pills.

The Court of Criminal Appeals discussed the following key principles in regard to cases involving constructive possession of drugs, weapons or other contraband:

1. To sustain the convictions for possession of illegal drugs, the state has to establish that the defendant possessed the controlled substances and that his possession was knowing.
2. In regard to the firearms offense, the state has to show that the defendant possessed the firearm and that he acted recklessly, knowingly, or intentionally, in doing so.
3. Possession may be either actual or constructive.

4. Constructive possession is the ability to reduce an object to actual possession. If possession is deemed to be constructive, there must be proof that the accused had the power and intention at a given time to exercise dominion and control over the contraband either directly or through others.
5. Mere presence in the vicinity of the contraband is not, alone, sufficient to support a finding of constructive possession. Neither is “mere” association with a person who does in fact control the drugs or property where the drugs are discovered.
6. When the defendant is not in exclusive possession of the place where the contraband is found, additional incriminating facts and circumstances must be presented that affirmatively links the accused to the contraband in order to raise a reasonable inference of possession.
7. Constructive possession is evaluated in light of the totality of the circumstances and may be proven by circumstantial evidence.
8. Possession may be exercised solely or jointly with others.
9. Whether possession is knowing is generally shown by inference and circumstantial evidence.
10. When the defendant is charged with possession of contraband located in a vehicle, knowledge may be inferred from control over the vehicle in which the contraband is secreted.
11. Tennessee courts have upheld convictions based on constructive possession when the defendant was the owner or driver of the vehicle, but the court must consider all facts involved in the totality of the situation.
12. When another person is committing visibly criminal acts in the presence of the accused, then the chances are substantially greater that a companion of the offender is something more than a mere bystander.
13. When the contraband is in a location under the control of multiple persons, incriminating circumstances other than the defendant’s mere occupancy, ownership, or presence have contributed to findings of

sufficient evidence of constructive possession, and these circumstances include the open and obvious nature of the contraband.

14. When evidence has established that the defendant knew about the presence of the contraband, this court has found sufficient evidence for constructive possession.

15. On the other hand, this court has found the evidence insufficient to support a finding of possession when there was no evidence that the accused knew about the contraband.

PRACTICE POINT: This is a good case to review in regard to the principles of a court's determining whether the evidence establishes actual or constructive possession of any type of illegal contraband.

State v. Siner (Tenn. Cr. App. 1/27/22)

PRE-TRIAL IDENTIFICATION PROCEDURES

PHOTOGRAPHIC LINEUP: EVEN THOUGH THE TRIAL COURT FOUND THAT THE DEFENDANT'S PICTURE IN THE PHOTOGRAPHIC LINEUP HAD A "LIGHTER BACKGROUND" THAN THE OTHER FIVE PHOTOGRAPHS AND WAS A "LITTLE SUGGESTIVE," THE PHOTOGRAPHIC LINEUP ITSELF WAS NOT UNDULY SUGGESTIVE AND THE FIVE FACTORS FROM NEIL V. BIGGERS SUPPORTED THE TRIAL COURT'S DECISION

FACTS: In a case in which the defendant was convicted of second-degree murder, the defendant filed a motion to suppress the identification of the defendant by witnesses in the photographic lineup and at trial, claiming that the photograph of the defendant in the lineup was "different from the other photographs and designed in a way to stand out."

The state responded that the photographic lineup was not "unduly suggestive."

HELD: The Court of Criminal Appeals held that the trial court had appropriately concluded that there was nothing unduly suggestive about the photographic lineup. The court noted that the photographic lineup contained photographs of six African American males, all of whom had short, dark hair and similar facial hair. The court noted that each was uniform in size. Also, the witnesses were previously familiar with the defendant and interacted with the defendant just prior to the shooting.

The Court of Criminal Appeals noted that the U.S. Supreme Court case of Biggers establishes a two-part analysis which the trial court must apply to determine the validity of a pre-trial identification. The CCR noted that, first, the trial court must determine whether the identification procedure was unduly suggestive. Secondly, the trial court must determine whether under the totality of the circumstances, the identification procedure was reliable, considering five factors, stated as follows:

1. the opportunity of the witness to view the criminal at the time of the crime;
2. the witness's degree of attention at the time of the crime;
3. the accuracy of the witness's prior description of the criminal;
4. the level of certainty demonstrated by the witness at the confrontation;
5. the length of time between the crime and the confrontation.

The Court of Criminal Appeals determined that after full review the trial court properly determined that while the photographic lineup was "a little suggestive," it was not unduly suggestive.

The court also found that the trial court had appropriately applied the five factors as the court had gone on to consider each of the five factors even after finding the lineup was not unduly suggestive.

The court noted that in regard to the first factor, both witnesses had a full opportunity to view the defendant and that they had seen him and recognized him clearly. In regard to the second factor, the court noted that the degree of attention of the witness's was very high. In regard to the third factor, the trial court noted that the witnesses knew the defendant

and accurately described him. In regard to the fourth factor, the court noted that the trial court had determined that both witnesses were “absolutely certain” in their identification of the defendant from the lineup. In regard to the fifth factor, the court noted that the length of time between the crime and confrontation was very slight as the identification occurred “immediately thereafter that same night.”

The Court of Criminal Appeals therefore concluded the trial court did not err in denying the defendant’s motion to suppress based upon its proper evaluation pursuant to the Biggers case.

State v. Bobo (Tenn. Cr. App. 3/17/22)

PHOTOGRAPHIC LINE-UP: INDICIA OF RELIABILITY OF THE IDENTIFICATION PROCEDURE IN THE PRESENT CASE WAS STRONG ENOUGH TO OUTWEIGH THE CORRUPTING EFFECT OF THE SUGGESTIVE IDENTIFICATION PROCEDURE AND THEREFORE THE WITNESS’S IDENTIFICATIONS OF THE DEFENDANT, BOTH DURING THE PHOTOGRAPHIC LINE-UP AND AT TRIAL, WERE PROPERLY ADMITTED

FACTS: In a case involving felony murder and aggravated burglary, the defendant maintained that the trial court had erred in denying his motion to suppress the eyewitness identification evidence, claiming that the witness had a limited opportunity to view the perpetrator at the time of the offenses, that the witness’s attention was diverted by a number of factors and that the witness had initially stated that he did not know who shot him. The defendant also maintained that the witness was never asked to state the confidence of his identification at the time of the photographic line-up.

HELD: The Court of Criminal Appeals held that even though the identification procedure in the case was suggestive, the indicia of reliability was strong enough to outweigh the corrupting effect of the suggestive identification procedure. The CCA therefore concluded that the trial court properly admitted the witness’s identifications of the defendant, during both the photographic line-up and at trial.

The Court of Criminal Appeals reviewed several important principles in regard to use of eyewitness identification evidence:

1. The United States Supreme Court has identified procedures in regard to the admission of eyewitness identification evidence which are necessary when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.

2. Due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.

3. Even if the police use such a procedure which is suggestive, suppression of resulting identification is not the inevitable consequence.

4. Instead the Due Process Clause of the United States and State Constitutions require courts to determine, on a case-by-case basis, whether improper police conduct during the identification procedure created a "substantial likelihood of misidentification."

5. If the conduct did create a substantial likelihood of misidentification, the trial court must disallow presentation of the evidence at trial.

6. However, if the indicia of reliability is strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the fact finder will ultimately determine its worth.

7. The United States Supreme Court in the case of Neil v. Biggers (1972) established a two-part analysis for determining whether evidence of identification from a line-up is admissible under the due process clause. Specifically, the Biggers court stated that the trial court must determine; (1) whether the identification procedure was unnecessarily suggestive, and (2) if the identification procedure was unnecessarily suggestive, then it must determine whether, under the totality of the circumstances, the identification was nevertheless reliable.

8. In determining whether an identification is reliable, Biggers set out the following factors:

- a. The opportunity of the witness to view the criminal at the time of the crime;
- b. The witness's degree of attention;
- c. The accuracy of the witness's prior description of the criminal; and
- d. The level of certainty demonstrated by the witness at the confrontation; and
- e. The length of time between the crime and the confrontation.

In the present case, the Court of Criminal Appeals looked at the five-step process and determined that the identification procedure in the case was not unnecessarily suggestive. The Court of Criminal Appeals found that the conclusion of the trial court was wrong. The court noted that the record in the case clearly showed that Investigator Cook not only knew that the defendant's photograph had been included in the photographic line-up but also knew its precise location within the line-up. The court noted that such deviations from proper procedure can cause an officer, whether purposefully or inadvertently, to influence the eyewitness, which can then result in false identification. The court noted that even more problematic was Investigator Cook's failure to properly inform the witness that the perpetrator might or might not be included in the photographic line-up. Instead, the officer bluntly stated, "I'm gonna show you some line-ups, ok? And I want you to tell me who you recognize." The court noted that an officer's failure to give the simple admonition that the perpetrator "may or may not be in the line-up" can result in an eyewitness feeling pressure to choose one of the individuals in the line-up, even if none of the included individuals match the eyewitness's memory of the perpetrator. The court also noted that Investigator Cook also neglected to obtain a "confidence statement" from the witness after he identified the defendant. The court stated that "a confidence statement provides a clear measurement of the certainty of the eyewitness's identification, which is significant in and of itself and proves useful if the eyewitness's degree of certainty regarding the identification changes over time."

The court noted that in light of all these issues which were easily avoidable, the CCA concluded that the identification procedure was “unnecessarily suggestive,” and therefore the court stated it must consider the Biggers factors to determine whether under the totality of the evidence there was sufficient evidence of reliability to outweigh the corrupting effect of the suggestive circumstances.

In looking at the first factor, regarding the opportunity of the witness to view the criminal at the time of the crime, the record showed that the witness was within a foot or two of the perpetrator, that the witness was able to thoroughly observe the perpetrator, the court concluded that the record clearly established that the witness had more than sufficient opportunity to view the perpetrator and therefore that factor weighed in favor of reliability of the identification.

Secondly, regarding the witness’s degree of attention, the records show that the witness was able to observe the perpetrator in broad day light. The court concluded that the intention of the witness was sufficiently focused on the perpetrator in order to correctly identify him and that factor weighed in favor of reliability.

Thirdly, in regard to accuracy of the prior descriptions of the criminal, the records show that the witness provided no physical description of the perpetrator prior to his identification of the defendant in the photographic line-up. The court noted that because the witness provided no previous description of the defendant there was no basis to evaluate this factor and therefore that factor was neutral.

Fourth, regarding the level of certainty demonstrated by the witness at the time of the confrontation, the court noted the witness immediately without hesitation identified the defendant from the photospread. The court noted that since the response of the witness was immediate, assured, and unwavering, the factor weighed in favor of reliability.

Fifth, regarding length of time between the crime and the confrontation, the court noted that only a few hours passed between the commission of the crimes and the presentation of the photographic line-up and that this factor weighed in favor of reliability.

Based upon all of the factors in the Biggers case, the court concluded that the indicia of reliability of the identification was strong enough to outweigh the corrupting effect of the suggestive identification procedure.

State v. Cook (Tenn. Cr. App. 2/7/22)

RULE OF SEQUESTRATION

RULE OF SEQUESTRATION: THE RULE PROHIBITS WITNESSES FROM DISCUSSING THEIR TESTIMONY WITH OTHER WITNESSES, NOT WITH TRIAL COUNSEL

FACTS: In a case involving vehicular assault and DUI, the defendant maintained that the trial court made an ex parte decision to allow the state to privately confer with its own expert witness, Mr. Daniels, during a break in his cross-examination. The defendant alleged that the state violated the Rule of Sequestration and gained an unfair advantage by allowing the witness to more thoroughly prepare for cross-examination.

The facts established that during the trial, and during cross-examination, the expert witness (Daniels) was asked about an FDA recall for the machine that performed the test on the defendant's blood, being the Vista 1500. The state objected on the basis it did not have advance notice of the recall, and the trial court granted a recess for Mr. Daniels to review the substance of the recall. The state asked for permission to discuss the recall with the witness, at which time the trial court granted the request, to which the defendant did not object.

After the recess, Daniels explained to the court that the recall only applied to testing for a condition in diabetic patients, a test that was not performed by the Vista 1500 at Skyline Medical Center. As a result of Daniels' explanation of the recall, the trial court prohibited any further cross-examination about the recall and permitted the witness to testify about why the recall was not relevant to the blood testing performed on defendant's blood sample. The CCA noted that there was no objection by the defendant about the communication between counsel for the state and the expert witness.

HELD: The court found that the rule of sequestration prohibits witnesses from discussing their testimony with other witnesses, but not with trial counsel.

The court noted that under Tennessee Rule of Evidence 615, the Rule of Sequestration provides:

At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal state of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in allowing a witness to talk to counsel after receiving information about a recall that was not provided during discovery, specifically because the Rule of Sequestration does not apply to witnesses discussing their testimony with trial counsel.

State v. Moore (Tenn. Cr. App. 4/12/22)

SEARCH AND SEIZURE

**BLOOD DRAW PERFORMED BY HOSPITAL: TRIAL COURT
PROPERLY DENIED MOTION TO SUPPRESS BLOOD SAMPLE
DUE TO THE FACT THAT THE BLOOD SAMPLE WAS NOT**

**TAKEN AS A RESULT OF STATE ACTION BUT INSTEAD WAS
DRAWN BY HOSPITAL STAFF BECAUSE OF THE
SERIOUSNESS OF THE DEFENDANT’S INJURIES**

FACTS: In a case in which the defendant was convicted of vehicular assault, driving under the influence, and reckless endangerment, the defendant maintained that the trial court erred in denying the motion to suppress the blood draw as she claimed she was denied the opportunity to obtain a subsequent blood test pursuant to TCA 55-10-408(e) and because she was not warned of the consequences of submitting to a chemical test prior to the blood sample pursuant to TCA 55-10-406(c).

The state argued that the trial court properly admitted the blood test performed during the course of medical treatment that was required due to the injuries to the defendant and was not the result of state action.

At the motion to suppress hearing, Sergeant Bellavia testified that the defendant was immediately taken by LifeFlight to Skyline once she was removed from her vehicle. Sergeant Bellavia did not get a warrant for the blood draw because of the time involved to do so even though he did suspect that alcohol was a factor in the crash.

One week after the crash, Sergeant Bellavia sought and obtained a judicial subpoena for the defendant’s medical records from Skyline, and the medical records revealed that the blood alcohol content of the defendant’s blood was .176. The investigation was completed in mid-December of 2016, and presented to the grand jury in February 2017.

HELD: The Court of Criminal Appeals held that the evidence did not preponderate against the trial court’s denial of the motion to suppress due to the fact that the defendant was gravely injured in a car crash and flown via LifeFlight to the hospital for medical treatment, and the blood was drawn at the behest of the treating physicians and not a police officer.

The court noted that the exclusionary rule under both the Fourth and Fifth Amendments was designed to deter police conduct and that the exclusionary rule served to prevent police from violating constitutional

rights of the accused. The court noted that evidence gathered by private persons is generally not subject to the exclusionary rule because with private action there is no police conduct to be deterred. The court stated that therefore there is no constitutional violation when there is no state action.

The court also referred to TCA 55-10-406 which permits a law enforcement officer with probable cause to believe the operator of a motor vehicle is driving under the influence to request that the operator submit to tests to determine alcohol or drug content. The court noted that the law provides that “nothing in this section affects the admissibility into evidence in a criminal prosecution of any analysis of the alcohol or drug content of the defendant’s blood that was not compelled by law enforcement but was obtained while the defendant was hospitalized or otherwise receiving medical care in the ordinary course of medical treatment.” Based on that the court noted that the appellate courts have upheld the use of blood test results that were obtained as a part of medical treatment due to the fact there was no state action implicating the exclusionary rule.

The court summarized that the defendant was gravely injured in a car crash, flown by LifeFlight to the hospital for treatment, and that the defendant’s blood was clearly “drawn at the behest of the treating physicians, not a police officer.”

The court also noted that the defendant had complained that pursuant to TCA 55-10-408(a)(g) that she had the right to independently test a blood sample whether the sample was collected by law enforcement or by medical professionals. The court stated that the defendant was “simply incorrect” in her position as the right to have an independent test applies only to blood test performed by a “qualified practitioner ... acting at the written request of a law enforcement officer.” Since this was not drawn at the behest of law enforcement, the provision for an independent test did not apply.

In regard to the defendant’s argument that the state had violated her constitutional rights by waiting to present the matter to the grand jury until after her blood sample had been destroyed, the court again noted that this

position of the defendant ignored the fact that the “blood sample was taken at the request of medical professionals, not state officers.”

Lastly, the defendant had argued that the blood sample was obtained prior to the doctor issuing orders to test the blood for alcohol content and as a result the defendant argues that the test should be suppressed. The Court of Criminal Appeals noted that “the phlebotomist testified at the hearing on the motion to suppress that the blood was drawn prior to the doctor’s orders based on the defendant’s injuries in order to provide the best patient care.” The court once again emphasized that the blood sample was simply not taken as a result of state action.

State v. Moore (Tenn. Cr. App. 4/12/22)

FAILURE OF SEARCH WARRANT AFFIDAVIT TO CONTAIN “TIME STAMP”: THE COURT OF CRIMINAL APPEALS FOUND THAT THE EVIDENCE WAS CLEAR IN ESTABLISHING THAT THE SEARCH WARRANT AFFIDAVIT WAS SWORN IN FRONT OF THE TRIAL JUDGE BEFORE THE WARRANT WAS ISSUED AND THAT THE EVIDENCE DID NOT PREPONDERATE AGAINST THE TRIAL COURT’S FINDING

FACTS: In a case in which the defendant was charged and convicted of aggravated sexual battery, the defendant maintained that the trial court erred by denying the defendant’s motion to suppress the evidence of the seizure of key evidence derived from the search of the defendant’s home. The defendant maintained that the magistrate failed to make a neutral and detached judgment that probable cause was shown because the search warrant’s affidavit had no time stamp. The defendant contended that because there was no time stamp, there was no proof that the affidavit was sworn to before the issuance of the warrant.

The state responded that the trial court did not err in denying the defendant’s motion to suppress because the affidavit was sworn to on the same day the warrant was issued and both were sworn in front of the same magistrate.

HELD: The Court of Criminal Appeals held that the trial court had properly found that the affidavit was sworn to in front of the trial judge before the warrant was issued and the evidence did not preponderate against the trial court's finding.

The Court of Criminal Appeals noted that the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution safe guard the privacy and security of individuals against arbitrary invasions of government officials. The court noted that Tennessee Criminal Procedure Rule 41 provides that a warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and establish grounds for issuing the warrant. The court noted that Rule 41 provides that the magistrate "shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution." The court stated that the purpose of the magistrate's date and time endorsement required by Rule 41(c) is "to ensure that if a search warrant is executed prior to its issuance, such discrepancy will be apparent on the face of the warrant."

The court noted that at the suppression hearing, the search warrant was received as an exhibit and that the search warrant reflected that on January 30, 2018, the affidavit was sworn by Detective McKlean in front of the trial judge. The court noted that on the same day, the same trial judge signed the search warrant, and the warrant was issued at 9:55 p.m. This search warrant stated that "proof by affidavit having been made before the trial judge by Detective Santiago McKlean, and said affidavit being incorporated by references of this warrant." The Court of Criminal Appeals therefore noted that the trial court found that this clear expression that the affidavit was sworn in front of the trial judge before the warrant was issued supported the ruling of the trial judge and the evidence did not preponderate against the trial court's ruling.

State v. Montella (Tenn. Cr. App. 4/7/22)

SEARCH CONDUCTED PURSUANT TO VALID CONSENT: CONSENT FOR A WARRANTLESS SEARCH MAY BE GIVEN BY A THIRD PARTY WHO POSSESSED COMMON AUTHORITY OVER THE PREMISES OR EFFECTS WHICH ARE SOUGHT TO BE INSPECTED

FACTS: In a case in which the defendant was charged with first degree premeditated murder, the defendant contended that the trial court erred by denying his motion to suppress the handgun obtained from inside his bedroom as a result of the police officer's warrantless entry onto the premises.

At the suppression hearing, Detective Hawkins testified (consistent with his trial testimony) regarding his investigation which led to the receipt of an anonymous tip about the location of the Dodge Charger that was utilized during a shooting which led to a murder. Detective testified that Sergeant Ryan related that someone had called stating that the defendant was believed to be the person who was inside the white Dodge Charger who committed the shooting, following which the Dodge Charger was determined to be at a home owned by Mr. Hinerman, the defendant's cousin and owner of the home. Based upon the tip, the detective and other officers went to Mr. Hinerman's home to look for the white Dodge Charger which they discovered was parked at the end of the driveway closest to the backyard. Instead of seeking a search warrant at the time, Detective Hawkins testified that he and the other detectives and officers approached the house and knocked on the door. Mr. Hinerman opened the door and he was asked to step outside to which he complied. Detective Hawkins asked Hinerman who owned the Dodge Charger and he advised that it belonged to Henning, a co-defendant in the case. The detectives asked if the defendant was home and Mr. Hinerman stated that the defendant and the co-defendants were home. Detective Hawkins asked Mr. Hinerman if he and the detectives could come inside to get the defendant and Mr. Hinerman gave permission to enter the home but first he wanted to put up his cats. The detectives were allowed into the home

and Mr. Hinerman identified the downstairs bedroom as the defendant's bedroom.

The detectives yelled for the defendant to come out of the bedroom, but there was no answer, following which Detective Hawkins and Detective Morris opened the door and entered the bedroom, observing the defendant asleep on the bed with a handgun on the bed beside the defendant. Hawkins testified that the defendant appeared to be the same person who was in the video recording on the victim's cell phone which had been introduced.

HELD: The Court of Criminal Appeals held that the record supported the trial court's determination that Mr. Hinerman had joint authority in the bedroom and that Mr. Hinerman consented to the officers' entering the home and entering the defendant's bedroom.

The Court of Criminal Appeals noted that the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protects individuals from unreasonable searches and seizures, noting that warrantless seizures are presumed unreasonable unless conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.

The Court of Criminal Appeals noted that "one such exception to the warrant requirement exists for a search conducted pursuant to valid consent." The court noted the following key principles in regard to searches conducted pursuant to valid consent:

1. Consent for a warrantless search may be given by the defendant or by a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.
2. Common authority is shown by mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

The court noted that the record reflects the defendant had been allowed to stay at the home for a couple of weeks at the time of the shooting, and that Mr. Hinerman consented to the officers entering the home for the purposes of arresting the defendant and the co-defendants, Mr. Hinerman having told the police that all three people along with the firearm were inside the home.

The Court of Criminal Appeals therefore concluded that the record supported the trial court's determination that Hinerman had joint authority in the bedroom and that Hinerman consented to the officers' entering the home and the defendant's bedroom.

State v. Hinerman (Tenn. Cr. App. 5/4/22)

VEHICLE INVENTORY SEARCH: BECAUSE NO ELIGIBLE DRIVER WAS AVAILABLE TO TAKE POSSESSION OF THE CAR WHEN THE OFFICER DECIDED TO IMPOUND THE VEHICLE AND HAVE IT TOWED FROM THE SCENE, THE IMPOUNDING OF THE VEHICLE WAS LAWFUL AND APPROPRIATE

FACTS: Officer Akins testified that he was assigned to the U.S. Marshal-led Smoky Mountain Fugitive Task Force, which assisted in “apprehending violent fugitives, gang members, and people with felony drug charges.” Akins testified that the task force was looking for Erreese King who was wanted by the U.S. Marshal Service. The defendant in this case (Holmes) was not a target of that investigation but the defendant was somewhat associated with Mr. King. Officers had previously gone to the defendant's house and warned the defendant about harboring a fugitive and that if he harbored Mr. King that he could be subject to prosecution.

On 2/5/17, officers saw Mr. King riding in the defendant's vehicle and they effectuated a traffic stop, following which the officers determined that the defendant was driving the vehicle on a revoked license. The officers also took Mr. King into custody on outstanding warrants. The officers determined that none of the three occupants could drive the vehicle and therefore determined the vehicle would be towed. The officers performed an inventory search of the vehicle which revealed the presences of crack

cocaine and OxyContin, and the vehicle was then towed from the scene. Officer Akins testified that under the KCSO's policy, it was up to the officer's discretion whether to have a vehicle towed or to allow someone to drive it away from the scene. Akins testified to his knowledge no one asked to take the vehicle from the scene in the case.

The defendant and his family testified that the vehicle stop took place near a family member's home and family members came by the scene and offered to take the car so it would not have to be towed. The defendant's mother testified that one officer gave her permission to take the car from the scene when another officer stopped that from happening and said that they were going to seize the car.

The trial court determined that the search of the vehicle was not lawful as a search incident to an arrest because the defendant was secured in a police vehicle at the time of the search. The trial court did conclude, however, that the search was a valid inventory search because the defendant had been arrested and no family members of the defendant were present when the officers decided to impound the vehicle.

HELD: The Court of Criminal Appeals held that the inventory search of the vehicle was lawful, and the results of the search were not subject to suppression. The CCA specifically found that the family members of the defendant arrived after the search of the vehicle had commenced which did not invalidate the impoundment itself and therefore that the inventory search was valid.

The CCA noted the following important principles in regard to inventory searches:

1. As an exception to the warrant requirement, it is constitutionally permissible for police officers to inventory the contents of a lawfully impounded automobile without a search warrant as long as it is in accordance with routine administrative procedures.

2. "Impoundment of a citizen's vehicle following his or her arrest on a traffic charge is inappropriate when reasonable alternatives to impoundment exists." (Tennessee Supreme Court)

3. The lawful arrest of a driver, alone, is insufficient to support a vehicle's impoundment; there must also be reasonable cause to take his vehicle into custody.

4. The guideline is that "if the circumstances that bring the automobile to the attention of the police in the first place are such that the driver, even though arrested, is able to make his or her own arrangements for the custody of the vehicle, or if the vehicle can be parked and locked without obstructing traffic or endangering the public, the police should permit the action to be taken rather than impound the car against the will of the driver."

5. The overriding question is whether, under all the attendant circumstances, impoundment is reasonably necessary.

6. The state bears the burden to show the reasonableness of the impoundment.

7. In determining the reasonableness of the impoundment, the trial court should consider the extent to which the officer advised the defendant that his car will be impounded unless he can make a reasonable alternative to impoundment. An officer's failure to ask the defendant if he had an alternative to towing the vehicle, however, does not invalidate an impoundment when there are no reasonable alternatives for the disposition of the car.

The Court of Criminal Appeals concluded that the trial court had properly found the defendant's vehicle was stopped in the middle of the road and that the family members of the defendant did not arrive until after the vehicle had been impounded and the search of the vehicle had begun. The CCA held that the record supported those findings; "because no eligible driver was available to take possession of the car when Officer Akins decided to impound the vehicle and have it towed from the scene, the impounding of the vehicle was appropriate."

State v. Holmes (Tenn. Cr. App. 1/4/22)

SUA SPONTE HEARING BY TRIAL COURT

SUA SPONTE HEARING AND COURT'S CALLING OF WITNESSES:

HAVING BEEN INFORMED THAT THE DEFENDANT HAD ALLEGEDLY THREATENED A VICTIM-WITNESS IN THE HALLWAY, THE TRIAL COURT ACTED APPROPRIATELY AND WITHIN ITS AUTHORITY BY HOLDING AN IMMEDIATE SUA SPONTE JURY-OUT HEARING TO INQUIRE INTO THE INCIDENT

FACTS: In a case involving unlawful possession of a firearm by a felon and other charges, the defendant contended that the trial court erred by holding an improper sua sponte hearing to address the alleged actions of the defendant after the trial court was informed by the bailiff that an officer overheard the defendant threaten an alleged victim in the hallway.

The trial record reflected that the trial court held the jury-out hearing upon being informed by the bailiff that an officer had overheard the defendant threaten one of the victims. The court during the hearing questioned the witnesses, Mr. Solomon and Mr. Harper, and each testified about the incident that had just transpired in the hallway. At the conclusion of his voir dire of each witness, the court afforded both the state and the defendant the opportunity for cross-examination. The court also inquired whether each party had any additional witnesses for the hearing. Both the state and the defense responded that they had no further proof to present, but the state requested, over the objection of the defendant, that it be allowed to add Mr. Harper as a trial witness. The trial court took a brief recess to consider the issue, and, upon returning to the court, found that there was clear and convincing evidence that the defendant made the statement threatening the witness, and that the statement was relevant to the issue of the defendant's intent to cause the victim to reasonably fear imminent bodily injury. The court found that while it was a close call as to whether the probative value of the evidence outweighed the danger of unfair prejudice, the court would reserve its final ruling on the admissibility of the evidence pending the development of the proof at trial. In the

meantime, the court did order the defendant's bond to be revoked until the conclusion of the trial because the court was not going to tolerate such statements during a trial.

The proof at trial was that on 4/28/18 the defendant's estranged girlfriend was transferring her belongings into a storage shed owned by her parents when the defendant came to the property, brandished a handgun, and threatened to kill his girlfriend. The girlfriend's mother had a handgun and told the defendant to leave, and the girlfriend's father also arrived at the scene. These facts are pertinent, because during the trial, the defense counsel began cross-examining the girlfriend's mother about her husband's acts toward her when the state objected. The court ended up instructing the defense counsel that getting into such issues in regard to the respective witness's character for violence could possibly open the door to allowing the proof regarding the hallway incident. The trial court made it clear that if the defense counsel proceeded to introduce certain evidence that the court would probably allow the state to introduce evidence of the hallway threat.

The trial court ultimately ruled that all of the related issues about defense and self defense involving the girlfriend's family and related matters convinced the court to allow the state to present proof about the alleged threat toward the girlfriend's father in the hallway.

HELD: The Court of Criminal Appeals concluded that the trial court did not exceed its authority or violate Rules 404 and 614 by the sua sponte out-of-court hearing and the examination of witnesses.

The Court of Criminal Appeals discussed certain principles regarding the case:

1. Tennessee trial courts possessed the inherent power to supervise and control the proceedings in their courts.
2. It is well established that a trial judge has broad discretion in controlling the courts and conduct of the trial, and that in exercising that discretion, he or she must be careful not to

- express any thought that might lead the jury to infer that the judge is in favor of or against the defendant in a criminal trial.
3. In regard to the facts of the present case, the court noted that “having been informed that the defendant had allegedly just threatened a victim-witness in the hallway, the trial court acted appropriately and within its authority by holding an immediate jury-out hearing to inquire into the incident. Because the proceeding, including the trial court’s questioning of the witnesses, took place outside the presence of the jury, there was no danger that the court’s questioning of the witnesses would lead the jurors to infer that the court favored one side over the other.” The CCA also noted that while Rule 404(b) requires a trial court to hold a jury-out hearing upon request by a party, it does not preclude a trial court from holding a hearing on its own initiative.

The Court of Criminal Appeals also noted that TRE 614, “Calling and interrogation of witness by court,” provides as follow:

- a) Calling by Court. – The court may not call witnesses except in extraordinary circumstances or except as provided for court-appointed experts in Rule 706, and all parties are entitled to cross-examination witnesses thus called.
- b) Interrogation by Court. – The court may interrogate witnesses.
- c) Objections. – Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

The Court of Criminal Appeals found that the trial court’s actions were in compliance with Tennessee Rule of Evidence 404 and with Tennessee Rule of Evidence 614 regarding the calling and interrogation of witnesses by the court under extraordinary circumstances. The court had allowed the opportunity for the state and the defense to cross-examine the witnesses and also allowed for both the state and the defense to present any additional witnesses for the hearing.

USE OF A THERAPY DOG DURING TRIAL

TWELVE-YEAR-OLD RAPE VICTIM: THE TRIAL COURT DID NOT ERR BY ALLOWING THE CHILD VICTIM IN THE RAPE OF A CHILD CASE TO TESTIFY WITH THE AID OF A THERAPY DOG

FACTS: In a case in which the defendant was convicted by a jury of eighty-one counts of aggravated sexual battery and one count of rape of a child, and one count of continuous sexual abuse of a child, the defendant contended that the trial court had erred in allowing the victim to testify at trial with the assistance of a therapy dog, claiming that the trial court did not hold an evidentiary hearing concerning the dog’s qualifications and necessity of its use by the victim and further arguing that the dog was “paraded” in and out of the courtroom in front of the jury in blatant defiance of the court’s directive.

HELD: The Court of Criminal Appeals held that the trial court did not abuse its discretion by allowing the victim to testify with the assistance of the therapy dog. The CCA disagreed with the defendant’s characterization that the therapy dog (Lucia) was paraded in and out of the courtroom. The court noted that the witness stand was rearranged to limit the jury’s view of the dog and noted that there was nothing in the record to indicate that this was done in an obtrusive or disruptive manner. The trial court had specifically recalled during the motion for new trial that the dog’s presence at trial was a “very neutral event” and that the presence of the dog appeared to the court to be a “non-event.”

The Court of Criminal Appeals noted that Rule 611 of the Tennessee Rules of Evidence charges a trial court with “exercising appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel.” The court noted that the advisory commission comments to Rule 611 states, “Nothing in these rules prohibits the court in its inherent authority from permitting a suitable animal, toy, or support person to accompany a witness who is shown to be at risk or unable to communicate effectively without the aid of such comfort.”

The CCA noted that the state had filed a pre-trial motion to allow use of a therapy dog by the victim at trial and that the state had noted that Lucia “is trained to accompany individuals in public settings, including victims that suffer from traumatic experience.” The defendant filed a motion opposing the state’s use of a therapy dog, and during the hearing on the motion, the prosecutor explained to the trial court that the witness stand had been altered in such a way as to keep Lucia mostly out of the jury’s sight. The CCA also noted that although the trial court did not conduct a hearing and make explicit findings regarding Lucia’s qualifications and the necessity of the dogs use during the trial, the court noted that this is not mandated by case law or by Rule 611 of the Tennessee Rules of Evidence. The motion by the state had set out the training of Lucia and further set out the effect of the therapy dog on the victim in the case.

Trial court also gave a special instruction concerning the use of the therapy dog to the jury:

“The law allows either the prosecution or the defense to use a facility dog during the testimony of witnesses. This dog is not a pet, does not belong to any witness. It is a highly trained professional animal available for use by either side. The presence of the facility dog is in no way to be interpreted as reflecting upon the credibility of any witness. You may not draw any inference either favorably or negatively for or against either the prosecution or the defense because of the dog’s presence and should attach no significance to the use of a facility dog by any side or witness.

You may also – you also may not allow any sympathy or prejudice to enter into your consideration of the evidence during deliberations merely because of the use of a facility dog.”

State v. Cox (Tenn. Cr. App. 2/3/22)

VIOLATION OF PROBATION

PROBATION REVOCATION PROCEEDING: THE TENNESSEE SUPREME COURT CONCLUDES THAT PROBATION REVOCATION IS A TWO-STEP CONSIDERATION ON THE PART OF THE TRIAL COURT, THE FIRST TO DETERMINE WHETHER TO REVOKE PROBATION, AND THE SECOND IS TO DETERMINE THE APPROPRIATE CONSEQUENCE UPON REVOCATION

FACTS: The defendant pled guilty to theft of property over \$1,000.00 but less than \$10,000.00 and received a six-year sentence, which the trial court suspended to supervised probation. The history of the case reflects that a series of revocation proceedings were conducted, but at the final revocation hearing, the trial court fully revoked the defendant’s probation.

The final revocation hearing included testimony by the defendant’s supervising probation officer who testified that the defendant had been discharged from Freedom House Ministries and that the defendant had never contacted her nor had he reported back to jail. The defendant maintained that he had been wrongfully discharged from Freedom House Ministries plus the defendant called the program director for Mountain Movers Addiction Recovery to testify regarding that treatment facility’s willingness to accept defendant into their rehabilitation program.

At the conclusion of the hearing, the trial court explained that it was conducting a two-step analysis. The court first found the defendant had violated probation by failing to report back to jail following his discharge from the treatment facility and absconding. As to the second

consideration, “based on the evidence presented at the hearing and numerous factors including defendant’s character, prior criminal history, mental health and addiction, and the nature of the offense, the court concluded that the appropriate consequence for his violation was to fully revoke probation.”

The trial judge stated, “At this point, I really have no choice but to deny any possibility of probation and just revoke you to serve your sentence in full in the Tennessee Department of Correction.” The defendant was ordered to serve the remainder of his six-year sentence in the Tennessee Department of Correction.

The defendant appealed the case to the Court of Criminal Appeals which affirmed the decision of the trial court and concluded that the trial court had not abused its discretion in fully revoking defendant’s probation and ordering him to serve the balance of his sentence.

The Supreme Court granted the defendant’s application for permission to appeal.

HELD: The Supreme Court concluded that probation revocation is a two-step consideration on the part of the trial court. The Supreme Court stated, “The first is to determine whether to revoke probation, and the second is to determine the appropriate consequence upon revocation. This is not to say that the trial court, having conducted a revocation hearing, is then required to hold an additional or separate hearing to determine the appropriate consequence.” The Supreme Court added, “We emphasize that these are two distinct discretionary decisions, both of which must be reviewed and addressed on appeal. Simply recognizing that sufficient evidence existed to find that a violation occurred does not satisfy this burden.” The court also stated in a footnote, “We reiterate that as a prerequisite to deciding to revoke probation, the trial court must determine whether the preponderance of the evidence at the revocation hearing establishes that the defendant violated the conditions of his or her release.”

The Supreme Court noted that the court was impressed with the arguments made by the defendant that a two-tiered process and

appropriate findings by the trial court are “essential to facilitate meaningful appellate review of the trial court’s discretionary decision to revoke probation and impose a consequence.” The court added “Indeed, how can an appellate court determine if the trial court has abused its discretion if It has no insight on the reasons or factors considered?”

The Supreme Court emphasized that articulating reasons for imposing a sentence are “critical” to ensure fair and consistent sentencing as the trial court is in a superior position to impose an appropriate sentence and articulate the reasons for doing so.

The Supreme Court stated the following key principles in probation revocation proceedings:

1. “We expressly extend the same principles (“broad discretion” of trial court in sentencing decisions and the “presumption of reasonableness” of the decision of the trial court unless the trial court fails to address on the record the principles and purposes of the sentencing act) to appellate review of a trial court’s decision to revoke probation and the consequence of that revocation.”

2. The standard of review is abuse of discretion with the presumption of reasonableness so long as the trial court places sufficient findings and the reasons for its decisions as to the revocation and the consequence on the record.

3. It is not necessary for the trial court’s findings to be particularly lengthy or detailed but only sufficient for the appellate court to conduct a meaningful review of the revocation decision.

4. This serves to promote meaningful appellate review and public confidence in the integrity and fairness of our judiciary.

5. The Supreme Court then turned its attention to the specifics of the defendant’s case. The Supreme Court noted that the trial court considered the defendant’s repeated violations, his addiction, and the nature of his most recently violation. Supreme Court noted that the trial court stated that the defendant knew what was expected of him after he was discharged from the treatment facility, whether or not he was properly

or wrongfully discharged. Instead of reporting to probation or to jail the defendant absconded, the Supreme Court noted that the trial court emphasized the lack of success in giving defendant multiple chances to comply with the terms of his probation in the past and the seriousness of his deliberate failure to report back to jail and choosing to order the defendant to serve his sentence in incarceration.

The court noted that the Court of Criminal Appeals did not mention specifically a “two-step” process, but that the majority opinion of the Court of Criminal Appeals properly listed its reasons for agreeing with the propriety of the consequence imposed by the trial court and the Supreme Court found that there was overwhelming evidence to support the trial court’s decision to fully revoke probation.

The Supreme Court also made note in a footnote that the trial court had used an expression that he had “no choice” but to revoke defendant’s probation but the Supreme Court did not take these words literally. The Supreme Court stated that of course the trial court understood it had a choice in whether or not to revoke the probation and stated as much in the oral findings but that the court was speaking “figuratively” about his perceived lack of options because of the defendant’s inability or unwillingness to comply with the terms of his probation.

PRACTICE POINT: Whenever we as judges say that we have “no choice” but to take a certain action, it might be good to add for the record and for everybody’s knowledge that by saying “no choice” we are merely stating our opinion that all of the history of the case and our knowledge of the case indicates that our only real choice is to revoke probation.

State v. Dagnan (Tenn. 3/4/22)

**SPEEDY TRIAL: FIFTEEN-YEAR DELAY IN PROSECUTING
PROBATION VIOLATION WARRANT HELD TO BE
“INHERENTLY PREJUDICIAL” AND “ATTRIBUTABLE TO
BUREAUCRATIC NEGLIGENCE OR INDIFFERENCE”**

FACTS: In a case in which the defendant was charged with violation of probation, the defendant maintained that his right to a speedy trial was violated due to the fact that there was a fifteen-year delay in pursuing the probation violation warrant and that the prosecution therefore was “inherently prejudicial” and “attributable to bureaucratic negligence or indifference.” The state maintained that the trial court properly denied the defendant’s motion to dismiss for lack of a speedy trial, maintaining that the defendant caused the delay and failed to establish any prejudice.

The trial court denied the motion of the defendant and after hearing the case revoked the defendant’s probation and ordered him to serve his original six-year sentence in confinement.

HELD: The Court of Criminal Appeals held that the defendant’s right to a speedy trial was violated and that the trial court abused its discretion in denying the defendant’s motion to dismiss.

In analyzing the defendant’s claim of denial of his right to a speedy trial, the Court of Criminal Appeals noted the following key principles to be applied in speedy trial cases:

1. Criminal defendants are entitled to a speedy trial under both the United States and Tennessee Constitutions and under Tennessee Statutory Authority.
2. The guarantees are designed to protect the accused against oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that evidence will be lost or memories diminished.
3. A probation revocation proceeding is a continuation of a criminal prosecution and therefore falls within a defendant’s constitutional right to a speedy trial.
4. Probation revocation proceedings are commenced when a trial judge issues the warrant; the warrant serves as the formal accusation.
5. A trial court must carefully balance societal interest in punishing criminals against a defendant’s interest in a speedy trial, because dismissal of charges is the only available remedy for the violation of the right.

6. To determine whether a speedy trial violation has occurred, the trial court must balance the factors outlined in Barker v. Wingo (U.S. Supreme Court 1972), as adopted by the Tennessee Supreme Court in State v. Simmons (Tenn. 2001). The key factors in a speedy trial determination under Barker v. Wingo are (1) length of delay; (2) reasons for delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice resulting from the delay.

In looking at the first factor, the court noted that a one-year delay or longer generally triggers an inquiry into a speedy trial violation. The court noted that this was a fifteen-year delay between the issuance of the 2005 probation violation warrant and the defendant's 2020 arrest, resulting in this factor weighing heavily in favor of the defendant.

In regard to the second Barker factor the reason for the delay, the court noted that this factor usually falls into one of the following categories:

- (1) intentional delay to gain a tactical advantage over the defense or delay designed to harass the defendant;
- (2) bureaucratic indifference or negligence;
- (3) necessary delay for the fair and effective prosecution of the case; and
- (4) delay agreed to or caused by the defendant.

The Court of Criminal Appeals stated that in this case the court agreed with the defendant that the fifteen-year delay was either caused by Madison County's failure to timely upload the October 2005 warrant into the NCIC database or by Shelby County's failure to check the NCIC database each time the defendant was arrested and released. The court noted that over the course of the fifteen-year period, the record reflected that the Madison County Sheriff's Department made no effort to serve the 2005 warrant after it was issued, including after being put on notice that the probation violation warrant was not entered in the NCIC in 2013 and 2018 and that no holds were placed on the defendant as a result until October 2020. The court found that the state was clearly negligent in pursuing the

warrant against the defendant and that this factor should be weighed heavily against the state.

In looking at the third Barker factor the court noted that a defendant's assertion of a speedy trial right is entitled to strong evidentiary weight. The court noted that after being served with a probation violation warrant on 10/28/20, the defendant asserted his speedy trial right in his motion to dismiss filed on 12/2/20, and that this factor weighed in favor of the defendant.

In regard to the fourth factor, the prejudice to the defendant caused by the delay, the Court of Criminal Appeals agreed with the defendant that he was prejudiced by the delay and the execution of the probation violation warrant because he was not able to timely complete his Madison County sentence. The court noted that the defendant's sentence would have expired in 2007 had he not violated the terms of his probation, but the warrant was not timely pursued resulting in the trial court ordering the defendant to serve the six-year sentence nearly ten years after it would have been completed. The court noted that speedy trial guarantees were designed to protect the defendant against the anxiety and concern due to unresolved criminal charges and that this factor weighed in favor of the defendant.

In totality, the Court of Criminal Appeals concluded that the defendant's right to a speedy trial was violated and therefore the trial court had abused its discretion in denying the defendant's motion to dismiss. The court noted that the dismissal also applied to the amended warrant because the defendant was prejudiced as to both the original and amended warrants due to the state's actions.

State v. McBrien (Tenn. Cr. App. 4/6/22)

**UNRELIABLE HEARSAY EVIDENCE: SINCE THE STATE ONLY
PRODUCED UNRELIABLE HEARSAY EVIDENCE AT THE
DEFENDANT'S TRIAL FOR THE CHARGE OF VIOLATION OF
PROBATION, THE STATE FAILED TO ESTABLISH BY**

**PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT
HAD VIOLATED THE LAW AND THE CONVICTION IS
REVERSED AND REMANDED TO THE TRIAL COURT**

FACTS: On 7/28/11, the defendant pled guilty to delivery of controlled substance and was sentenced to twelve years. On 7/16/13, the defendant pled guilty to facilitation of delivery of cocaine and was sentenced to ten years suspended to probation to be served consecutively to the twelve-year sentence previously imposed.

On 11/12/20, the trial court issued probation violation warrants in both cases alleging that the defendant had violated his probation by being arrested and charged with the offense of domestic assault on 9/6/20 and by being arrested and charged with coercion of a witness and violating his bond conditions on 10/5/20. Subsequently, the defendant was charged with aggravated stalking and violating his bond conditions.

On 1/29/21, at the probation revocation hearing, the probation officer testified that on 9/1/20, the Memphis police responded to a simple domestic call, at which time defense counsel objected to any testimony about any fact pattern of alleged charges because such would be hearsay. Defense counsel asserted that the state was required to call an officer or the victim in order to present any proof about the facts of those cases. The prosecutor responded that it was “reliable hearsay,” and that a copy of an affidavit of the complaint on the new charge had been attached to the probation violation report of the probation officer. The trial court ruled that the affidavit was reliable hearsay. The probation officer proceeded to tell about the facts as set out in the domestic assault charge and the aggravated stalking charge, but no witnesses to those events were called to the witness stand.

HELD: The Court of Criminal Appeals held that the state had failed to establish by a preponderance of the evidence that the defendant violated the law and held that the record did not support revocation of the defendant’s probation.

The court noted the following principles in regard to violation of probation cases:

1. A trial judge is vested with discretionary authority to revoke probation if a preponderance of the evidence established that a defendant violated the conditions of his or her probation.
2. Appellate courts will not overturn a trial court's revocation of probation absent abuse of discretion.
3. For an appellate court to reverse a trial court, there must be "no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred."
4. While the courts recognized that a new arrest and pending charges are proper grounds on which a trial court can revoke a defendant's probation, a trial court may not rely on the mere fact of an arrest or an indictment to revoke a defendant's probation. Instead, the state must show by a preponderance of the evidence that the defendant violated the law.
5. "Reliable hearsay" is admissible in probation hearings so long as the opposing party has a fair opportunity to rebut the evidence. If reliable hearsay is admitted, the defendant must be granted at least "minimum confrontation requirements established by case law, which include (1) a specific finding by the trial court of "good cause" that would justify the denial of the defendant's right to confront and cross-examine an adverse witness; and (2) a showing that the information contained in the report or testimony is reliable.

The defendant in the present case argued that the trial court had not made any determination that the information was reliable and denied that good cause existed to admit the evidence. The court noted that in the present case, the state did not offer any explanation at the revocation hearing as to why the victim and/or the responding officer were not present as witnesses. The state also failed to make a showing that the information contained in the probation officer's report was reliable, and the trial court failed to make any finding of good cause to justify the denial of the defendant's confrontation rights. The court held that "clearly, the statements by the victim to the responding officer were hearsay."

The Court of Criminal Appeals noted after careful review of the record, “we are unable to conclude that the trial court ‘implicitly’ found good cause or that the record supports the trial court’s determination that the hearsay was reliable.”

The Court of Criminal Appeals therefore concluded that it was error for the trial court to consider the evidence over the defendant’s objection and the judgment was reversed and remanded for a probation revocation hearing consistent with the opinion.

State v. Harris (Tenn. Cr. App. 2/22/22)

WITHDRAWAL OF GUILTY PLEA

WITHDRAWAL OF GUILTY PLEA: EVEN THOUGH THE DEFENDANT HAD PROPERLY FILED A MOTION TO WITHDRAW HER PLEA SHORTLY AFTER ENTERING INTO HER PLEA AGREEMENT AND HAD OBTAINED NEW COUNSEL TO FILE HER MOTION TO WITHDRAW, THE COURT OF CRIMINAL APPEALS FOUND THAT THE TRIAL COURT HAD PROPERLY CONSIDERED ALL OF THE PHELPS FACTORS AND DETERMINED THAT THE DEFENDANT DID NOT PROVIDE SUFFICIENT JUSTIFICATION OF A FAIR AND JUST REASON FOR THE WITHDRAWAL OF HER PLEA

FACTS: On 1/23/20, the defendant entered into an open plea on a second-degree murder charge. At that time the state provided a detailed recitation of the facts underlying the offense which included a statement that an eyewitness on her way into a gas station saw a white female standing near the vehicle by which the victim was found lying, but the female was on the phone “ranting about a boyfriend and drugs,” and when the witness came out of the convenience store, the female was gone. When officers went to the victim’s mother’s house to inform her of the victim’s death, the victim’s mother indicated that the defendant had shot the victim and that when the victim’s mother provided a description of the defendant, it closely matched the description given by the gas station eyewitness. Officers went to the

defendant's residence to wait for her and when she arrived later, she appeared to have new freshly-cut, freshly-dyed hair, an "attempt to change her appearance."

The trial court instructed the defendant about the seriousness of pleading guilty and the importance of answering questions truthfully, told the defendant that failure to answer questions truthfully could result in a perjury charge, and the defendant indicated that she understood. The defendant affirmed that she had read and reviewed the plea agreement paperwork and had discussed it "completely" with her lawyers. The defendant confirmed that she had signed the petition to enter a guilty plea, that she had initialed each paragraph, that she had read and discussed each paragraph with her attorneys, and otherwise affirmed that she understood the document. The court went through her rights and her educational background in some detail.

The next day after the guilty plea hearing, the defendant phoned her mother from jail and the two women discussed the circumstances that took place at the plea hearing.

After the defendant hired new counsel, she filed a motion to withdraw her guilty plea on 1/30/20, one week following her guilty plea. In the motion she alleged she felt pressure to enter her guilty plea, that she was not afforded an opportunity to discuss the plea with her parents, that the effects of a 2011 traumatic brain injury impaired her decision-making ability, and that she did not understand the full impact of an open guilty plea. The defendant testified that she was in a car wreck in 2011 that had rendered her unconscious and she felt the injury affected her ability to make decisions. The defendant on cross-examination agreed that she had previously pled guilty to nine other offenses and had some familiarity with what it meant to have a criminal charge and to plead guilty to a criminal offense. The previous guilty pleas were misdemeanor charges.

The trial court found that the short delay between a guilty plea hearing and the request to withdraw the plea clearly favored the defendant. The trial court reviewed the factors of motion to withdraw

under the case of State v. Phelps (Tenn. 2010), and the trial court overruled defendant's motion to withdraw her guilty plea.

HELD: The Court of Criminal Appeals concluded the trial court properly considered the Phelps factors and properly found the defendant did not provide sufficient justification of a fair and just reason for the withdrawal of her plea.

The Court of Criminal Appeals reviewed specific principles that applied to cases where a defendant sought to withdraw a guilty plea:

1. A trial court's decision regarding a defendant's motion to withdraw a plea is reviewed for an abuse of discretion.
2. A defendant who has entered a guilty plea does not have a right to unilaterally withdraw the plea.
3. The Tennessee Supreme Court established seven factors to evaluate in determining whether to permit a defendant to withdraw a plea.
4. The purpose of the "any fair and just reason" standard is to allow a hastily entered plea made with "unsure heart" and "confused mind" to be undue.
5. The inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury.
6. Thus, where the balance of the factors weighs in the defendant's favor, the trial court should permit a defendant to withdraw a plea even if the defendant's reasons could be characterized as a change of heart.
7. The trial judge should always exercise his/her discretion with caution in refusing to set aside a plea of guilty, to the end that one accused of a crime may have a fair and impartial trial.
8. However, a defendant should not be allowed to pervert the process into a tactical tool for purposes of delay or other improper purpose.

The court found that the trial court had engaged in the proper analysis. In regard to the first factor – the amount of time that elapsed

between the plea and the motion to withdraw it-- that factor clearly favored the defendant because the motion was filed a week after the plea was entered.

In regard to the second factor – the presence or absence of a valid reason for the delay in filing the motion – the trial court determined that this was a neutral factor because there was no real delay given the fact the motion was filed so quickly.

In regard to the third factor – the defendant’s assertion or maintaining innocence – the trial court determined that factor weighed heavily against the defendant and found the defendant not credible in regard to that issue. The trial court did not accredit her testimony that she failed to understand the details of the plea paperwork because the guilty plea hearing included her recitation of the facts of the offense and repeated inquiry of the defendant whether she understood what was taking place.

The trial court also referenced the recording of the jail call between the defendant and her mother as evidence that the defendant never asserted or maintained her innocence and the fact that her mother referred to the fact of seeking a trial date as leverage for a better plea arrangement. The court noted that there was no clear assertion of actual innocence at any point.

In regard to the fourth factor – relative to the circumstances of the plea – the trial court held this “very much against” the defendant, noting that the defendant had previously lost an involved motion to suppress incriminating evidence and that this was not the defendant’s first trial date. The court did not find that the defendant’s injury from a car wreck in 2011 had any significant impact and the trial court had remarked that the defendant appeared to be “very intelligent, very street smart,” and so that factor was found to weigh against her.

In regard to the fifth factor of the defendant’s nature and background, the defendant had completed the eleventh grade and later obtained her GED. The trial court had previously repeatedly questioned the defendant about whether or not she understood the process and

consequences of pleading guilty and she had agreed that she discussed the agreement fully with her attorneys. No proof sufficiently addressed the issue of how any traumatic brain injury in 2011 had impacted her decision and the trial court found her claims of forgetfulness incredible.

In regard to the sixth factor – the degree of experience the defendant had with the court system – the trial court found the defendant had extensive experience with the criminal justice system, including nine previous guilty pleas to misdemeanors and that this weighed heavily against the defendant.

After review of all of the factors, the Court of Criminal Appeals found that the trial court properly considered all the Phelps factors and found that the defendant did not provide sufficient justification of a fair and just reason for the withdrawal of her plea. That made consideration of the seventh factor unnecessary in regard to potential prejudice to the government if the motion to withdraw is granted.

State v. Brooks (Tenn. Cr. App. 3/3/22)

WITHDRAWAL OF GUILTY PLEA: THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT’S ORAL MOTION TO WITHDRAW HIS GUILTY PLEAS AS THE RECORD SIMPLY DID NOT SUPPORT A FAIR AND JUST REASON FOR THE COURT TO ALLOW THE DEFENDANT TO WITHDRAW HIS GUILTY PLEA

FACTS: On 11/2/20, the defendant pled guilty to evading arrest, burglary, shoplifting and driving on a revoked license. Sentencing was delayed until 1/4/21, to allow the defendant to be home for the Christmas and New Year holidays. At the time of the pleas, the state described the underlying facts by stating that the defendant entered a Kroger store for which he had been banned and concealed a number of steaks in a backpack within a motorized shopping cart and left the store. The defendant subsequently led the police on low-speed chases on different dates when they attempted to arrest him.

At the outset of the sentencing hearing on 1/2/22, trial counsel informed the court the defendant had indicated to trial counsel that he wanted to set his case for trial but trial counsel was unsure the defendant had that option since he had pled guilty two months earlier. The defendant told the trial court that he wanted another lawyer because he felt trial counsel was only interested in his entering a plea, the defendant also claiming that he was “really drugged up” at the plea hearing and “wasn’t really in his right mind.”

At the conclusion of the defendant’s complaints, the trial court placed the agreed four-year sentence in to affect and informed the defendant his right to appeal. On appeal, the defendant challenged the trial court’s failure to let him withdraw his guilty pleas, claiming that the trial court abused its discretion in denying his oral motion to withdraw without engaging in any “meaningful” analysis relative to whether a “fair and just reason” existed for permitting him to withdraw his guilty pleas.

HELD: The Court of Criminal Appeals held that the record simply did not support a fair and just reason for allowing the defendant to withdraw his guilty pleas, and therefore denied the defendant any relief.

The Court of Criminal Appeals discussed several principles which it applied to withdrawal of guilty pleas:

1. Tennessee Rule of Criminal Procedure 32(f) provides that a trial court may grant a motion to withdraw a guilty plea for any fair or just reason before the sentence has been imposed.
2. TRCP 32(f) makes it clear that a criminal defendant who plead guilty does not have a unilateral right to later withdraw his plea either before or after sentencing.
3. The defendant bears the burden of establishing sufficient grounds for withdrawing a plea.
4. In State v. Phelps (Tenn. 2010), the Tennessee Supreme Court adopted a “non-exclusive multi-factor test” to be used in determining if there was any fair and just reason to allow withdrawal of a guilty plea. Those factors are:

(a) the amount of time that elapsed between the plea and the motion to withdraw it; (b) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (c) whether the defendant has asserted or maintained his innocence; (d) the circumstances underlying the guilty plea; (e) the defendant's nature and background; (f) the degree to which the defendant has had prior experience with the criminal justice system; and (g) potential prejudice to the government if the motion to withdraw is granted.

5. No single factor is dispositive and the relevance of each factor varies according to the circumstances surrounding both the plea and the motion to withdraw.

6. A trial court need not consider the seventh factor unless and until the defendant establishes a fair and just reason for permitting withdrawal.

Applying the principles listed and the factors from the Phelps case, the Court of Criminal Appeals concluded that there was no fair and just reasons supporting withdrawal of the defendant's pleas.

First, the court noted that over two months had elapsed between the entering of the guilty plea and the motion to withdraw. The court noted that this was "coincidentally" happening when it was time for the defendant to go to jail; this first factor weighs against the defendant.

Second, the reasons given by the defendant for his failure to move for withdrawal sooner was that he had thought that he had a longer amount of time and he didn't know he couldn't change his plea. At best this is a neutral factor.

Third, the defendant never asserted or maintained his innocence in any proceeding and in fact, plainly admitted his guilt at the plea hearing, so this factor weighs against the defendant.

Fourth, circumstances surrounding the plea reflected that the defendant was advised of his rights, his sentencing exposure, and he acknowledged he understood the plea paperwork and had reviewed it with his lawyer. The defendant did express his satisfaction with the lawyer but his comments were contradictory and at best this factor was neutral.

Fifth and sixth, regarding the defendant's nature and background and prior experience with the criminal justice system, the record established the defendant was fifty-eight years old at the time of the plea, had a six-grade education, that he was able to understand the paperwork and had gone over the paperwork with counsel, and the court felt that these factors weighed against the defendant or at best were neutral.

The court found that it did not need to consider the seventh factor because the defendant did not establish a fair and just reason for permitting withdrawal. The court concluded, "On balance, the record simply does not support a fair and just reason for allowing the defendant to withdraw his guilty plea."

State v. Jones (Tenn. Cr. App. 2/28/22)

ETHICS

CHARITABLE ORGANIZATION FUND RAISING EVENTS

JAIL AND BAIL FUNDRAISER EVENT: A JUDGE CANNOT SERVE AS A JUDGE FOR A CHARITABLE EVENT BECAUSE THE PUBLIC MAY MISCONSTRUE, HOWEVER WRONG THEY MAY BE, THE JUDGE'S PARTICIPATION AS BEING A SOLICITATION OF DONATIONS FOR THE ORGANIZATION

FACTS: A judge in West Virginia sought an advisory opinion in regard to a 501(c)(3) charitable organization who was celebrating its 70th anniversary by holding a fund raiser in the form of a Jail and Bail event. During the event, the charitable organization “created phony charges, set their bail amounts and collected donations to secure their bail.” The judge in the county was asked to serve as a judge for the event, and the judge sought to find out from the Judicial Education Commission whether or not he could participate in the activity.

HELD: The commission found that the judge could not serve as a judge for the charitable event because the public may misconstrue, however wrong they may be, the judge's participation as being solicitation of donations for the organization.

The court pointed to Rule 3.7 of the Code of Judicial Conduct which states:

Rule 3.7 Participation in . . . Charitable . . . Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by . . . or on behalf of educational, religious, charitable, fraternal or civic organizations not conducted for profit, including but not limited to the following activities: . . .

(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges

over whom the judge does not exercise supervisory or appellate authority;

The comment to the Rule notes that it is “generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions at fund-raising events sponsored by charitable organizations. Such activities are not solicitation and do not present an element of coercion or abuse of the prestige of judicial office.”

The commission did find that the judge could not serve as a judge for the charitable event in this situation because the public could misconstrue the participation of the judge in the event as being a solicitation of donations for the organization.

Judicial Investigation Commission Advisory Opinion 2021-16
(7/26/21)

CLOSE FRIENDSHIPS WITH AN ATTORNEY PRACTICING BEFORE THE COURT

CLOSE FRIENDSHIP WITH JUDGE: IF A FRIENDSHIP IS SO CLOSE OR UNUSUAL THAT IT REASONABLY RAISES A QUESTION OF IMPROPRIETY, THE JUDGE SHOULD CONSIDER RECUSAL, BUT THE DECISION IS WITHIN THE JUDGE’S DISCRETION

FACTS: A judge who presided over four rural counties within a judicial district in Colorado made a request for an advisory ethics opinion based upon a situation when he was very close friends with an attorney with whom he attended the same law school, participated in each other’s weddings, and attended the birth of each other’s children. Under the factual stipulation, the judge and the attorney worked at the same law firm for two years but later decided to form their own firm. The judge considered the attorney during this period of time “a member of his family.” The law firm of the attorneys dissolved after seven years, and the judge was appointed to the bench about seven years later. After the firm dissolved, the interaction between the judge and the attorney diminished significantly, even though they remained friendly but got together only a few times a year to exchange gifts or when

their children met periodically. When they do get together, they do not discuss business or cases.

At the time of the request for an opinion, the attorney did not practice law in the four rural counties over which the judge presided in order to avoid conflicts. The judge advised that he was considering whether to preside over another division within the same judicial district, but the attorney regularly practices in the division, and the judge would like to know if recusal is necessary every time the attorney appears before the judge.

ISSUE PRESENTED: Whether judges must disqualify themselves when a friend appears before the judge.

HELD: The Colorado Supreme Court Judicial Ethics Advisory Board issued an opinion stating that under the Code of Judicial Conduct, “a judge need not per se disqualify himself or herself merely because a friend appears as a lawyer.” The board noted that whether a judge should recuse himself or herself is evaluated on a case-by-case basis in which the inquiry hinges on the closeness of the relationship and its bearing on the underlying case. The board noted that if the friendship is so close or unusual that it “reasonably raises a question of impropriety,” the judge should consider recusing, but the decision is within the judge’s discretion.

The board stated that the requesting judge should examine the friendship to determine whether the relationship might give a reasonable appearance of impropriety. If so, the judge should consider whether or not he should recuse himself, but again that is within the judge’s discretion. The board noted that “even if the judge believes recusal is unnecessary, the judge should disclose their relationship to the parties because there might exist information the parties could reasonably consider relevant to a motion for disqualification.”

The board noted that the Colorado Supreme Court had previously recognized that a rule requiring a judge to disqualify himself or herself whenever a friend appeared before the judge would be “unnecessarily restrictive in a community where friendships among judges and lawyers are common.” The board noted that the Supreme Court held that the “mere existence of a trial judge’s friendship with an attorney, by itself, did not create actual bias or the appearance of impropriety.” The Supreme Court had concluded that determining whether a judge should disqualify himself or herself because of friendship was a case-by-case inquiry requiring the judge to examine the closeness of the relationship and its bearing on the underlying case.

The board noted that several other jurisdictions have similarly concluded that a judge need not disqualify him or herself just because a friend, even a close friend, appears as a lawyer.

The court noted that significant cases and resources indicated the following as important factors to consider by a judge when dealing with this type of situation:

(1) The first step is a subjective examination of conscience and emotion by the judge in which the judge must ask if he or she would be biased in favor of the attorney.

(2) Even if the judge believes that he or she is unbiased, the public and litigants are not privy to the judge's subjective feelings, and thus the judge must step back and try to evaluate the relationship objectively through the perspective of others.

(3) While there is no single determining factor, other jurisdictions have identified the following considerations when applying the objective test:

- Whether the families of the judge and attorney are included in their socializing.
- Whether their family members have interrelationships.
- Whether the judge and attorney or their family members share confidences.
- Whether the judge and attorney or their families celebrate significant events in each other's lives.
- Whether the judge and attorney or their families share important personal interests.
- Whether the judge and attorney or the families vacation together.
- Whether the judge and attorney or their families visit each other's homes.
- Whether the judge and attorney socialize in public or private settings.
- Whether the judge and attorney initiate social contact or their interactions result from coincidence.
- Whether the judge and attorney have plans for future get-togethers.
- The frequency of their social contacts.
- The length of the relationship.
- Whether the relationship is continuing.
- Whether there are additional circumstances like current or past financial, political, partnership, or amorous relationships.
- Whether the judge has received gifts or hospitality from the attorney.
- The frequency with which the attorney appears before the judge.
- The culture and size of the legal community.

- The number of attorneys who practice in the judge’s court.
- Whether other local practitioners know that the judge and the attorney socialize.
- Whether the judge’s relationship with the attorney differs significantly from the judge’s relationship with other attorneys.
- Whether other people commonly identify the judge and the attorney as being closely associated.

The board concluded that “standing alone, a judge’s friendship with an attorney or party with the proceedings does not per se require disqualification.” The board does state that if it is a significantly close relationship the judge should “at a minimum” disclose the relationship to the parties.

Colorado Judicial Ethics Advisory Board, Advisory Opinion 2021-02 (11-17-21)

CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION: SUPREME COURT FOUND THAT HEARING PANEL DID NOT ABUSE ITS DISCRETION BY SUSPENDING ATTORNEY FOR ONE YEAR AFTER DETERMINING THAT ATTORNEY VIOLATED RULES OF PROFESSIONAL CONDUCT

FACTS: In attorney disciplinary proceedings, the hearing panel found that the attorney’s testimony about his income in a juvenile court proceeding to reduce his child support obligation violated Tennessee Supreme Court Rule 8.4, which states it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects or to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The hearing panel found that the attorney’s answers were carefully crafted to give the “appearance of literal truth” but were in fact dishonest in that they intentionally omitted relevant information fairly called for in the questions before the hearing panel. The hearing panel found that the presumptive sanction was disbarment, but the sanction was reduced to a one-year suspension in light of the attorney’s prior unblemished forty-year legal career.

HELD: The Tennessee Supreme Court found substantial and material evidence in the record to support the decisions of the hearing panel and the trial court that the attorney’s testimony in the juvenile proceedings violated Rule 8.4.

The Supreme Court noted the following key principles is this type of case:

(1) “Our advisory system for the resolution of disputes rests upon the unshakable foundation that truth is the object of the system’s process which is designed for the purpose of dispensing justice.”

(2) The system can “provide no harbor for the clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end.” The court noted that, as officers of the court, lawyers have the “first line task of assuring the integrity of the process.”

(3) Lawyers have a duty to do “more than simply refrain from committing perjury.”

(4) A lawyer’s general duty of candor to the courts includes not only the duty to refrain from knowing misrepresentations but also a positive duty to disclose to the court all material facts.

(5) The “general duty of candor” requires attorneys to be honest and forthright with courts; that attorneys refrain from deceiving or misleading courts either through direct representations or through silence; and this duty is owed to courts during all aspects of litigation.

(6) “Lawyers have no less obligation to meet these standards in litigation where they are personally involved. In all circumstances, a lawyer’s conduct must further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”

(7) The Supreme Court noted that the “misleading testimony was given by an experienced and accomplished lawyer, someone who should have been well-acquainted with a lawyer’s special obligations to demonstrate respect for the law and legal institutions.”

The Supreme Court stated that the trial judge put it succinctly: “An experienced and accomplished lawyer should know better than to omit information highly relevant to the issues before a court.”

PRACTICE POINT:

1. This case gives a good statement of the expectations that judges should have for lawyers as officers of the court. These are excellent principles for judges to remind lawyers about possibly in a private setting rather than in public, but to do whatever is necessary.

2. These principles are also important reminders for judges themselves in regard to their own conduct. This case makes clear that there are high expectations of officers of the court and for judges who preside over the courts. The comments in regard to someone being well acquainted with the legal system and the need to have respect for the law and legal institutions applies very much to the judges who preside over courts and will be an important factor against us in any kind of ethics proceedings we face.

One comment stated in regard to lawyers can be paraphrased for us as judges to note in our everyday activities and when we have to respond to any kind of ethical complaints: “An experienced and accomplished judge should know better than to omit information highly relevant to the issues before a court.” It is also important for us to remember as judges that “membership” within the ranks of the judiciary is a “privilege burdened with conditions.”

Harris v. Board of Professional Responsibility, 645 S.W.3d 125
(Tenn. 4/29/22)

DISQUALIFICATION OF DISTRICT ATTORNEY'S OFFICE

DISQUALIFICATION OF DISTRICT ATTORNEY'S OFFICE: TRIAL COURT ABUSED ITS DISCRETION IN ORDERING DISQUALIFICATION OF THE 12TH JUDICIAL DISTRICT ATTORNEY'S OFFICE AS NO EVIDENCE WAS PRESENTED TO SUGGEST THAT THE DISTRICT ATTORNEY GENERAL OR HIS STAFF WERE BIASED IN FAVOR OF THE GENERAL SESSIONS JUDGE IN THE COUNTY WHO WAS A WITNESS TO THE ALLEGED BRIBERY CHARGE AGAINST THE DEFENDANT, AND NO EVIDENCE SUGGESTED THAT THE FACTS INFLUENCED THE ATTORNEY GENERAL AND HIS

STAFF TO PROSECUTE THE DEFENDANT IN AN UNFAIR MANNER

FACTS: A General Sessions Judge in the 12th Judicial District was the alleged target of a bribe. The trial court noted that the intended target was a part-time General Sessions Judge and that the General Sessions Judge was in fact an essential witness for the state in the case. The trial judge granted the defendant's motion to disqualify the 12th Judicial District Attorney's Office finding that since the Attorney General's Office and his staff prosecuted cases in the judge's court that that fact would create the "appearance" that the judge would have an improper influence over the 12th Judicial District Attorney's Office.

The defendant had also complained that the general sessions judge and an assistant district attorney general sat on the board of directors of a bank from which the district attorney general had borrowed money which was secured by three deeds of trust. The trial court found that those facts regarding the bank did not create a conflict or an appearance of a conflict under the circumstances of that issue and was therefore not relevant to the case.

The state contended that the trial court erred in disqualifying the District Attorney's Office mainly because the District Attorney General appeared in cases in front of the General Sessions Court. The defendant contended that the trial judge had made the appropriate decision on that issue but argued that the trial court abused its discretion by not also finding that an appearance of impropriety existed because of the relationships of the General Sessions Judge and a member of the district attorney's staff with the bank in which the district attorney general had outstanding loans.

HELD: The Court of Criminal Appeals (in a 2-1 decision) concluded that the trial court abused its discretion in ordering disqualification of the Attorney General's Office due to the appearance of an impropriety.

The Court of Criminal Appeals made the following key points in its decision:

1. The venue of the present case is in a small community in which attorneys in private practice, judges, and prosecutors know one another and are involved with each other in multiple capacities, both related and unrelated to the law. The court noted that the population of Bledsoe County according to the 2020 Census was 14,913.
2. The CCA found that "no evidence was offered to suggest that the District Attorney General and his staff were biased in the present case toward the

General Sessions Judge by virtue of their appearance in court before the General Sessions Judge in any other cases or that they would take actions contrary to their duties as prosecutors to seek justice.”

3. “No evidence suggested that these facts influenced the District Attorney General and his staff to prosecute the defendant unfairly or differently than a defendant in a case in which the General Sessions Judge was not a witness.” The court noted that in the context of a small community in which the legal professionals serve in “multiple, interconnected roles,” a reasonable lay person with knowledge of the facts of the case would not conclude that an appearance of impropriety existed.

The court noted that the defense argument at the hearing and on appeals suggested nothing more than a “mere possibility of such, which is insufficient to warrant the drastic remedy of disqualification of a District Attorney General’s Office.”

The Court of Criminal Appeals also noted the existence of general principles of law when dealing with a case of this nature, which are as follows:

1. A party moving to disqualify an attorney in a criminal case must establish a conflict of interest by preponderance of the evidence.
2. A trial court’s decision to disqualify an attorney for a conflict of interest and to impute an attorney’s conflict of interest upon the attorney’s firm is reviewed for an abuse of discretion.
3. When deciding whether a District Attorney General or his office must be disqualified from prosecuting a case, a trial court must consider whether an actual conflict of interest or the appearance of impropriety exists.
4. A conflict of interest includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of compromising interest and loyalties.
5. The Tennessee Supreme Court has stated that the appearance of impropriety must be more than the “mere possibility of impropriety” and that it must be real. This issue is determined objectively, from the perspective of a reasonable lay person when knowledge of all the relevant facts.

The court concluded that the trial court had abused its discretion in ordering the disqualification on the basis which it did, considering all these principles.

The Court of Criminal Appeals also concluded that in regard to the banking relationship of the District Attorney and the General Sessions Judge, no evidence was offered at the hearing which suggested that the

board of directors had any decision-making authority or influence over the bank's lending decisions as regards the district attorney general's loans. The trial court did not abuse its discretion in denying the motion to disqualify the District Attorney General's Office based upon the banking relationship.

DISSENT: Judge Kelly Thomas filed a dissenting and concurring opinion in the case. Judge Thomas stated that, "Under the facts presented, I cannot agree with the majority that the trial court applied an incorrect legal standard or reached a decision that is against logic or reasoning when it disqualified the District Attorney General's Office."

Judge Thomas noted that the indictment charged that the defendant unlawfully and knowingly offered a pecuniary benefit of \$10,000.00 to the Bledsoe County General Sessions Judge with the intent to influence the said public servant's exercise of discretion or other action in the said public servant's official capacity. Judge Thomas noted that the majority had correctly noted that the trial court judge found an appearance of impropriety existed, rather than finding that an actual conflict of interest was present.

Judge Thomas noted significant factors in the case as follows:

1. Under the Tennessee Rules of Professional Conduct, Judge Thomas noted that the District Attorney General's Office's representation of the State of Tennessee is "materially limited by" its responsibility to a third person, that being the General Sessions Court Judge for Bledsoe County, who is also the prosecuting witness.
2. Judge Thomas noted that under language of a United States Supreme Court case, "A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information would be sought as evidence, ... these decisions, critical to the conduct of a prosecution, were all made outside the supervision of a court."
3. Judge Thomas also noted that under comments to Rule 1.7, "even where there is no directed diversity between clients, conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interest." The comment goes on to say that: "The critical questions are: What is the likelihood that a difference in interest will eventuate and, if it does, will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client?"

4. Judge Thomas noted that while the state and the majority referred to the General Sessions Judge as merely a witness, the judge is in fact the subject of the bribery, and the individual who reported the offense. Judge Thomas noted that the judge's cooperation with the 12th Judicial District's Office and participation in the defendant's prosecution were crucial. Judge Thomas also noted that the District Attorney's Office prosecutes criminal cases in the judge's court. Judge Thomas noted that in his view the small close-knit nature of Bledsoe County exacerbates the problem as the judge is the only General Sessions Judge in Bledsoe County.

5. Judge Thomas stated that he could see how such duties would create a significant risk that the District Attorney General's representation of the State of Tennessee would be materially limited by its responsibility to the judge and, therefore a conflict of interest may be present and at least the appearance of impropriety existed. The judge stated that "relative to whether an appearance of impropriety exists, it is determined objectively from the perspective of a reasonable lay person with knowledge of all reasonable facts."

Based upon all of these facts, Judge Thomas stated that, "I cannot say the trial court abused its discretion in holding that an appearance of impropriety is present regarding the 12th Judicial District Attorney General's Office." The judge also noted that all the Circuit Court Judges in the 12th Judicial District recused themselves from the defendant's prosecution due to the involvement of the General Sessions Judge. The Circuit Judges all noted that the General Sessions Judge, a part-time attorney, also made regular appearances before all the trial judges in the district and surrounding districts. Judge Thomas stated: "If the Circuit Judges feel that a conflict exists, then I cannot say the trial court abused its discretion in holding that an appearance of impropriety is present regarding the 12th Judicial District Attorney General's Office." Judge Thomas went on to say that it presented an even more egregious situation when the witness was not merely an attorney who frequently appeared before the Circuit Court but that he also was a judge who adjudicates the prosecutions of the District Attorney in Bledsoe County General Sessions Court.

Finally, Judge Thomas felt like the majority's analysis "comes perilously close to requiring evidence of actual impropriety rather than just an appearance of impropriety."

Judge Thomas did agree with the majority's conclusion that the banking relationship between the General Sessions Judge and the Assistant District Attorney General did not by itself create an appearance of impropriety.

RECUSAL OF TRIAL JUDGE: EVEN THOUGH THERE WAS NO QUESTION THAT THE TRIAL JUDGE WAS ACTIVELY INVOLVED IN THE PROSECUTION OF THE DEFENDANT BACK IN 1990, THE COURT OF CRIMINAL APPEALS NOTED THAT THERE WAS NOTHING IN THE RECORD TO SHOW ACTUAL BIAS OR TO GIVE REASON TO QUESTION THE TRIAL JUDGE’S SUBJECTIVE DETERMINATION THAT HE SHOULD NOT BE REQUIRED TO RECUSE HIMSELF IN HANDLING THE CASE INVOLVING THE DEFENDANT IN 2021

FACTS: In a case involving robbery, the defendant contended that the trial judge committed reversible error by failing to recuse himself because he had prosecuted defendant in 1990 and in 2002 as an Assistant District Attorney General.

The State of Tennessee responded that the trial judge properly denied the motion because he expressly stated that he was able to preside impartially over the defendant’s sentencing and because a person of ordinary prudence in the judge’s position would not find a reasonable basis for questioning his impartiality.

HELD: The Court of Criminal Appeals held that the recusal of the trial judge was not objectively required in the present case and that the trial judge had properly denied the motion for recusal.

In reaching this decision the court considered several important principles on issues pertaining to the disqualification of a trial judge as follows:

1. The rules of the Tennessee Supreme Court require that a judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.
2. A judge’s impartiality might reasonably be questioned when a judge has “a personal bias or prejudice” against any of the parties, “personal knowledge of facts that are in dispute in the proceeding,” when the judge has “served as lawyer in the matter in controversy, or was associated with a

lawyer who participated substantially as a lawyer in the matter during such association.”

3. The test for recusal is an objective one because the appearance of bias is just as injurious to the integrity of the courts as actual bias.

4. The Tennessee Supreme Court has ruled that broad supervisory authority, without some evidence that the judge participated personally and substantially in the case, was an insufficient reason to reasonably question the judge’s impartiality.

5. The issue is “whether a person of ordinary prudence in the judge’s position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.”

In the present case after considering these broad principles pertaining to recusal, the Court of Criminal Appeals noted that the trial judge in the present case had served in more than a supervisory capacity in the defendant’s prior case as the trial judge was directly and substantially involved in the prosecution of the defendant’s prior case. The court further noted that, however, unlike previous cases, the case in which the trial judge prosecuted defendant was more than thirty years prior. The court stated that while there is no question that the trial judge was actively involved in the prosecution of the defendant in 1990, there is “nothing in the record to show actual bias or give reason to question the trial judge’s subjective determination that he should not be required to recuse himself for lack of impartiality in determining the defendant’s sentence for his 2021 conviction.”

The court pointed out that the trial judge had explicitly stated that he could preside over the defendant’s sentencing “fairly, impartially, and without bias.” The defendant made statements in his motion for recusal in the present case that “during the defendant’s 1990 trial” the trial judge had made statements to the effect that “there is a dark side to the defendant in which teachers and coaches don’t see, and when the dark side surfaces, no young girl is safe.” The trial court in the present case noted that his actions and statements as a prosecutor in the 1990 trial were “legal” and “professional” only and did not reflect his personal opinion about the defendant or indicate any lingering bias or prejudice toward the defendant.

The Court of Criminal Appeals noted in conclusion that the CCA disagreed with the defendant’s interpretation of any of the trial judge’s previous actions or comments as an indication of his hostility, bias, prejudice, or prejudgment of defendant “in the instant case.” The court said that the defendant had failed to establish that the trial judge relied on his

knowledge gleaned from his prior prosecutions of the defendant in sentencing him. The court also noted that the defendant had failed to establish that the trial judge's impartiality should be questioned based upon the Supreme Court's having overturned the defendant's 1990 convictions." The court concluded that recusal was not objectively required under the facts of the case.

PRACTICE POINT: I would suggest that in a case of this nature where a trial judge had previously served as a prosecutor in a case in which he actively prosecuted the defendant that it could be very reasonable for the defendant to believe that the trial judge has actual bias against him and that there can be an appearance of impropriety.

State v. McMurry (Tenn. Cr. App. 4/12/22)

ETHICS 101: COMPLY WITH THE LAW

IS THE TBI ABOVE THE LAW?: THE TBI LACKS AUTHORITY TO REFUSE TO COMPLY WITH THE FINAL EXPUNGEMENT ORDER

FACTS: In February 2015, the plaintiff in this civil action was a citizen of McNairy County, Tennessee, and negotiated a judicial diversion agreement for two criminal charges. The state agreed to dismiss one criminal charge, and the plaintiff consented to complete four years of probation in exchange for the dismissal of the remaining charge and expungement of both charges.

By February 2019, the plaintiff had successfully completed four years of probation, and he petitioned for expungement of his records and paid the applicable expungement fee. The state of Tennessee, through an assistant district attorney general, consented to the expungement and the parties submitted an agreed, joint, proposed expungement order to the trial judge, who approved and entered the order on 2/19/19, which provided that "all public records relating to such offense above referenced be expunged and immediately destroyed upon payment of all costs to the clerk and that no evidence of such records pertaining to such offense be retained by any municipal, county or state agency . . . "Neither the state nor the plaintiff filed any post-judgment motion or appeal following entry of the expunction order, and the TBI did not seek to intervene in the expungement proceeding. The expunction order became final and was sent to the TBI, which triggered a

portion of TCA 40-32-102(b) which provides that the TBI shall remove expunged records from the person's criminal history within sixty days from the date of receipt of the expunction order.

Later, the plaintiff learned that the TBI had not expunged the records as provided in the order, and plaintiff's counsel notified the TBI by email that it should comply with the expunction order. The TBI responded that it had been advised by an assistant attorney general with the Tennessee Attorney General's Office that the TBI did not have to remove the expunged records from the plaintiff's criminal history because TCA 40-32-101 makes sexual offenses ineligible for expunction, even if a person successfully completes the judicial diversion program.

Thereafter, the plaintiff sued the TBI in the Chancery Court for Davidson County. Ultimately, the trial court declined to grant either party's motion for partial judgment on the pleadings, but the trial court allowed the plaintiff to seek an interlocutory appeal under Rule 9 of the Tennessee Rules of Appellate Procedure.

ISSUE: Under what circumstances, if any, may the TBI refuse to comply with the final expungement order issued by a trial court. The TBI claimed that statutes obligated TBI to disregard to final expunction orders encompassing offenses that are statutorily ineligible for expungement. The plaintiff responded that the statutes simply obligate the TBI to remove expunged record from a person's criminal history within sixty days of receipt of an expunction order and entrust courts with adjudicating whether an offense is eligible for expungement.

HELD: The Tennessee Supreme Court held that the plaintiff's position was correct and that the Tennessee statute simply obligates the TBI to remove expunged records from a person's criminal history within sixty days and thereby the law entrusts courts with adjudicating whether an offense is eligible for expungement.

The Supreme Court noted that the provisions of judicial diversion of the judicial diversion statute relating to expungement, which applies specifically to the plaintiff, do not assign the TBI any responsibility in the process by which a court adjudicates an expungement petition. The statute specifically refers to the fact that "the court determines" whether the records should be expunged.

The Supreme Court stated as follows: "Like the general expungement statute, the judicial diversion statute assigns to the court the task of adjudicating the expungement petition and requires the TBI to enter information from expunction orders into its expunged criminal offender and

pretrial diversion database, and to remove expunged records from the person's criminal history within sixty days of the receipt of the expunction order."

The court noted that while TBI is correct that certain offenses are statutorily ineligible for expunction, "no statute vests the TBI with authority to enforce these statutory ineligibility provisions by disregarding the final expunction orders."

The Supreme Court noted that no statute precludes district attorney generals from consulting the TBI on expungement petitions, and the statute may well contemplate that an attorney general will consult with the TBI, "but no statute grants the TBI authority to independently review and decline to comply with a final expunction order it considers erroneous." The court further noted that state agencies may not alter the judgment of a court, even if that judgment is illegal.

The Supreme Court stated, "To hold that the TBI possesses such authority would eviscerate principles of res judicata, which serve the core judicial function of settling disputes between contending parties." The Supreme Court held that the TBI had established no basis for disregarding the res judicata effect of the plaintiff's final expunction order. The Supreme Court additionally stated the following significant principle: "The plaintiff's expunction order is res judicata and binding on the state and the persons and entities in privity with the state, including the TBI. As the Supreme Court of the United States has recently stated, if citizens 'must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.'" The Supreme Court therefore concluded that "for all these reasons, we conclude that the TBI lacked authority to refuse to comply with the plaintiff's expunction order. The determination of whether an offense is eligible for expunction is an obligation entrusted to courts, not the TBI."

The Supreme Court therefore distinctly stated the basis of the whole case as follows:

"The plaintiff successfully completed judicial diversion, the charges against him were dismissed, and he petitioned to expunge those charges. The state, acting through its representative, the District Attorney General, consented to the expungement order. The circuit court entered the expungement order. After thirty days, the expungement order became final. The TBI received a copy of the expungement order. The TBI's only responsibilities at that point were to enter information about the plaintiff into its

expunged criminal offender and pretrial diversion database and remove the expunged records from the plaintiff's criminal history within sixty days of receipt of the expunction order.”

The judgment of the trial court was reversed and remanded to the trial court for any further proceedings consistent with the opinion.

PRACTICE POINT: A reminder of the first principle of Ethics 101 is as follows:

- (1) The TBI is required to comply with the law.
- (2) Law enforcement officers are to comply with the law.
- (3) Each of the courts of the State of Tennessee and each judge in the State of Tennessee is to first and foremost make every effort to comply with the requirements of the law.

No one is above the law.

Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. David B. Rausch, Director of The Tennessee Bureau of Investigation, and Tennessee Bureau of Investigation (Tenn. Supreme Court 5/27/22)

EX PARTE COMMUNICATIONS

FACEBOOK POSTS IN THE AFTERMATH OF THE JUDGE'S RULING ON A CASE: WHEN A JUDGE RECEIVED A FACEBOOK POST FROM A THIRD PARTY ALERTING THE JUDGE TO POSTS MADE BY DEFENDANT AFTER A HEARING, THE JUDGE WAS INSTRUCTED BY A JUDICIAL INVESTIGATION COMMISSION (JIC) NOT TO REVIEW OR CONSIDER SUCH POSTS BUT INSTEAD TO REFER ANY POST-HEARING FACEBOOK COMMUNICATIONS TO BOTH THE PROSECUTOR AND DEFENSE ATTORNEY TO TAKE SUCH ACTION AS THEY DEEM APPROPRIATE

FACTS: A judge in West Virginia sentenced a defendant in a criminal case to the penitentiary, following which he received a message on Facebook from a third party alerting the judge to various posts allegedly made by the defendant after the hearing. The posts did not contain any threats, but the author of the posts made negative comments about or engaged in name calling of the victim, the victim's relative who spoke at the sentencing hearing and in regard to the judge.

The judge sought an advisory opinion from the Judicial Investigation Commission.

HELD: The JIC issued an opinion, recommending the appropriate actions to be as follows:

1. The judge should not review or consider any Facebook posts about the subject of a pending or impending case that was referred to him/her by a third party.
2. Any similar ex parte communication that the judge receives should be immediately referred to both the prosecutor and defense attorney to investigate its truthfulness and to take any further action that they may deem appropriate.
3. The judge should not contact the Commissioner of the Division of Corrections and Rehabilitation and alert them to the situation since the judge did not know if, and the judge could not investigate whether, the defendant in fact posted the comments. The commission noted that by doing so, the judge would create an appearance, however incorrect it might be, that the judge was trying to use his/her position to effectuate the outcome of a parole hearing.

In making these recommendations, the commission considered the following principles of the Code of Judicial Conduct:

Rule 1.2 Confidence in the Judiciary – A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

Rule 1.3 Avoiding Abuse of the Prestige of Judicial Office – A judge shall not abuse the prestige of a judicial office to advance the personal or economic interests of the judge or others or allow others to do so.

Rule 2.9 Ex Parte Communications

(A) A judge shall not intimate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter ...

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

A point of emphasis by the commission included this important comment: “The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. Importantly, this provision is not intended to refer to routine court records available from the bench, as long as the records are disclosed to and subject to review by both parties.”

This principle makes clear that being made aware of certain posts would encourage us to look at such posts, which in effect is conducting an inappropriate investigation which in effect borders on investigating facts not introduced at a trial or a hearing and which can encourage us to take further actions of investigation. While it might be reasonable to look at a post that is brought to our attention, this opinion is making clear that it would be inappropriate to act further by investigating further except for making both parties aware of the communication for any appropriate action they may need to take from an ethical standpoint and/or to instruct parties or witnesses to cease and desist in certain actions. The point is well taken that since we should not do any investigation on our own and therefore judges may be unable to determine who in fact made the posts, that it is certainly best for us not to forward the posts to other legal bodies who may mistake our communication for an attempt to influence said legal body. This will also help the judge avoid an inappropriate attempt to in fact influence another legal body against a person who has made negative comments about the judge.

West Virginia Judicial Investigation Commission Advisory Opinion
2021-02 (1-21-21)

JUDGE SERVING AS SIDELINE BROADCASTER FOR LOCAL HIGH SCHOOL FOOTBALL GAMES

FACTS: A judge made contact with the Judicial Investigation Commission for West Virginia and advised the commission that for the past seven years he had volunteered for a local radio station as a sideline broadcaster of local high school football games. The job as a broadcaster is not connected to the schools or board of education. The people the judge works with in broadcasting do not hold public jobs and do not appear that they would cause any potential conflicts. The judge makes inquiry as to whether or not he could continue the public service of broadcasting high school football games now that he has been appointed as a Circuit Judge.

HELD: The commission held that the judge's volunteering as a sideline broadcaster would not violate any rules of the Code of Judicial Conduct governing extra judicial activities because there did not appear anything that would lead to potential conflicts or an appearance of impropriety.

Judicial Investigation Commission Advisory Opinion 2021-17
(8/11/21)

PUBLIC COMMENTS AND SOCIAL MEDIA ACTIVITY BY A JUDGE: COMMENTS BY JUDGE CAN REASONABLY BE CONSTRUED TO SUGGEST THAT TRIAL JUDGE HAS "A SPECIFIC AGENDA THAT IS ANTAGONISTIC TO THE INTERESTS OF THOSE IN THE PHARMACEUTICAL INDUSTRY"

FACTS: Circuit Court Judge Jonathan Lee Young of the Thirteenth Judicial District in the State of Tennessee was the presiding judge in the case of Clay County, et al v. Purdue Pharma L.P., et al. The claim involved underlying litigation of claims made by plaintiffs against manufacturers of prescription Opioid medications, including Health Solutions, Inc. (ENDO). Endo filed a motion to recuse the trial judge based upon a public interview he had given to a reporter and based upon Facebook postings made by the judge. Specifically, the trial judge gave an interview to a Law360.com as he told the reporter that the alleged discovery violations by the Endo Defendants were "the worst case of document hiding that I have ever seen. It

was like a plot out of a John Grisham movie, except that it was even worse than what he could dream up.” Later, on 2/15/22, the trial judge posted on his personal Facebook page about the lack of local media coverage in the case, as the judge stated: “Why is it that national news outlets are contacting my office about a case I preside over and the local news is not interested.” Screenshots of the trial judge’s Facebook page reflected a “Re-Elect” banner next to his name.

The trial judge’s Facebook activity also included other communications by the judge, including comments by a commentor that he didn’t know if the judge would get help or get him the platform he needed because: “Many of Tennessee’s powerful have ties to pharmaceuticals.” The trial judge specifically “liked” this comment.

In regard to statements by another commentor, the judge responded that the reason the case he was presiding over was newsworthy, is because the case: “is a \$1.2 Billion opioid case. Our area has been rocked with that drug for decades. Lots of interesting and new developments about the manufacturers in this case.”

HELD: The Court of Appeals held that the trial courts order denied of the defendants’ motion for recusal must be reversed and the case remanded for transfer to a different judge.

The Court of Appeals stated:

“In our view, this activity by the trial judge positions himself publicly as an interested community advocate and voice for change in the larger societal controversy over opioids, not an impartial adjudicator presiding over litigation. This perception is enhanced when considered alongside the trial judge’s ready participation in the Law360.com article and apparent desire, as expressed on his Facebook page, for more local media coverage. The trial judge appears to us to be motivated to garner interest in this case and draw attention to his stated opposition to opioids within a community that he noted had been rocked with that drug. Regardless of the specific motivation, however, it is clear here to us that the trial judge’s comments and social media activity about this case are easily construable as indicating partiality against entities such as the Endo Defendants. For this reason, and to promote confidence in our judiciary, we conclude that the trial judge erred in refusing to recuse himself from the case.”

The court also noted that the trial judge had signed an order granting sanctions prior to adjudicating the pending motion for recusal, and the court of appeals held that order must be set aside and vacated.

Clay County ET AL v. Purdue Pharma LP ET AL (Tenn. Civ. App. 4/20/22)

BOARD OF JUDICIAL CONDUCT

The Tennessee Board of Judicial Conduct also took action against Judge Jonathan Lee Young, Circuit Judge of the Thirteenth Judicial District. **FACTS:** The Tennessee Board of Judicial Conduct noted that the Tennessee Court of Appeals had found that Judge Young’s removal from the Purdue Pharma case was necessary to protect the public confidence in the judiciary, as the case was a major Opioid case involving numerous parties and more than a billion dollars.

The Board of Judicial Conduct further noted that rather than heeding the Court of Appeals conclusions regarding his extra judicial activities, Judge Young continued his public media campaign by conducting additional interviews about the case with local and national publications and authoring additional social media posts. The board noted that this “continued course of conduct risked tainting the jury pool” in the ongoing case.

The board also noted that rather than taking responsibility for his extra-judicial conduct that led to his removal from the case and the disruption to the orderly administration of justice caused by his conduct, Judge Young proceeded to blame the parties and their lawyers and attempted to portray himself as a victim. He asserted without any legal authority, said the Board of Judicial Conduct, that as a judge he essentially enjoyed a constitutional right to say and do as he pleased in the media and social media platforms concerning cases assigned to his court.

The Board of Judicial Conduct also took note of the fact that Judge Young had initiated communications with a female party in an adoption case before him, in which the judge, among other inappropriate activities, requested explicit pictures from her and also met with her on multiple occasions outside of court, including a hotel in Cookeville where he had sex with the female who was involved in the court case. Judge Young provided her with advice about her custody case even after his recusal from the matter, including giving her advice on how to get the judge handling the

case disqualified from hearing the case and about how to replace her attorney.

HELD: The Board of Judicial Conduct found that reasonable cause existed to believe that Judge Young committed misconduct summarized above and the board noted that Judge Young's term would end on August 31, 2022, at which time he would no longer be subject to the board's jurisdiction after that date.

(Note should be made that the judge was defeated in May 2022, in the Republican Primary, in which his opponent in the primary received 15,521 votes to Judge Young's 8,090 votes.)

The Board of Judicial Conduct ordered that Judge Young would be suspended for a term of thirty (30) days, effective August 2, 2022 through August 31, 2022. The court found that during this term of suspension, Judge Young would be prohibited from exercising any judicial power or authority which would include that he could not hold court, issue subpoenas, set or reset cases, issue warrants, set or change bonds, administer oaths, or issue oral or written rulings in any matter.

In Re: Judge Jonathan Lee Young, Circuit Court, Thirteenth Judicial District, Tennessee Board of Judicial Conduct (7/26/22)

“THE SPECTER OF RACIAL PREJUDICE”

CONFEDERATE MEMORABILIA IN JURY ROOM: IN A CASE INVOLVING A DIFFERENT DEFENDANT, A SECOND PANEL OF THE COURT OF CRIMINAL APPEALS CONTRADICTED A SEPARATE PANEL OF THE COURT OF CRIMINAL APPEALS BY CONCLUDING THAT THE DEFENDANT, AN AFRICAN-AMERICAN MALE, FAILED TO SHOW THAT ANY SPECIFIC EXTRANEOUS PREJUDICIAL INFORMATION WAS IMPROPERLY BROUGHT TO THE JURY’S ATTENTION DESPITE THE PRESENCE OF CONSIDERABLE MEMORABILIA OF THE CONFEDERACY, INCLUDING A CONFEDERATE FLAG, BEING PRESENT IN THE JURY ROOM

FACTS: The facts in the present case were essentially similar to the case of State v. Tim Gilbert (Tenn. Cr. App. 12/3/21). In both cases, the jury deliberated in the Giles County Circuit Court jury room which had substantial Confederate memorabilia including a Confederate flag, a portrait of Jefferson Davis and other memorabilia, in the county where the Ku Klux Klan was founded across the street from the courthouse. The defendant, Barry Jamal Martin, was convicted of possession of one-half gram or more of cocaine with intent to sell and other charges. The defendant claimed that the environment was inherently prejudicial and exposed the jury to extraneous information that was prejudicial to his case.

HELD: The Court of Criminal Appeals held that, while the court did not condone the presence of the memorabilia in the jury room, the defendant failed to show that any specific extraneous prejudicial information was improperly brought to the jury’s attention or improperly brought to bear upon any juror or grand juror, and, accordingly, no unequivocal rule of law was breached.

PRACTICE POINT: In our February 2022 conference, we previously covered State v. Gilbert (2021). I noted the extremely strong statement that was made by the first panel of the Court of Criminal Appeals which emphasized the historical context of the Confederacy jury room, the history of the county, including the founding of the Ku Klux Klan in Giles

County, and the extremely dangerous conditions that surrounded the case for a person of color. The first panel boldly concluded that the “specter of racial prejudice” permeated the entire atmosphere of the case, resulting in the CCA reversing the defendant’s conviction.

Therefore, I applauded the decision of State v. Gilbert, since the days we live in appear to be a particularly appropriate time in the history of our state and nation to emphasize that racial prejudice has no place in the criminal justice system and that racial prejudice should be discouraged at every stage of every proceeding. This includes no tolerance for a county having a jury deliberate life-changing decisions in a jury room which is permeated by souvenirs and memorabilia of the Confederacy in the county in which the KKK was founded.

State v. Martin (Tenn. Cr. App. 8/16/22)

“THE SPECTER OF RACIAL PREJUDICE”

Newspaper articles have reported throughout the State of Tennessee the contradictions of the two panels of the Court of Criminal Appeals. The articles themselves point out the stark contrast in the two opinions in which the explosive setting is totally downplayed by one panel and totally magnified by the other panel. The question becomes why our society would want to tolerate any kind of possibility of racial animus entering into the extremely important deliberations of a judge or jury in deciding a case as important as the freedom and due process rights of an individual charged with serious crimes. These are times that “try” men’s and women’s souls as verified by many recent developments which I will briefly describe.

Here are examples of today’s headlines:

1. June 29, 2022:

Knoxville News Sentinel - “Racist Attack at Middle School Forces Family to Leave Tennessee Town”

In this article, the journalist depicts horrible acts committed by middle school white boys including the display of signs which state: “Bring back slavery”, “White Power”, and “Put them down.”

The article notes that the school where this occurred is in Campbell County, Tennessee, a county which has an African American population of 1% and in which African American students comprise 5% of the middle school population.

2. **July 19, 2022:**

Knoxville News Sentinel - “KPD Chief Fires Officer Over Racism Cover-Up”

The article discusses several officers who had roles in covering up complaints of racist harassment within the department and indicating that the officers involved “violated the truthfulness policy.”

3. **August 16, 2022:**

Articles regarding the Tennessee Court of Criminal Appeals hit the newspapers which point out the contradictory approaches of the two panels of the Court of Criminal Appeals.

4. **August 9, 2022:**

A substantial new report is released by the Southern Prisons Coalition, a group of civil and human rights organizations, which is entitled “Human Rights Violations in Prisons Throughout Southern United States Cause Disparate and Lasting Harm in Black Communities.”

The findings include the following:

- a. The United States’ Criminal Legal System Reflects Systemic Discrimination Against Black People and Creates Racial Disparities in the Carceral System.
- b. The United States Disproportionately Places Black People in Solitary Confinement.
- c. The Practice of Forced or Coerced Labor, in a Disproportionately Black Carceral System, Continues the Vestiges of Chattel Slavery in the United States.
- d. The Racially Biased United States Carceral System Harms Black Children and Families.
- e. The United States’ Education System Disproportionately Disciplines Black Children and Pushes Them into the Juvenile Justice System.

Each of these findings is supported by statistics which point to these conclusions.

5. April 28, 2022:

A joint effort of Disability Rights Tennessee (DRT) and the Youth Law Center (YLC) released a report on Wilder Youth Development Center, a Department of Children’s Services Facility, which was entitled “Designed to Fail.”

This detailed report makes the following conclusions:

- (1) DCS is failing to protect children from abuse, mistreatment or neglect.
- (2) DCS is failing to appropriately assess, educate, or rehabilitate youth at Wilder, many of whom have disabilities and/or trauma related needs.
- (3) DCS is failing to provide effective behavior and mental health treatment.
- (4) DCS is failing to ensure that health care needs of youth are met.

The report documents the “destructive practices of warehousing a disproportionate number of youth with disabilities and of black youth, who represent the majority of children locked up in Tennessee’s juvenile detention centers, and steps that should be taken immediately to stop harming these children.”

The report details many steps that need to be taken to make children safer and to have more transparent policies which will prevent abuse by staff at the facility.

6. April 27, 2022:

A report issued by the Minnesota Department of Human Rights was filed on 4/27/22, after the completion of an “investigation into the City of Minneapolis and the Minneapolis Police Department.”

The Minnesota Department of Human Rights opened its investigation after an MPD officer murdered George Floyd on May 25, 2020.

Conclusions that were reached after this extensive investigation were as follows: (1) MPD officers use higher rates of more severe force against black individuals than white individuals in similar circumstances. (2) MPD officers are more likely to stop vehicles with people of color and Indigenous individuals when officers are more likely to identify the race/ethnicity of a vehicle’s occupants. (3) MPD officers treat black and white individuals differently during traffic stops, including that black individuals are more likely to be searched along with their

vehicles, black individuals are more likely to be cited than white individuals in similar circumstances, black individuals are held for longer periods of time during a traffic stop than white individuals, MPD officers are more likely to use force against black individuals during a traffic stop than white individuals in similar circumstances, and black individuals are more likely to be arrested. (4) MPD officers improperly and excessively cite black individuals with disorderly conduct and obstruction resulting in collateral consequences. (5) MPD uses covert social media to target black leaders, black organizations, and elected officials without a public safety objective. This includes covert social media accounts used to conduct surveillance of black individuals and leaders which were unrelated to criminal activity; it includes the use of covert accounts to pose as community members to criticize elected officials. (6) MPD maintains a culture where MPD officers consistently use racist, misogynistic, and disrespectful language and are rarely held accountable. (7) MPD provides deficient training and guidance for its officers, which exacerbates a pattern of discriminatory, race-based policing. (8) Officers are not held accountable because of ineffective accountability and oversight systems, which contribute to a pattern of discriminatory policing.

The findings and the statistical data and the thoroughness of the report is horrific in pointing out the extent of the pattern or practice of race discrimination.

This is consistent with studies that have been evaluated in cities in the State of Tennessee and throughout the nation.

CONCLUSION: A recent article in Sojourners Magazine is entitled “Tell Me, Where Do You Live? How Can You Not Know All the Things You Do Not Know?”, written by Jamie McGhee and Adam Hollowell. The article discusses a James Baldwin play entitled, “Blues for Mr. Charlie.” The play was written by Baldwin pursuant to a recommendation made to him that he write a script based on the 1955 murder of Emmett Till in Money, Mississippi.

The article notes that the play “proved to be one of the most intimate, gut-wrenching, and emotionally exhausting experiences of Baldwin’s artistic life.” In the play, a young black male is killed and a white journalist is investigating the incident and talks to the white police chief among others. Juanita, a young black friend of the black murder victim, confronts the journalist (Parnell) as she perceives the white journalist cannot quite grasp the significance of the entirety of the events. She says: “Tell me, where do you live, Parnell? How can you not know all the things that you do not know?”

The writers of the article point out that Baldwin is suggesting “that we cannot understand the world around us without fully embracing our senses: seeing, hearing, touching, and feeling the bodies of the people who are most threatened by

violence and cruelty,” specifically the targets of white violence in those turbulent years in the 50’s and 60’s. The authors point out that Baldwin is “calling us to be present to ourselves and the world around us. He is asking what we know, how we know it, and whether we have the courage to confront the answers.” The authors go on to state, “But senses are not sufficient.” Parnell sees Juanita, speaks with her, and engages with her, but he holds something back. “His integrity fails not because his body lacks function but because his heart lacks courage.”

Baldwin therefore asks his audience: “Tell me, where do you live?”

As judges today, as we hear cases and preside over our courtrooms, it is important that we all see the people in our courtroom – the defendants, the victims, the witnesses, the lawyers, the police officers and all the human beings who are there to be seen, to be heard, to be felt, to be understood.

It is important to understand the depleted budgets that do not provide for enough public defenders to meet the demand. It is important to understand the limitations of defense counsel who might need to have more time with their clients to properly handle the cases. It is important to understand backgrounds, neighborhoods, educational opportunities, poverty and limited incomes. It is important to understand “desperation” of rent due, high amounts of fines and court costs, and the demands of probation. It is important to understand lack of mental health resources and lack of drug and alcohol resources.

It is important to know “where we live,” and to expand the territories “where we live.” The area “where we live” probably should include every geographical inch of our “judicial jurisdiction,” the area over which we exert considerable power. It is important to know all that we can about people and institutions and resources and limitations in the county where we live.

We are effectively asked every day –

In what world do you live?

Why are you content not to know all that you do not know?

Why do you not care enough to find out?

A haunting question:

“Hey Judge Stokes, where do you live?

Are you in any position to make any judgments about my life?”

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Judge Stokes has served as Sevier County's General Sessions and Juvenile Court Judge since his election in 1998. 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 University 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. He served on the Tennessee Commission of Children & Youth for nine years and previously served on the statewide Disproportionate Minority Contact Task Force and the Tennessee Board of Judicial Conduct. Judge Stokes is an adjunct professor at Carson-Newman University in the Political Science Department.