

**TENNESSEE GENERAL SESSIONS JUDGES
CONFERENCE**

FEBRUARY 2015

**Criminal Law Update
Nashville, Tennessee**

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CRIMINAL LAW UPDATE
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ARREST

PROBABLE CAUSE FOR ARREST: INFORMATION PROVIDED BY A CITIZEN-BYSTANDER WITNESS IS PRESUMED TO BE RELIABLE AND PROSECUTION IS NOT REQUIRED TO ESTABLISH EITHER CREDIBILITY OF INFORMANT OR RELIABILITY OF INFORMATION

FACTS: At the time of defendant's arrest for multiple counts of first degree murder, the police knew that nine year old CJ, the defendant's nephew, had identified the defendant as perpetrator of the homicides and assaults. Based on the information, CJ was a citizen informant and witness to and victim of the crime. The police also had information that the crime scene had been altered; that the murders and assaults were accomplished with weapons found inside the home; that the defendant was a close relative of several of the murder victims and had spent time in the home and was familiar with it; that the defendant was one of the last persons to see two of the victims alive; and that the defendant had previously been convicted of a murder and only recently been released from jail.

HELD: Under all of the circumstances that are described above, the officers had sufficient knowledge to warrant a prudent person in believing that the defendant had committed the homicides and assaults.

The Supreme Court also rejected that the defendant's argument that CJ's identification of the defendant was not entitled to presumption of reliability that was ordinarily accorded information from citizen informants; defendant's argument that CJ had not been shown to be motivated "solely by sense of civic duty" was determined to be without merit. The Supreme Court concluded that information provided by a citizen-bystander or witness known to the police is presumed to be reliable, and the prosecution is not required to establish either credibility of the informant or the reliability of this information. The court stated that no Tennessee decision has conditioned application of the presumption of reliability upon a showing that the citizen informant was in fact motivated by one or both of these interests (that the citizen informant acts either in the interest of society or his own

personal safety). The record also contained no evidence that CJ had any ulterior motive for identifying his uncle, the defendant, as the perpetrator of the crimes.

In an unrelated issue, the Supreme Court found that the defendant had not invoked his right to remain silent by merely stating that he wished to speak with other officers rather than the officers who were there questioning him. The court stated that the defendant's request to speak to officers other than those conducting the interview did not amount to an invocation, ambiguous or unambiguous, of his right to remain silent.

On another issue, the Supreme Court found that the defendant's argument that his confession to his mother should not have been admitted because she was a state agent was not supported by the evidence as there was no proof that officers asked, directed, induced, or threatened her in order to obtain information from the defendant. The court stated that there was simply no evidence that the mother of the defendant was acting as an agent for the state or that her conversation with the defendant amounted to interrogation.

State v. Dotson, 39 TAM 40-2 (Tenn. S. Ct. 09-30-14)

BAIL BOND

FORFEITURE OF BAIL BOND: TRIAL COURT ERRED IN DENYING SURRENDER AND RELEASING DEFENDANT OVER SURETY'S OBJECTION WHEN BONDING COMPANY MET REQUIREMENTS OF T.C.A. § 40-11-132

FACTS: Defendant failed to appear for a hearing and the general sessions court forfeited the bond and issued a capias for the defendant's arrest. The bonding company physically surrendered the defendant to the trial court and requested it be relieved of surety. The trial court denied the surrender and released the defendant on the same bond, following which the defendant failed to appear at another court hearing and the trial court entered final forfeiture against the bonding company.

HELD: The trial court erred in denying surrender and releasing defendant over surety's objection when the bonding company had met the requirements of T.C.A. § 40-11-132. The court noted that the bonding company attempted to surrender the defendant pursuant to the statute including that it had good cause to believe the defendant would not appear as ordered by the court having jurisdiction, that a forfeiture had been rendered against the defendant, and that the defendant had failed to appear in court either as ordered by court or commanded by legal process.

The Criminal Court of Appeals concluded the trial court had committed error in denying the surrender and not relieving the bonding company from the obligation.

State v. Caldwell, 39 TAM 48-18 (Tenn. Cr. App. 07-31-14)

BURGLARY

AGGRAVATED BURGLARY: EVIDENCE INSUFFICIENT TO CONVICT DEFENDANT AS EVIDENCE ESTABLISHED THAT THE DEFENDANT ENTERED THE VICTIM'S RESIDENCE WITH CONSENT OF THE VICTIM

HELD: In this case involving felony murder, aggravated assault and aggravated burglary among several other crimes, the Court of Criminal Appeals found that the evidence was not sufficient to convict the defendant of aggravated burglary. The Court of Criminal Appeals stated that the evidence established that the defendant had entered the victim's residence with the consent of the victim. The court noted that there was no active deception by the defendant which occasioned the defendant's entry into the Moss residence, and although Moss did not give his express consent to allow the defendant to enter his residence, the fact that he allowed the defendant to enter is evidence of his apparent consent. The Court of Criminal Appeals stated that even if the victim could have formed a false impression that the defendant intended to enter his residence for the purpose of purchasing marijuana, the statute does not allow for conviction on aggravated burglary

based upon the defendant's failure to correct the victim's false impression of his intention.

It should be noted that the evidence was sufficient to convict the defendant of many of the other charges including felony murder, attempted perpetration of robbery and theft among other charges.

State v. Alajemba, 40 TAM 2-15 (Tenn. Cr. App. 11-12-14)

COMPULSORY PROCESS RIGHTS OF DEFENDANT

RIGHT TO COMPULSORY PROCESS: TRIAL COURT'S APPOINTING COUNSEL FOR WITNESS THAT DEFENDANT HAD SUBPOENAED AND ALLOWING WITNESS TO ASSERT HIS FIFTH AMENDMENT RIGHT NOT TO TESTIFY IS NOT A DENIAL OF DEFENDANT'S RIGHT TO COMPULSORY PROCESS

HELD: The trial court did not deny the defendant his right to compulsory process by appointing counsel for the witness the defendant had subpoenaed and allowing the witness to assert his Fifth Amendment right not to testify.

The Court of Criminal Appeals noted that when there is a conflict between the basic right of a defendant to compulsory process and the witness's right against self incrimination, the right against self incrimination is the stronger and most paramount right.

The state, acting on its ethical obligations, asked the trial court to appoint counsel to advise the witness of his right against self incrimination. The court agreed with the request of the state and appointed counsel to represent the witness, and the witness ultimately decided to invoke his right against self incrimination.

The court noted that the defendant was willing to call the witness without advising him of his right to secure counsel which is contrary to the Rules of Professional Conduct.

CONFESSION

CONFESSION WHILE INTOXICATED: GENERALLY ADMISSIBLE EVEN THOUGH DEFENDANT IS UNDER INFLUENCE OF ALCOHOL AND NARCOTICS IF ACCUSED IS CAPABLE OF MAKING A NARRATIVE OF PAST EVENTS OR OF STATING HIS OWN PARTICIPATION IN THE CRIME

HELD: The trial court did not err in denying the defendant’s motion to suppress his statement to police. The defendant contended that his intoxication rendered his statement involuntary.

The Court of Criminal Appeals stated that generally a confession is admissible even though the defendant is under the influence of alcohol or narcotic drugs if the accused was capable of making a narrative of past events or of stating his own participation in the crime. The Court of Criminal Appeals stated that the defendant provided no authority that required that he be specifically asked by an interrogating officer whether he was under the influence of drugs or alcohol. The police chief had testified that the defendant was able to give a statement that described “how he would sell drugs.”

The Court of Criminal Appeals concluded that under the circumstances the defendant voluntarily, knowingly and understandingly waived his Miranda rights and gave a confession.

CONFESSION: MERE MENTION BY DETECTIVES OF POSSIBLE PUNISHMENTS FOR OFFENSE INCLUDING POSSIBILITY OF DEATH PENALTY, IS

NOT ALONE SUFFICIENT TO PROVE COERCION

FACTS: The trial court noted, “I don’t think in over thirty years of being in this business I have ever seen a more voluntary, intelligent, knowing waiver and statement made by defendant in any criminal case, much less a murder case.” The trial court found that there was nothing done in any way, shape, form or fashion to threaten, intimidate, coerce or do anything to overbear the will of the defendant in the case.

HELD: The Court of Criminal Appeals found that the trial judge had properly denied the defendant’s motion to suppress his statement to the police. The court also noted that the defendant had voluntarily given his statement to the police, the detective had advised the defendant of his rights; and the defendant had expressed willingness to speak with the police, and nothing indicated otherwise. The court also found that there were no threats nor did the officers act in an intimidating manner during the interview.

The Court of Criminal Appeals did note that the detectives informed the defendant of charges he faced, including the possible punishment of death penalty. The Court of Criminal Appeals concluded that the detectives’ mention of a possible punishment for an offense alone is not sufficient to prove coercion in the case.

State v. Ostine, 39 TAM 37-18 (Tenn. Cr. App. 05-28-14)

CONFINING DEFENDANT IN A HOLDING CELL UNDER POOR CONDITIONS: DEFENDANT’S STATEMENT STILL FOUND TO BE VOLUNTARY AND ADMISSIBLE

FACTS: In a case involving facilitation of felony murder and facilitation of aggravated robbery among other charges, the defendant maintained that her statement to police was involuntary and based on coercion. The facts established that the defendant was confined between October 21, 2010 to November 10, 2010 in a visitation booth. The cell was a small visitation booth, measuring five feet by six feet, with no toilet, bed, or running water. She did have a mattress that was placed in the room for sleeping and had frequent contact with correction officers as they walked the hallway. The

area was also monitored by video camera and the officers checked on inmates every thirty minutes.

HELD: The trial court did not err in denying the defendant's motion to suppress her statement to police. The Court of Criminal Appeals found that the officers did not purposefully expose the defendant to threats or place her in a visitation booth in order to force her confession. Even though co-defendants did in fact threaten her while she was confined, this threat was not established as something the authorities intended or purposefully allowed. The defendant admitted that she was read her Miranda rights "millions of times" and that she waived her Miranda rights. Even though her full scale IQ was 90 she had requested to speak with the officers on several occasions.

The Court of Criminal Appeals concluded that although the defendant's conditions of confinement were particularly bad at times, her statements were made voluntarily.

State v. Kennedy, 39 TAM 48-14 (Tenn. Cr. App. 07-30-14)

ILLITERATE DEFENDANT: NO ERROR BY TRIAL JUDGE IN DENYING DEFENDANT'S MOTION TO SUPPRESS AS PROOF ESTABLISHED DEFENDANT UNDERSTOOD HIS RIGHTS EVEN THOUGH DEFENDANT HAD NO ABILITY TO READ OR TO WRITE

HELD: The Court of Criminal Appeals in this case (involving rape of a child) held that the trial court did not err in denying the defendant's motion to suppress his confession. The Court of Criminal Appeals noted that while the proof established that the defendant could not read or write, the officers testified that they went over the defendant's Miranda rights with him and they testified that he understood his rights. The trial court had determined that the defendant knowingly and voluntarily waived his rights and there was no evidence of duress or coercion. The Court of Criminal Appeals noted that there was no indication that defendant was detained prior to giving his statement, no evidence that he was intoxicated or in ill health, nor was he subjected to physical abuse or threats by the officers.

The Court of Criminal Appeals also noted that after the defendant gave his statements, the investigators wrote it out for the defendant and then read the statement back to the defendant line by line, verifying the accuracy of each sentence.

State v. Smith, 39 TAM 47-17 (Tenn. Cr. App. 08-13-14)

MENTALLY CHALLENGED DEFENDANT: DEFENDANT WITH SCHIZOPHRENIA AND AN IQ OF APPROXIMATELY 67 FOUND TO BE COMPETENT TO GIVE A VOLUNTARY STATEMENT, OVERRULING TRIAL COURT'S RULING

FACTS: The defendant had a history of mental illness and was diagnosed with schizophrenia as well as mental retardation. The defendant had an IQ tested in the range of 67. The defendant contended that the statements made during his interrogations should be suppressed because the statements were made during a continuing psychotic episode. The trial court found that the defendant's statement to police was inadmissible based upon the circumstances of the confession.

HELD: The Court of Criminal Appeals noted that the trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them, and the issue is reviewed de novo on appeal.

The Court of Criminal Appeals stated that the rule in Tennessee is that mental illness alone will not render a confession invalid. The court noted that the evidence must otherwise demonstrate the accused was incapable of understanding his rights or that the mental illness affected his capacity in the first place to form a will of his own and to reject the will of others.

After reviewing the record before the court, including audio recordings and video recordings, the Court of Criminal Appeals concluded that the police did not overreach as defined by the case law. The court noted that at the crime scene the defendant clearly and simply stated what had happened. The interrogation at the police station also revealed that the defendant clearly explained what happened. The court noted that the defendant had recounted the events clearly including the timing of his

stealing the tractor, the location of the theft, and his subsequent activities of stealing gas and running over the victim. The defendant assisted the sergeant in creating a map of the scene of the stabbing, offering street names and the names of local establishments.

The court noted that, during part of the video, the defendant appeared to have “conversation” while no one was present in the room. The Court of Criminal Appeals concluded that the trial court’s finding that the defendant’s statements displayed such incompetence that further questioning by the police constituted overreaching is contrary to the evidence presented at the suppression hearing. The Court of Criminal Appeals reversed the trial court’s grant of the defendant’s motion to suppress.

State v. Beasley, 39 TAM 48-15 (Tenn. Cr. App. 07-31-14)

PROMISES OF LENIENCY: THE COURT OF CRIMINAL APPEALS FOUND THAT TRIAL COURT ERRED IN GRANTING DEFENDANT’S MOTION TO SUPPRESS STATEMENTS HE MADE TO POLICE AS APPELLATE COURT FOUND THAT DETECTIVE’S ACTIONS DID NOT CONSTITUTE AN IMPLIED PROMISE OF LENIENCY

FACTS: After an evidentiary hearing on the defendant’s motion to suppress his confession, the trial court issued an order granting the defendant’s motion by making the following findings of fact and conclusions of law:

“In the instant case, the Defendant was 18 years old at the time of the interview. Detective Farrell arrived at the Defendant’s home, handcuffed the Defendant, told him that there was warrant for his arrest and that he would have to take him to the hospital to get blood drawn because of the nature of the warrant and that it had ‘nothing to do with the case.’ During the course of the interview, Detective Farrell gave the impression to the defendant that he was there to help him by repeatedly indicating to the defendant that he believed that he had

made a mistake because of his age and that he would get treatment.

“The court heard arguments of respective counsel, listened to testimony of Detective Farrell, the recorded interview and reviewed the transcript and relevant case law. Applying the above legal standard, the court finds after review of the challenged statement under the totality of the circumstances that the Defendant’s statements were ‘compelled’ as a result of psychological coercion and were induced by an implied promise of leniency, however slight. In viewing the totality of the circumstances surrounding the interrogation, the court finds that there were repeated statements by the detective that the Defendant was going to get help if he acknowledged wrong doing. The court finds that these statements were implied promises of leniency. Therefore, the court finds that the defendant’s statements were involuntary, a product of coercion and are not admissible.”

The state filed an appeal to the Court of Criminal Appeals .

HELD: The Court of Criminal Appeals stated , “based on the totality of the circumstances, we cannot conclude that Defendant’s will was overborne such that his statements were not freely self-determined.” The Court of Criminal Appeals also stated that even if “we were to find that Detective Farrell did make promises of leniency, we see no evidence that Defendant’s will to resist was overborne.”

The court also pointed out that the Defendant did not testify in the hearing and consequently the trial court’s determinations are not predicated upon a finding about defendant’s credibility. The court analyzed the facts and found that: 1) the total conversation between the detective and the Defendant was conducted in a police car outside the Defendant’s home, with his mother supplying food to him while he was in the car; 2) the officer had relocated his handcuffs to the front so that defendant could eat what his mother had given him to eat; detectives continually insisted that the defendant would help himself by giving a statement and that most definitely treatment would be something that he would receive; that at 18 years old and remorseful he would be exactly the type of person the court would want to

help. These statements and actions of the detectives were held not to be sufficient to support the trial court's decision to sustain defendant's motion.

PRACTICE POINT: As shown here, a trial court after hearing all of the testimony himself, made a decision that the confession was manipulated and coerced by psychological maneuvering of the detectives, and yet the Court of Criminal Appeals decided that all of this meant nothing and the promises of leniency could not reasonably been understood by an 18 year old defendant to be promises of leniency. It appears that manipulative law enforcement officers who do not have anything near the ethical responsibilities of a trial judge to insure fairness and legal controls get to determine the outcome of this case well before any constitutional rights to counsel or other rights can even kick into effect.

State v. Woods, 40 TAM 1-23 (Tenn. Cr. App. 10-31-14)

VOLUNTARY STATEMENT BY DEFENDANT: UNDER FACTS OF CASE, THE OFFICERS WERE NO LONGER QUESTIONING THE DEFENDANT AND THE DEFENDANT MADE A VOLUNTARY STATEMENT WHILE NOT SUBJECT TO INTERROGATION

FACTS: Officers responded to an arson call. Upon arriving at the scene the officers spoke with the victims, who gave officers the defendant's name as the person who started the fire. Officers eventually came into contact with the defendant, and asked the defendant "general questions" about the fire. The defendant stated that he did not have any knowledge about the fire, following which officer placed the defendant under arrest for an outstanding probation violation warrant.

Once inside the patrol vehicle, the defendant began talking and said that he was angry at the victims because they had stolen his property. The officer then asked the defendant, "What did they steal?" The defendant responded that the victims had stolen his camp stool and so he had proceeded to burn their s**t to the ground in retaliation for stealing his chair.

HELD: The Court of Criminal Appeals noted that close examination had to be made of the facts in each individual case as to whether a statement was

voluntary or not. The court noted that, in the present case, the officer placed the defendant into custody because of probation violation warrant. The court noted that the officer had testified that his arrest of the defendant occurred after questioning about the defendant's involvement with the fire had ceased. The court also noted that once inside the patrol vehicle and within the custody of the state, the defendant made a statement about his stolen property, prompting the officer to ask about what property the defendant was referring to. The subsequent statement, including his admission of burning the victim's property to the ground, was not pursuant to interrogation by the officers but was voluntarily made to officers by the defendant. The trial court's denial of the motion to suppress was therefore well taken.

State v. Anderson, 39 TAM 37-21 (Tenn. Cr. App. 05-30-14)

COURT COSTS

COURT COSTS: NO ABUSE OF DISCRETION IN ORDERING DEFENDANT TO PAY COURT COSTS EVEN IF DEFENDANT WAS DETERMINED TO BE INDIGENT

FACTS: The defendant asserted that the trial court had erred by ordering him to pay court costs, noting that the trial court had determined the defendant was indigent at his arraignment and that he again was found to be indigent when his motion for new trial was denied. The defendant then relied upon the provisions in T.C.A. § 40-25-129 and 40-25-130 to assert that the state should have been ordered to pay the court costs.

HELD: The Court of Criminal Appeals concluded that the defendant failed to show how the trial court abused its discretion by ordering the defendant to pay costs. The Court of Criminal Appeals noted that in the Tennessee Supreme Court case of State v. Black, 897 S.W. 2d 680(Tenn.1995), the Supreme Court addressed issues regarding waiver of court costs by general sessions judge in the case of an indigent defendant convicted of DUI. First, the Supreme Court held that a general sessions court does have the authority

to waive payment of court costs by an indigent defendant in a DUI case. Next, the Supreme Court addressed the issue of whether it is mandatory that the general sessions court waive costs each time an indigent is convicted of DUI or whether it is discretionary with the court to waive the court costs. The Court of Criminal Appeals noted that the Supreme Court held that the decision to waive court costs is discretionary, stating: “We find that even if the statute cited by the parties impliedly grant the power to either the General Sessions or trial judge, there is no affirmative duty upon said judge to waive the costs, even if the defendant is found indigent. A defendant may be indigent at the time of conviction yet the trial court might find that he or she may have the means of paying the costs in the future.”

The Court of Criminal Appeals therefore concluded that there is “no statutory or decisional authority to support the proposition that a trial court must waive the court costs upon a finding of indigency. Therefore, the decision of whether to waive court costs rests within the discretion of the court.

PRACTICE POINT: In these type of issues, it is simply important for the general sessions judge to exercise good discretion in making determinations on court costs. When people are indigent, costs of the case can be prohibitive, particularly when considered with all the other financial hurdles an indigent person may be required to overcome, which can include employment issues, financial problems, and other costs of litigation. It is important to make the best decision possible based upon all the circumstances presented to the judge.

State v. Ryan, 39 TAM 46-19 (Tenn. Cr. App. 07-22-14)

CRIMINAL EXPOSURE OF ANOTHER TO HIV

**CRIMINAL EXPOSURE OF ANOTHER TO HIV: CERTAIN
CONVICTIONS FOR EXPOSURE OF ANOTHER TO
HIV ARE REVERSED AS DEFENDANT’S CONDUCT
IN THREE COUNTS DID NOT POSE SIGNIFICANT
RISK OF TRANSMITTING HIV TO VICTIM**

HELD: In a case in which the defendant was convicted of multiple counts of criminal exposure of another to HIV, three counts are reversed due to the fact that the defendant’s conduct in those three counts did not pose a significant risk of transmitting HIV to the victim. The Supreme Court noted that in the context of criminal exposure of HIV statute, the term “significant risk” requires the chance of HIV transmission that is more definite than a faint, speculative risk as shown by expert medical proof.

Medical testimony in the present case reflected that certain conduct of the defendant did not constitute a significant risk under the statute. The conduct which did not constitute a significant risk included the defendant’s conduct in licking the anus of an uninfected person. The medical expert testified that she would discourage this type of conduct on the part of one of her HIV-positive patients but that it did present a very low risk under the statute and was too faint and speculative for the purpose of supporting a conviction. The Supreme Court also found that the defendant’s manual manipulation of the male victim’s sex organ would be low risk and therefore did not violate the statute in regard to exposure to HIV.

State v. Hogg, 39 TAM 39-2 (Tenn. S. Ct. 09-25-14)

CRIMINAL PROCEDURE

**AMENDMENT OF INDICTMENT OR PRESENTMENT:
AMENDMENT OF PRESENTMENT FROM CHARGE
OF DRIVING ON SUSPENDED LICENSE TO NO
DRIVER’S LICENSE AFTER THE ATTACHMENT OF
JEOPARDY FOUND TO BE IN ERROR**

FACTS: In a case involving first degree murder, a subsidiary issue involved a charge of driving on suspended license on count ten. After the conclusion of the state's proof and during the phase of going over jury instructions, the state admitted that it could not prove driving on suspended license and suggested that the court charge the jury on the offense of driving without a license. The court complied with this request and the defendant was found guilty of driving without a license along with first degree murder and several other charges.

HELD: The trial court erred in allowing the presentment to be amended from driving on a suspended license to driving without a license in his possession.

The Court of Criminal Appeals concluded that an examination of the elements of both offenses reveals that it is evident that they are not the same, and one offense is not a lesser included offense of the other. The Court of Criminal Appeals concluded that the trial court constructively amended the indictment by permitting the jury to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. The Court of Criminal Appeals concluded that the defendant's conviction for driving without a license in his possession must be dismissed.

PRACTICE POINT: Even in general sessions court, once jeopardy attaches, the court cannot unilaterally amend the charge that would allow the defendant to be convicted upon a factual basis that effectively modifies an essential element of the offense charged.

State v. Smith, 39 TAM 49-17 (Tenn. Cr. App. 08-27-14)

CRIMINAL SENTENCING

JUDICIAL DIVERSION: TRIAL COURT ERRED IN CONCLUDING THAT THE FACT THAT DEFENDANT WAS "CHILD OF PARENTS WHO WERE NEVER MARRIED" SHOULD BE A NEGATIVE MARK ON DEFENDANT'S SOCIAL HISTORY FOR PURPOSES OF SENTENCING AND JUDICIAL DIVERSION

FACTS: The defendant was charged with aggravated robbery and a jury found him guilty of the lesser included offense of facilitation of aggravated robbery. During the process, the trial court found that the defendant's social history was not good because the defendant was a "child of parents who were never married; and it perpetuates itself."

HELD: The trial court erred in concluding that the fact that the defendant was a child of parents that were never married should be a blemish on the child's social history. The court noted that whether defendant is a child of an unmarried mother is not the type of fact which should be negative mark on defendant's social history when determining appropriateness of judicial diversion. The court said specifically that whether the defendant's child was born to married or unmarried parents should not be a factual consideration for judicial diversion. The court did conclude that based upon all the factors that the trial court did appropriately deny judicial diversion but that the court should not have used the factor of the child's parents never being married.

State v. Jones, 39 TAM 45-25 (Tenn. Cr. App. 07-09-14)

**JUDICIAL DIVERSION: TRIAL JUDGE ABUSED
DISCRETION IN GRANTING DEFENDANT HIS
REQUEST FOR JUDICIAL DIVERSION FOR
CHARGE OF VEHICULAR ASSAULT AFTER
MERGING DUI CONVICTION INTO SAID CHARGE**

FACTS: The defendant was convicted of DUI and vehicular assault, following which the trial court merged the DUI conviction into the vehicular assault conviction and granted the defendant's motion for judicial diversion.

HELD: The trial judge abused discretion in granting the defendant's request for judicial diversion. Because the defendant, who was convicted of

vehicular assault by reason of DUI, would not be a “qualified defendant” for purposes of judicial diversion, the trial court abused its discretion by deeming the defendant eligible and granting her request for judicial diversion.

State v. Jones, 39 TAM 49-36 (Tenn. Cr. App. 08-20-14)

DRUG OFFENSES

DRUG OFFENSES: MERE PROXIMITY OR PRESENCE OF A PERSON TO SEIZED CONTRABAND IS NOT SUFFICIENT TO ESTABLISH ACTUAL OR CONSTRUCTIVE POSSESSION

FACTS: The Court of Criminal Appeals commented about the facts in the case being “fairly straight-forward.” The court noted that the offense was initiated by a typical traffic stop where there had been no prior surveillance of the vehicle or investigation of the occupants. The owner of the vehicle was the co-defendant- driver, not the defendant-appellant, who was a passenger. There was no proof establishing the relationship between the defendant-appellant and, the driver of the vehicle, and/or with the backseat passenger, other than the fact that they were all on their way to get a beer. There was also no proof as to how long the occupants were inside the vehicle. The gun was found inside the center console of the car hidden from view, the driver testified that the gun was placed there three weeks before the stop, and the driver and the defendant-appellant testified that the defendant-appellant was unaware of its presence. The drugs were found inside of the same console, which the backseat passenger claimed to exclusively possess.

HELD: The Court of Criminal Appeals stated that “there was no evidence upon which a reasonable inference of constructive possession” could have been made to connect the defendant-appellant to the hidden contraband. The Court of Criminal Appeals, viewing the facts in the light most favorable to the state, determined that a reasonable jury (fact-finder) would be unable to determine to what extent, if any, the defendant-appellant had dominion or

control over the contraband or the car.

The Court of Criminal Appeals found, “In effect, the sum total of the state’s proof establishing constructive possession was that a detective saw the driver and the defendant-appellant ‘moving’ in the area of the console when the detective activated his blue lights. Other than the defendant-appellant’s proximity to the contraband, there was no proof to establish a link between the defendant-appellant and the hidden contraband.” The court stated that “mere proximity or presence to the seized contraband is not sufficient to establish actual or constructive possession.” The court also noted that the reversal of the conviction did not hinge upon witness credibility, because even without the testimony of the co-defendants, there was simply no proof supporting constructive possession.

PRACTICE POINT: This is a good case to review in regard to mere presence of a person in a car next to contraband not being sufficient to justify a conviction.

State v. Hilerio-Alfaro, 40 TAM 2-19 (Tenn. Cr. App. 11-19-14)

DUI

“BATH SALTS”: NO ERROR IN ALLOWING A TBI AGENT TRAINED TO TEST BLOOD FOR DRUG CONTENT TO TESTIFY ABOUT PRESENCE OF BATH SALTS IN DEFENDANT’S BLOOD AND GENERAL EFFECTS OF BATH SALTS EVEN THOUGH AGENT COULD NOT QUANTIFY AMOUNT OF BATH SALTS IN DEFENDANT’S BLOOD

FACTS: The defendant maintained that the trial court erred in allowing two TBI agents to testify as experts about the effects of specific drugs on human

performance, “bath salts” and alprazolam. The trial court allowed the agents to testify about the effects of bath salts and the alprazolam.

HELD: The trial court did not abuse its discretion in ruling that the agents could testify respectively about the effects of bath salts on an individual and the effects of alprazolam on an individual. The respective agents were able to identify the drug, type of drug, effects of the drug, and the types of behavior that could indicate the defendant was under the influence.

The court specifically reached the following conclusions: 1) Each of the agents had enough knowledge about the drug to testify with expertise about the nature of the drug and the general effects of the drugs on the individuals. Neither of the agents testified about the specific effect upon the defendant but the general effect it can have on individuals. The agents also testified about the presence of both substances in the defendant’s system. 2) Over the defendant’s objection that the amount of bath salts in the blood cannot be quantified, the Court of Criminal Appeals found that the mere presence of bath salts in the defendant’s blood was highly relevant to the charges of DUI and possession of a handgun while under the influence. The court found that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. 3) The court also found that there was no error by the trial court in allowing the state to refer to alpha-PVP as “bath salts” instead of its chemical name. The witness testified that alpha-PVP was commonly referred to and marketed as “bath salts.” 4) The court also found that the evidence sufficiently established that the defendant was guilty of DUI and possession of a handgun while under the influence. The court noted that the officer had seen the defendant drive the vehicle and when exiting the car, the defendant appeared disoriented and confused and had difficulty walking steadily. From all the proof, the court found that the presence of the bath salts and alprazolam were relevant even if the amount could not be quantified based upon the testimony of the officer and the conduct of the defendant.

PRACTICE POINT: In these cases, the court found that the TBI agents, trained in identifying drugs and types of drugs and effects of drugs, had sufficient expertise to benefit the jury (fact finder). The court also found that it was not required to quantify the amount in the system or to be able to say that the amount in the person’s system was sufficient to cause the defendant’s conduct. The court found that the presence of the drugs in the system was relevant and that when coupled with the conduct of the defendant, the proof was sufficient to convict the defendant of DUI.

**CONSENT TO BLOOD DRAW: DEFENDANT
ACQUIESCED TO TERMS OF IMPLIED CONSENT
LAW BY OBTAINING DRIVER'S LICENSE AND
DRIVING ON STREETS AND HIGHWAYS OF
TENNESSEE, AND AT NO TIME DID SHE
WITHDRAW HER CONSENT OR REFUSE TO
SUBMIT TO THE BLOOD DRAW**

FACTS: The defendant was involved in a fatal car accident and was charged with DUI. The defendant filed a motion to suppress the results of a blood analysis, the trial court granted the defendant's motion.

HELD: The Court of Criminal Appeals concluded that the warrantless blood draw was proper under the implied consent statute because the defendant did not refuse the blood draw.

The defendant had argued that the implied consent statute is invalid in light of the United States Supreme Court case, Missouri v. McNeely (2013). McNeely had held that in drunk driving investigations the natural dissipation of alcohol in the blood stream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. The Court of Criminal Appeals found that consent is a separate and distinct exception to the warrant requirement from exigent circumstances, and that the majority opinion in McNeely specifically limited its decision to the issue of exigent circumstances.

The Court of Criminal Appeals stated that in the present case, the defendant acquiesced to the terms of the implied consent law by obtaining a driver's license and driving on the streets and highways of Tennessee. The court noted that at no time after the accident did she withdraw her consent or refuse to submit to a subsequent blood draw. The court noted that the application of the Tennessee implied consent statute has not been held to be invalid or unconstitutional in this context—when an individual suspected of DUI, based upon probable cause, did not refuse to submit to a chemical test.

The Court of Criminal Appeals therefore concluded that because the officer had probable cause to believe that the defendant was driving after having consumed alcohol and because the defendant did not refuse a blood

draw, the defendant's blood test results were not subject to suppression by the trial court.

The court did state in dictum in its opinion that if the implied consent statute were held to be unconstitutional by the Tennessee Supreme Court or U.S. Supreme Court, the present case would be an appropriate one for application of the good faith exception and as an opportunity for the Tennessee Supreme Court to adopt the United States v. Leon good faith exception to the exclusionary rule.

CONCURRING OPINION: The concurring opinion by Judge Witt took exception to Judge Easter's suggestion about the good faith rule and stated that the present case does not present an opportunity for consideration of the good faith exception to the exclusionary rule.

State v. Reynolds, 40 TAM 2-22 (Tenn. Cr. App. 11-12-14)

**DEFENSE CLAIM OF LACK OF REASONABLE
SUSPICION: PROOF ESTABLISHED THAT VEHICLE
WAS NOT "DRIVEN AS NEARLY AS PRACTICABLE
ENTIRELY WITHIN A SINGLE LANE"**

HELD: The trial court did not err in denying defendant's motion to suppress evidence seized as a result of the stop of the defendant's vehicle due to the fact that the officer had reasonable suspicion that the defendant had violated T.C.A. § 55-8-123, which requires that "vehicle shall be driven as nearly as practicable entirely within a single lane." The officer testified that as he reduced his distance between his vehicle and the defendant's vehicle he saw the defendant fail to maintain her lane of travel on two occasions, one when she drifted to the right lane and one when she drifted into the left. The Court of Criminal Appeals also found that this was verified by the video recording which the trial court observed.

State v. Hiyama, 39 TAM 41-22 (Tenn. Cr. App. 06-17-14)

**ELECTION OF OFFENSES: THE STATE OF TENNESSEE
WAS NOT REQUIRED TO MAKE AN ELECTION
BETWEEN THE DEFENDANT'S DRIVING OR BEING**

IN PHYSICAL CONTROL OF THE VEHICLE, DUE TO THE FACT THAT DUI IS A CONTINUING OFFENSE

FACTS: Officer Cate was dispatched to the AeroJet parking lot in response to a call that a person appeared to be passed out in a vehicle in the parking lot. The officer found the defendant asleep in the driver's seat of his vehicle with the keys in the ignition. The officer also testified that when he asked the defendant how he came to be parked in the AeroJet parking lot, the defendant responded that he had driven there, and that he had been visiting a friend and was on his way home. The officer denied that the defendant had told him that a friend had driven the car into the AeroJet parking lot.

The defendant contended that because the trial court did not require the state to elect between the alternative modes of committing DUI, a serious question existed as to whether the verdict of the jury was unanimous. The state responded that the jury's general verdict should be presumed unanimous because the defendant was convicted of a single offense based upon a single course of conduct.

HELD: The Court of Criminal Appeals found that because DUI is a "continuing offense," the state was not required to make an election between his driving or being in physical control of his vehicle. The court concluded that "our courts have never treated the alternate means of committing DUI as 'so disparate as to exemplify two inherently separate offenses.'" The court noted that the DUI charge could be proven by showing either that the defendant was driving or in physical control of the vehicle, and the evidence adduced at trial was sufficient to support the defendant's conviction under either theory.

State v. Morrell, 39 TAM 52-29 (Tenn. Cr. App. 10-07-14)

EXIGENCY EXCEPTION TO WARRANT REQUIREMENT: TRIAL JUDGE PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS AS RESULTS OF BLOOD ALCOHOL ANALYSIS WERE ADMISSIBLE PURSUANT TO EXIGENCY EXCEPTION TO SEARCH WARRANT REQUIREMENT

FACTS: The defendant asserted that the mandatory blood draw provision of T.C.A. § 55-10-406(f)1 was unconstitutional and that it violates the right to be free from unreasonable searches and seizures under the federal and state constitutions.

HELD: The results of the blood alcohol analysis were admissible under the exigency exception to the warrant requirement, irrespective of the validity of the defendant's consent under the complied consent statute.

The court noted that, in the instant case, the trooper had arrived on the scene after the defendant had been transported to the hospital. The trooper had to stay on the scene in order to interview witnesses and in aiding the tow truck driver in removing the motorcycle from the ditch. The trooper ultimately traveled to the hospital and although he was able to speak with the defendant when he arrived, his investigation was delayed by the necessity of the defendant having his wounds stitched. By the time the officer was able to fully question the defendant, over two hours had passed since the time of the accident.

Noting the time constraints involved, the Court of Criminal Appeals concluded that these circumstances made obtaining a warrant impractical "such that the dissipation of alcohol from the blood stream supported an exigency justifying a properly conducted warrantless blood test." The court therefore concluded that the results were admissible under the exigency exception to the warrant requirement, irrespective of the validity of the defendant's consent under the implied consent statute. The court also found that there was no basis to support the defendant's claim that the implied consent statute prohibited a lawful search based upon the exigent circumstances exception to the warrant requirement independent of consent.

The court went on to state that the implied consent statute does not require an officer to inform an accused of his right to refuse but rather the clear purpose of the admonition requirement is to warn drivers of the consequences of failing to comply with the implied consent law. The court noted that it is not a Miranda type warning that the driver is not compelled to give evidence against himself.

The Court of Criminal Appeals stated, "Because consent occurs at the point that a driver undertakes the privilege of operating a motor vehicle in the state of Tennessee, not at the point that the implied consent form is read, the defendant's argument that his consent was rendered involuntary by the potentially coercive nature of the mandatory implied consent form read to

him by Trooper Raybun is misplaced. Rather, at the time the complied consent is read, ‘voluntary consent is unnecessary as consent has already been obtained by the act of driving the motor vehicle upon the public roads of this state.’”

The court noted that there was no further requirement that the defendant be made aware of his right to refuse to provide a sample after he was read his rights under the implied consent law. The court stated, “Because there is no proof that the defendant refused to submit to the test, his implied consent remains valid and his contention that his consent was involuntary is without merit.” The court went on to hold that, in addition to the exigency discussed, the results of the blood alcohol test were alternatively admissible under the implied consent statute.

The court concluded that the trial court properly denied the defendant’s motion to suppress the results of the blood alcohol test.

State v. Walker, 39 TAM 47-25 (Tenn. Cr. App. 08-08-14)

**PROBABLE CAUSE TO ARREST DEFENDANT FOR DUI:
EVEN IF DEFENDANT PERFORMED
SATISFACTORILY ON ALL FIELD SOBRIETY
TESTS, THE TOTALITY OF THE CIRCUMSTANCES
ESTABLISHED PROBABLE CAUSE FOR
DEFENDANT’S ARREST**

HELD: The trial court properly determined that there is probable cause to believe the defendant was driving under the influence even if he performed satisfactorily on all of his field sobriety tests administered by law enforcement. The Court of Criminal Appeals noted the defendant had been involved in a head-on collision which occurred mainly in the opposing lane of traffic, the victim told law enforcement the defendant was so far in her lane that she veered into his lane to try and avoid him, the defendant smelled of alcohol and had red eyes, the defendant acknowledged having consumed

two twenty-four ounce beers, and several beer cans and half empty whiskey bottles were found strewn from the passenger's side door of his car.

State v. Crisp, 39 TAM 41-21 (Tenn. Cr. App. 07-17-14)

PROBABLE CAUSE TO ARREST: WHILE ODOR OF ALCOHOL ALONE WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE, THE COMBINATION OF THE ODOR OF ALCOHOL WITH OTHER SIGNS OF INTOXICATION SUPPORTED A FINDING OF PROBABLE CAUSE FOR DUI ARREST

FACTS: The trial court in the present case granted the defendant's motion to suppress regarding any evidence or statements pertaining to or obtained after the defendant's arrest.

HELD: The Court of Criminal Appeals in this case strongly relied upon the case of State v. Bell (Tenn. 2014). The court stated that the pivotal question in this case is whether at the time of the arrest, the facts and circumstances within the officer's knowledge were sufficient to enable a prudent person to believe that the defendant had committed or was committing the offense of DUI. The court noted that the trial court in denying that there was probable cause for the arrest relied on various decisions which had concluded that the odor of alcohol alone, while sufficient to justify brief detention, was insufficient to establish probable cause for arrest.

The court referred to the Bell case and found that the combination of the odor of alcohol with other signs of intoxication supported a finding of probable cause for the DUI arrest. The court noted that the duty of courts is to conduct a common sense analysis of the facts and circumstances known to the officers at the time of the arrest to determine whether the facts are sufficient to permit a reasonable person to believe that the defendant had committed or was committing an offense. The court noted that in addition to the smell of alcohol, the defendant had committed a traffic infraction by running a stop sign; the proof also established that the defendant in his vehicle emitted a strong odor of alcohol, and that the defendant admitted to the officer that he had consumed a couple of beers that evening, the defendant had slurred speech, and was stuttering in addition to having

bloodshot, watery eyes. The court found that these facts alone clearly establish a finding of probable cause for DUI. The court also stated that it matters not “whether the arresting officers themselves believe that probable cause existed as long as probable cause actually existed.”

PRACTICE POINT: It appears that the Bell case and other similar cases are going to have a major impact on the case law as many decisions are being reversed whereby the trial court after reviewing the facts had found that probable cause did not exist for an arrest. The Supreme Court and now the Court of Criminal Appeals appear to be making a strong statement that even a clear finding by a trial court of a good performance on field sobriety tests will not override a combination of traffic violations, the presence or smell of alcohol, and/or other factors considered within the totality of the circumstances.

State v. Roscoe, 39 TAM 42-24 (Tenn. Cr. App. 07-11-14)

**REASONABLE SUSPICION: PRESENCE OF
DEFENDANTS IN HIGH CRIME AREA AND
LATENESS OF THE HOUR DID NOT ESTABLISH
REASONABLE SUSPICION FOR A SEIZURE OF THE
DEFENDANT WHEN THE OFFICER DID NOT
OBSERVE THE DEFENDANT ENGAGE IN ANY
CRIMINAL BEHAVIOR**

FACTS: On 1-28-13 at 3:30 A.M., an officer testified that she was dispatched to an area where a complainant had reported the presence of an unusual vehicle, following which the officer went to that area. The officer saw an SUV in a wooded area where there were no houses or roads. The officer stopped her vehicle and turned her spotlight on the SUV and asked the two subjects to come to her patrol car. The subjects complied, ultimately resulting in the officer charging the defendant with DUI. When asked why she thought the crime might have been committed, the officer responded,

“There is no residence back there. They could be trespassing and they could be the suspicious vehicle I was called to the scene to investigate.”

The trial court noted that the hour was late and that there was a presence of a strange vehicle in the area, but the trial court ruled that these facts did not establish reasonable suspicion to believe that a criminal offense had been or was about to be committed.

HELD: The Court of Criminal Appeals stated that while the lateness of the hour and defendant’s presence in a high crime area may be factors in determining reasonable suspicion, those factors alone did not establish reasonable suspicion. The complainant did not report that she had witnessed any criminal behavior and the officer did not observe any criminal behavior. The Court of Criminal Appeals noted that while the officer had the right to investigate further in a consensual manner, the officer did not have the right to seize the defendant based on a “hunch” that a criminal act may be about to occur.

State v. Willis, 40 TAM 4-31 (Tenn. Cr. App. 10-27-14)

**REASONABLE SUSPICION TO STOP VEHICLE:
ESTABLISHED BY DEFENDANT’S CROSSING FOG
LINE TWICE AS VEHICLE WAS TRAVELING ON
INTERSTATE EXIT RAMP**

HELD: Over defendant’s objection, the trial judge properly denied the defendant’s motion to suppress. The court found that the police officer had reasonable suspicion to stop the defendant’s vehicle when the officer observed the vehicle in early morning hours cross the fog line two times, once to the right and once to the left, as the vehicle was traveling on the interstate and the interstate exit ramp. The court noted that the videotape that was introduced confirmed the officer’s testimony and the court also noted that the trial court had found the officer’s testimony to be credible.

State v. Quinn, 39 TAM 34-23 (Tenn. Cr. App. 05-14-14)

SENSING REQUIREMENTS: FAILURE TO COMPLY

WITH SENSING TWENTY MINUTE OBSERVATION PERIOD REQUIREMENT RESULTS IN REVERSAL OF DUI CONVICTION

HELD: The Court of Criminal Appeals found that because the state failed to comply with the Sensing requirements, the defendant's conviction would be reversed. The court noted that evidence preponderated against the trial court's finding that the officer had complied with the requisite twenty minute observation period. The court noted that when the defendant's face and in particular his mouth is not visible on the police videotape during the entire twenty minute period of time that the observation period was not completed. The defendant's face and mouth were obstructed by what appeared to be the keyboard for the intoximeter.

The court noted that burping, belching and regurgitating can occur in a matter of seconds, and that while often belches or regurgitation will produce noise capable of being heard by another person that is not always the case. The court also noted that while it would have been nearly impossible for the defendant to place anything in his mouth because he was handcuffed during the entire time, the defendant's face and particularly his mouth were not visible to the officer during the entire twenty minute observation period. The court noted that the officer in the case did paperwork during the twenty minute observation period.

The court concluded that because the results of the breath test were the only evidence establishing DUI per se and were the only scientific evidence offered by the state in support of the DUI charge, that the jury would not have found the defendant was guilty beyond a reasonable doubt. The court did note that the officer testified that the defendant drove somewhat erratically, that he smelled of alcohol, and that he appeared intoxicated, but the court noted that without the admission of the .20 percent breath alcohol test results, the results were less than certain. The conviction was therefore reversed and the case was remanded for a new trial.

State v. Puckett, 40 TAM 2-23 (Tenn. Cr. App. 11-20-14)

SENSING REQUIREMENTS: SENSING CONTEMPLATES THAT OFFICER CERTIFIED TO PERFORM BREATH TEST WILL TESTIFY THAT TBI

**CERTIFIED THE TESTING INSTRUMENT AND
REGULARLY TESTED IT FOR ACCURACY, AND
STATE MAY INTRODUCE THESE CERTIFICATION
AND MAINTENANCE RECORDS THROUGH
TESTIMONY OF POLICE OFFICER**

FACTS: Defendant was stopped by police officer on 03/25/12 and charged with DUI. The defendant filed a motion to suppress evidence as a result of the stop, claiming that the officer did not have reasonable suspicion to make the stop. The defendant also maintained that the state had not met the Sensing safeguards.

HELD: 1) The Court of Criminal Appeals found that the trial court did not err in denying the defendant's motion to suppress as the officer had observed the vehicle cross the center line, turn into the yard of an abandoned house, and drove across the yard to the intersection, which was sufficient reason for an investigatory traffic stop.

2) The trial court was also found to have properly concluded that the six requirements of authenticating a breath alcohol test under Sensing had been met. The court noted that in DUI cases, Sensing contemplates that an officer certified to perform the breath test will testify that the TBI certified the testing instrument and regularly tested it for accuracy and that the state may introduce the certification and maintenance records through the testimony of the police officer. The court noted that these documents are self-authenticating under TRE 902(4) and TRE 803(8).

The court found that in a present case, the witness was shown during the hearing two certificates of compliance from the TBI for the intoximeter which the witness identified. The court found that the certificates were dated before and after the test date and indicated that the instrument had been found to perform within standards to measure breath alcohol. The court had properly ruled that the certificates were self-authenticating documents that were public records.

State v. Doyle, 39 TAM 34-22 (Tenn. Cr. App. 05-13-14)

**STOP OF VEHICLE: NO REASONABLE SUSPICION TO
STOP DEFENDANT'S VEHICLE AS DEFICIENCIES**

EXISTED IN VIDEO TAPE OF THE STOP AND IN OFFICER'S INABILITY TO RECALL THE INCIDENT

FACTS: The trial judge denied the defendant's motion to suppress evidence after hearing the testimony and viewing the video in the case. The video was less than clear and the officer's testimony was also not very clear even though the officer did state that the defendant crossed the fast lane into the turn lane and traveled a short distance straddling the line.

HELD: The Court of Criminal Appeals found that the trial judge erred in denying the defendant's motion to suppress evidence obtained as a result of the traffic stop due to the fact that the proof did not establish that the officer lawfully stopped the defendant's vehicle.

The Court of Criminal Appeals found that this case "boils down to the approximately one-minute video since Officer Rice recalled the incident 'just from the video'." The court noted that although the tape was played in court, there was no simultaneous testimony from Officer Rice identifying the times when the defendant's vehicle drifted into the other lane. The Court of Criminal Appeals concluded that the state's proof had failed to meet the state's burden. The court stated, "The deficiencies in the videotape, and Officer Rice's inability to recall the incident, both coupled with the fact of the trial court's having to supply information regarding lane markings in the area compel us to conclude that the court erred in determining that Officer Rice lawfully stopped the defendant's vehicle."

The Court of Criminal Appeals included a footnote in its opinion, which stated as follows: "When a video is being played during the testimony of a witness, it is helpful to an appellate court to have the witness explain what is depicted on the video and the points, if any, when particular attention should be paid. For instance, in this case, Officer Rice could have been asked to testify regarding the arrangement of lanes and the specific points at which, in his view, the defendant's vehicle strayed into another lane. This testimony is particularly important when, as here, the video is of poor quality and this court must make its own de novo determinations as to what the video shows."

State v. Wild, 39 TAM 49-33 (Tenn. Cr. App. 08-20-14)

WARRANTLESS SEARCH AND SEIZURE OF

DEFENDANT’S BLOOD: STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SHOW THAT OBTAINING THE SEARCH WARRANT ON THE NIGHT OF THE TRAFFIC STOP WOULD HAVE SIGNIFICANTLY DELAYED TAKING OF THE DEFENDANT’S BLOOD SO AS TO QUALIFY AS AN EXIGENT CIRCUMSTANCE

FACTS: The trial court denied the defendant’s motion to suppress results of his blood draw, finding that an exigency existed to justify the non-consensual warrantless search and seizure of the defendant’s blood. The state had claimed that obtaining the search warrant on the night of the traffic stop would have significantly delayed taking of the defendant’s blood due to the fact that the law enforcement officer involved had a lack of knowledge of the procedures related to obtaining a warrant and it would have taken too many law enforcement officers to complete the warrants and get the trial judge contacted.

HELD: The trial court erred in denying the defendant’s motion to suppress the results of his blood draw due to the fact that the record did not show sufficient exigency to justify the non-consensual warrantless search and seizure of the defendant’s blood.

The Court of Criminal Appeals noted that the taking of the defendant’s blood was a search pursuant to the 4th Amendment. The court found that the law enforcement officer’s lack of knowledge of procedures relating to obtaining the warrant does not create such an exigency that the “needs of law enforcement are so compelling that the warrantless search is objectively reasonable under the 4th Amendment.”

The court concluded that the state just failed to provide sufficient evidence showing that obtaining the search warrant on the night of the traffic stop would have significantly delayed the taking of the defendant’s blood. The court noted that the officers could have driven to the hospital and waited for one of the deputies to drive to the station or detention center, complete the warrant forms, and contact the trial judge who lived about five to ten minutes from the scene. The hospital was only approximately ten to fifteen minutes from the scene and there was no evidence showing that driving to the station or detention center to prepare the warrant would have significantly delayed the blood draw. As a result, exigent circumstances did

not justify the warrantless blood draw.

State v. Gardner, 40 TAM 2-24 (Tenn. Cr. App. 11-12-14)

EVIDENCE

911 RECORDINGS: HELD TO BE NON-TESTIMONIAL STATEMENTS WITHIN THE HEARSAY EXCEPTION OF “EXCITED UTTERANCE”

FACTS: In a case involving aggravated kidnapping, three witnesses to the incident called a 911 operator advising 911 that the callers had observed the defendant assault the victim, forcibly remove her, and drive away in a truck.

HELD: The trial court properly admitted the 911 recordings under the “excited utterance” exception to the hearsay rule. The court found that each of the declarants spontaneously reported observing the assault and the possible abduction of the victim and were in the process of describing the startling events as they occurred, still under the stress of the event.

The court noted that the callers acted with haste and dialed 911, responding to the victim’s call for help against a bona fide physical threat. The court noted that two female callers sounded audibly upset and the male caller was out of breath after having pursued the defendant’s truck on foot.

The Court of Criminal Appeals noted that the startling event did not end with the victim’s abduction, as kidnapping is a continuing crime “at every moment the victim’s liberty is taken.”

The trial court properly admitted the 911 recordings under the “excited utterance” exception to the hearsay rule and found that the statements were nontestimonial under the Crawford and Macklin line of cases.

State v. Duff, 40 TAM 3-20 (Tenn. Cr. App. 11-24-14)

BLOOD ALCOHOL TEST: CHAIN OF CUSTODY PROPERLY ESTABLISHED BY EVIDENCE

FACTS: At trial, Trooper McCalley testified that he physically observed the blood draw by a technician named Craig Dyer; the vials did not leave the trooper's presence while the draw took place; once the draw was complete the trooper secured the evidence in his patrol car; the trooper labeled the bag and locked it up before transporting it to the evidence locker. From that point, the evidence was sent to the TBI for testing, and although no one from TBI testified at the hearing, the requisite form from the TBI was sent back with the resulting blood alcohol level.

HELD: The trial court erred in granting the defendant's motion to suppress the results of the defendant's blood alcohol test. The court noted T.C.A. § 55-10-410 sets forth a procedure by which blood may be drawn from a defendant to determine the existence of alcohol or drugs in the defendant's system, and that the testimony at trial clearly established the chain of custody from the time of the blood draw to the delivery to the TBI. The court found that the testimony of Trooper McCalley alone "sufficiently established that the blood sample submitted for testing was the defendant's blood," and therefore "the result of blood alcohol level of the blood could be assumed to be the blood alcohol level of defendant's blood at that time of the crash."

The Tennessee Court of Criminal Appeals did quote Tennessee Law of Evidence by Cohen, et al, as stating as follows:

"The concept of a chain of custody recognizes that real evidence may be handled by more than one person between the time it is obtained and the time it is either introduced into evidence or subjected to scientific analysis. Obviously, any of these persons might have the opportunity to tamper with, confuse, misplace, damage, substitute, lose and replace, or otherwise alter the evidence or to observe another doing so. Each person who has custody or control of the evidence during this time is a "link" in the chain of custody. Generally, testimony from each link is needed to verify the authenticity of the evidence and to show that it is what is purports to be. Each link in the chain testifies about when, where, and how possession or control of the evidence was obtained; its condition upon receipt; where the item was kept; how it was safeguarded, if at all; any changes in its condition during possession; and when, where, and how it left the

witness's possession.”

The court noted that the issue addresses itself to the sound discretion of the trial court and that “reasonable assurance, rather than absolute assurance, is the prerequisite for admission.” The court found that based upon all of the evidence in this case, the safeguards of the statute were met and the evidence was admissible, overruling the trial judge.

State v. Brooks, 39 TAM 34-21 (Tenn. Cr. App. 06-06-14)

**BUSINESS RECORDS EXCEPTION TO HEARSAY RULE:
TRIAL JUDGE ERRED IN EXCLUDING TESTIMONY
OF 911 OPERATOR WHO SPOKE WITH VICTIM
REGARDING ONGOING AGGRAVATED ROBBERY
AS EVIDENCE WAS ADMISSIBLE UNDER
“BUSINESS RECORDS” EXCEPTION TO HEARSAY
RULE**

FACTS: The defendant sought to introduce testimony of the 911 operator who had spoken with the elderly victim in this case. The defendant had maintained that the evidence should come in under the “excited utterance” exception to the hearsay rule. The trial court ruled that while the utterance of the victim was an excited utterance, the 911 operator could not recall exactly what the victim had told her or the basis of her writing down on the complaint card of there being two intruders in the home.

HELD: The Court of Criminal Appeals concluded that the trial court had erred in excluding the evidence through the 911 operator. The Court of Criminal Appeals noted that although Ms. Hackney (911 operator) could not testify of an independent recollection about her conversation with the victim and did not recall the basis for the victim’s statement and the number

of intruders, the victim was present during the violent home invasion and had the opportunity to observe the intruders. The court stated there was no indication the method or circumstances of the preparation of the complaint card were unreliable. The Court of Criminal Appeals therefore concluded that the testimony of the 911 operator and the complaint card itself were admissible pursuant to the excited utterance rule and specifically pursuant to the “business records” exception to the rule.

The court found that Ms. Hackney had knowledge and a business duty to document information about 911 calls on complaint cards pursuant to Tennessee Rule of Evidence 803(6). The card itself had noted that there were two males of unknown description and that it was unknown at this time if or what may have been taken. Such information was admissible pursuant to the “business record” exception. The court did find that under the circumstances the failure to admit the call log was harmless error as the information basically came in through other witnesses about the number of intruders.

Lost Letter. In another issue, the Court of Criminal Appeals found that the trial court had not erred in admitting testimony from two individuals about an incriminating letter written by the defendant. The letter itself had been lost but the witnesses were allowed to testify about the contents as the court found that the contents were relevant to address the defendant’s going to the victim’s house to commit thefts on the night of the crimes and his denial of any involvement in harming the victims. The court found that the evidence of the letter’s contents was admissible under Tennessee Rule of Evidence 1004(1), finding that the letter was not unfairly prejudicial.

Previous thefts by defendant on victims’ property. In another issue, the Court of Criminal Appeals found that evidence of the defendant’s committing previous thefts of copper and gasoline from the victim’s farm and a previous discussion he had of burglarizing the victim’s home were admissible to show his motive and intent to burglarize the victim’s home and steal from them. The probative value of this evidence outweighed the danger of unfair prejudice.

Video recording of defendant’s pretrial statement. The Court of Criminal Appeals also found the trial court did not abuse its discretion in allowing the state to play a portion of the video recording of the defendant’s pretrial statement. The court found that the defendant’s reaction when he was questioned about the crimes was probative evidence, despite the fact

that the video also showed his lack of cooperation, cursing, and tattoos. The court found that the video itself was material to the issues and did not constitute unfair prejudice to the defendant as the probative value outweighed the prejudice.

State v. Damon, 39 TAM 36-18 (Tenn. Cr. App. 04-25-14)

“COMMANDS, INSTRUCTIONS, AND QUESTIONS”: NO ERROR IN ADMITTING VICTIM’S GRANDDAUGHTER’S SCREAMS FOR HELP AS SUCH STATEMENTS ARE NOT HEARSAY BECAUSE THEY ARE NOT OFFERED TO PROVE TRUTH OF THEIR CONTENTS

FACTS: In a case involving aggravated kidnapping and rape among other charges, the defendant contended that the trial court had erred by allowing the victim’s granddaughter to testify that she heard the victim screaming her name, “Help, help” and “Call the police” because the defendant claimed those statements were hearsay and the excited utterance exception did not apply. The state responded these statements were commands and were therefore not hearsay because not offered to prove the truth of the matter asserted.

The trial court ruled the statements were admissible under the “excited utterance” exception to the rule against hearsay.

HELD: The Court of Criminal Appeals held that the victim’s cries for help and plea for her granddaughter to call the police were commands and therefore not hearsay. The Court of Criminal Appeals stated that the appellate courts of Tennessee had repeatedly held that commands, instructions and questions often are not hearsay because they are not offered to prove the truth of their content.

State v. Guinn, 39 TAM 46-21 (Tenn. Cr. App. 07-15-14)

**DYING DECLARATION EXCEPTION TO HEARSAY
RULE: VICTIM’S STATEMENT REFLECTED HIS**

**BELIEF THAT HIS DEATH FROM HIS INJURIES
WAS IMMINENT AND THEREFORE SATISFIED
REQUIREMENTS OF DYING DECLARATION
EXCEPTION**

FACTS: The offenses in this case occurred on 11-09-09, and the defendant ultimately died from his injuries on 12-11-09. The defendant argued that the victim's medical condition had stabilized by the time he gave his statement and that the evidence failed to show that he was critically ill or near death or had a reasonable belief death was imminent at the time he gave his statement.

HELD: The trial judge properly admitted the victim's last statement under the dying declaration exception to the hearsay rule. The Court of Criminal Appeals noted that the police chief testified that the victim told him that he knew he "would not leave the hospital" and that he "was not long for this world." The Court of Criminal Appeals noted that the victim's statement reflects his belief that his death from his injuries was imminent, and the record also reflected that the victim's final statement related to the cause or circumstances of his injuries.

State v. Greene, 39 TAM 46-14 (Tenn. Cr. App. 07-10-14)

**EXCULPATORY EVIDENCE: STATE'S FAILURE TO
PRESERVE VIDEOTAPE OF DEFENDANT'S
TRAFFIC STOP FOUND TO BE SIMPLE
NEGLIGENCE (THERE WAS AN INADVERTENT
ERASURE OF THE VIDEO RECORDING) BUT THE
FACT OF THE VIDEOTAPE BEING UNAVAILABLE
IS A FACT WHICH CAN BE CONSIDERED BY THE
FACT FINDER IN A DUI CASE**

FACTS: The defendant filed a motion to dismiss the indictment in this DUI case due to the fact the state had failed to preserve the videotape of the defendant's traffic stop and that the defendant's trial would be fundamentally unfair because of the loss of that evidence. The state admitted that it had the duty to preserve the videotape evidence, but the trial court determined that the state's failure to preserve the videotape was at

most simple negligence and therefore defendant's motion was overruled. **HELD:** The trial court properly determined that the state's failure to preserve the videotape of the defendant's traffic stop was simple negligence at most. The court noted that the new technology caused an inadvertent erasure of the video recording and this "glitch" was not discovered until after other video recordings were also inadvertently deleted. The court noted that the videotape was unique evidence with no equivalent proof available and that the videotape may have had a negative impact on the credibility of the testimony of the three officers. 2) The court found that in this jury case, the trial court should have given a Ferguson instruction because the loss of the videotape implicated the defendant's due process right to a fundamentally fair trial. The court noted that the request and instruction should have been given since the videotape of the traffic stop may have revealed details that at least arguably conflicted with the two arresting officers and the third officer's recollections of the defendant's behavior. This was found to be harmless error because the defendant had admitted to taking oxycontin on the morning he was pulled over.

PRACTICE POINT: The importance of this case for general sessions judges is that we need to note 1) there is a duty for the state to preserve videotapes but simple negligence is not enough to have the case dismissed as being fundamentally unfair. 2) The court in this case found that the fact finder, the jury, should have the knowledge so that it can evaluate the loss of the evidence when considering all of the proof. This is also true of general sessions judges (who when looking at all the facts and giving the loss of the videotape due weight) can consider this a significant factor even in simple negligence cases.

State v. Farley, 39 TAM 47-27 (Tenn. Cr. App. 07-29-14)

EXCULPATORY EVIDENCE: STATE'S LOSS OF RAPE KIT DID NOT DEPRIVE DEFENDANT OF A FUNDAMENTALLY FAIR TRIAL

FACTS: In an aggravated rape case, the defendant maintained that the state's loss of the rape kit deprived him of a fundamentally fair trial.

HELD: The Court of Criminal Appeals concluded that the trial court was correct in denying the defendant's motion to dismiss as the court concluded that the loss of the rape kit did not deprive the defendant of a fundamentally

fair trial. The court said that even though the defendant argued that the rape kit had exculpatory value, the defendant had admitted in his videotaped interview that he had sex with the victim and left in the victim's car afterwards. The court said the identity of the defendant was not an issue in the case. The defendant had maintained with the investigators that he had consensual sex with the victim.

The court concluded that in light of the evidence at trial, "including the victim's testimony, the neighbor's testimony, evidence of the severity of the victim's injuries, and the defendant's own statement, the loss of the rape kit did not deprive him of a fundamentally fair trial."

State v. Stanley, 40 TAM 3-21 (Tenn. Cr. App. 10-15-14)

EXTRA-JUDICIAL IDENTIFICATION OF DEFENDANT IN PHOTOGRAPHIC LINE-UP: HELD TO BE PROPERLY ADMISSIBLE UNDER THE HEARSAY EXCEPTION OF RULE 803(1.1) OF THE TENNESSEE RULES OF EVIDENCE

HELD: The trial court did not abuse its discretion when it allowed the extra judicial identification of the defendant, Doss, into evidence through the testimony of Detective Thompson and by the witness Ms. Hambric. The court quoted the advisory comment of Tennessee Rules of Evidence which states, "Tennessee recognizes declaration of eye-witness identification as an exception to the hearsay exclusion, and the rule generally follows Tennessee precedent. Note that the declarant must also be a witness, affording at least delayed cross-examination as to the extra judicial statement. Note also, however, that witnesses also other than a declarant may testify about the identifying declaration."

The Court of Criminal Appeals stated that this was basically a text book example of the rule and that the detective (Thompson) testified about Ms. Hambric's identification of the defendant in the photographic line-up, and the witness herself was also available and did testify at the trial as required by Rule 803 (1.1).

State v. Doss, 39 TAM 37-19 (Tenn. Cr. App. 06-10-14)

EVIDENCE OF OTHER BAD ACTS OF DOMESTIC ASSAULT: TRIAL COURT PROPERLY FOUND EVIDENCE TO BE RELEVANT REGARDING DEFENDANT’S PREMEDITATION, INTENT, AND SETTLED PURPOSE TO HARM VICTIMS

FACTS: The defendant maintained that the trial court had abused its discretion by allowing prior bad act evidence about the defendant’s alleged acts of domestic violence in 1993 and 2007. The current case involved the defendant being charged with first degree premeditated murder among other charges.

HELD: The trial court did not err in allowing the prior bad acts that had happened years earlier in 1993 and 2007 to establish the defendant’s premeditation, intent, and settled purpose to harm the victims. The defendant had made threats against Teresa and her children as shown by credible proof which the court found to be shown by clear and convincing evidence. In the current case, Teresa’s eighteen year old daughter was murdered by the defendant and the defendant attempted to murder Teresa and two of her other children. The court also found that the prejudicial impact of the evidence did not outweigh its probative value.

State v. Williams, 39 TAM 34-18 (Tenn. Cr. App. 05-14-14)

EXCEPTION TO HEARSAY RULE: CHILD VICTIM PROPERLY ALLOWED TO TESTIFY REGARDING STATEMENTS MADE TO NURSE PRACTITIONER PURSUANT TO “MEDICAL DIAGNOSIS AND TREATMENT” EXCEPTION TO HEARSAY RULE

FACTS: In a case dealing with six counts of rape of a child and two counts of aggravated sexual battery, the nurse practitioner (Ross) was allowed to testify about her interview with the victim which included the victim’s medical history.

HELD: The Court of Criminal Appeals found that the trial judge had not abused his discretion in allowing the nurse practitioner to testify about the victim’s statements made to her at Our Kids Clinic. The Court of Criminal

Appeals found that the trial judge had properly admitted the statement pursuant to the medical diagnosis and treatment exception to the hearsay rule. Specifically, the nurse practitioner testified that the purpose of her interview with the victim and in obtaining the victim's medical history was for medical diagnosis and treatment and had then been followed by the physical examination of the victim. The statement read into the record by Ross included questions she posed to the victim about the defendant touching her. A detective had testified that the nurse practitioner's interview with the victim took place after the victim made disclosures of sexual abuse.

The Court of Criminal Appeals found that the testimony of the nurse practitioner and the detective provided the trial court with a sufficient overview of the case about when and how the victim's statement was made, from which the trial court could reasonably make a determination that the statement was made for the purposes of medical diagnosis and treatment and further making a determination about the statement's reliability.

In another issue, the Court of Criminal Appeals found that the trial judge had not erred in allowing a video recording of the victim's interview with an employee of the child advocacy center to be played for the jury. The court allowed the proof since during cross-examination of the victim, the defense counsel had attempted to undermine her testimony by suggesting it had been influenced by several adults and by counsel also questioning the victim's memory regarding the incidences with the defendant. The court found that, for this reason, the victim was in need of rehabilitation, and thus, her prior consistent statement was properly admitted into evidence to rebut the cross-examination.

State v. Felts, 39 TAM 45-16 (Tenn. Cr. App. 07-08-14)

EXCITED UTTERANCE: STATEMENT ALLOWED INTO EVIDENCE MADE BY VICTIM WHO WAS FLUSHED AND UPSET AND OBVIOUSLY UNDER STRESS OF EVENT

FACTS: As officers arrived at the scene of a crime, the officer observed that the victim was flushed red, shaking and upset and that the victim advised the officer that she was sitting in her car when the defendant hit her driver's side window with a hammer.

HELD: The trial court did not err in allowing such statement to be introduced into evidence as, under the circumstances, the trial court could

reasonably conclude that victim's statement qualified as an excited utterance.

In regard to another statement by the victim to another officer, the Court of Criminal Appeals found that the statements were not spontaneously made and there was no testimony at the hearing about the victim's appearance or behavior to suggest that she made the statements while she was still under the stress of the event. For that occasion, the victim's statements did not qualify as excited utterances but were found to be harmless based upon the other proof which had been introduced.

State v. Martin, 39 TAM 40-28 (Tenn. Cr. App. 06-5-14)

EXPERT TESTIMONY: NO ERROR IN ALLOWING PHYSICIAN TO TESTIFY AS EXPERT IN FIELD OF CHILD ABUSE PEDIATRICS AS COURT FOUND THAT THE FIELD OF CHILD ABUSE PEDIATRICS WAS RELIABLE ENOUGH TO “SUBSTANTIALLY ASSIST” THE FACT FINDER AS TO WHETHER THE CRIME OF CHILD ABUSE HAD TAKEN PLACE

FACTS: In this case involving aggravated child abuse, the defendant maintained that the trial court abused its discretion in permitting Dr. Karen Lakin to testify as expert in the field of child abuse pediatrics.

HELD: The trial judge did not abuse its discretion in permitting Dr. Lakin to testify as an expert in the field of child abuse pediatrics. The court quoted the Tennessee Supreme Court case of State v. Scott (Tenn. 2009), which stated that, “ Trial courts act as gatekeepers when it comes to the admissibility of expert testimony. Their role is to insure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice as an expert in the relevant field. A court must assure itself that the expert's opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation. The court's reliability analysis has four general inter-related components: 1) qualifications assessment, 2) analytical cohesion, 3) methodological reliability, and 4) foundational reliability.

As to the field of child abuse pediatrics, the Court of Criminal Appeals stated that while formal certification in the field of child abuse

pediatrics is fairly new, Tennessee courts have widely accepted expert testimony regarding child abuse and accidental vs. non-accidental trauma. The court found that there is no need to depart from this trend. The court noted that “Dr. Lakin did not testify about the victim’s behavior or common characteristics of abused children; rather, she testified about the specific physical injuries the victim sustained and opined about their cause.”

The court concluded “that there was a straight forward connection between Dr. Lakin’s knowledge and the basis of the opinions such that no analytical gap existed between the data and the opinion offered.”

State v. Jones, 39 TAM 48-13 (Tenn. Cr. App. 07-31-14)

FAILURE OF STATE TO PRESERVE EVIDENCE: STATE DID NOT BREACH DUTY TO PRESERVE EVIDENCE (COMPUTER) SINCE UNDER CIRCUMSTANCES THE LACK OF FINGERPRINTS OF THE DEFENDANT OR THE PRESENCE OF FINGERPRINTS OF THIRD PARTIES WOULD NOT NECESSARILY HAVE BEEN EXCULPATORY

FACTS: The defendant maintained that certain evidence should be suppressed due to the fact that the state had failed to preserve certain evidence— two computers—that defense would maintain was exculpatory evidence. The defendant argued that if defense had been given opportunity to test or finger print the computers then exculpatory evidence could have been developed to show that the defendant never touched the computers. The defendant was alleged to have stolen the computers.

HELD: The Court of Criminal Appeals discussed the fact that the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. In the State v. Ferguson case, the Tennessee Supreme Court addressed the issue that a defendant could be entitled to relief either by suppression of evidence or other relief in the event the state has lost or destroyed evidence that may have been exculpatory. The inquiry then focuses on the degree of negligence involved and the significance of the destroyed evidence.

The Court of Criminal Appeals concluded that there is no proof that

the state had acted in bad faith and therefore any negligence on the part of the state would be simple negligence. Secondly, the court found that the significance of the destroyed evidence or unavailable evidence was minimal, since the proof established that many persons within the tattoo parlor where defendant worked had access to the computer and were allowed to use the same. Therefore, the presence of third parties finger prints or the absence of the defendant's finger prints would have been of minimal probative value. The court also noted that the detective had been allowed to testify without objection to the fact that the employees of the tattoo parlor advised him that the computers belonged to the defendant. The

totality of the evidence suggested that the defendant was not entitled to relief by suppression of the evidence.

State v. Felts, 39 TAM 41-19 (Tenn. Cr. App. 06-25-14)

INTRODUCTION OF DEFENDANT'S AFFIDAVIT OF INDIGENCY INTO EVIDENCE: EVIDENCE OF DEFENDANT'S FINANCIAL STATUS IS RELEVANT EVIDENCE

FACTS: In this case involving murder and aggravated robbery, the state sought to introduce the affidavit of indigency filed by the defendant in obtaining an attorney to show that the defendant had neither income or assets to travel to Barbados, as the state was intending to show that the robbery of money would be necessary for such travel. The defendant argued that the affidavit was irrelevant and it should have been excluded pursuant to TRE 401 and 402.

HELD: The Criminal Court of Appeals noted that in a previous case, State v. Reid (Tenn. 2006), the Tennessee Supreme Court had ruled that evidence that a defendant is poor, without more, has little probative value. The court in Reid stated that the "better rule" is that the state must introduce proof of "something more" than a defendant's poverty in order to meet the threshold of relevance necessary for admission of such evidence. The Reid court ruled that proof that indicated the defendant had no legitimate source of income in

circumstances involving robbery could be relevant circumstantial evidence of the commission of certain crimes.

The Court of Criminal Appeals ruled that the introduction of the affidavit of indigency was therefore admissible since the information was pertinent and relevant to the current case.

State v. Catham, 39 TAM 48-12 (Tenn. Cr. App. 07-31-14)

LAY OPINION TESTIMONY: OPINIONS OF THREE OFFICERS REGARDING THE “STAGED” NATURE OF THE CRIME SCENE WERE FOUND TO BE ADMISSIBLE AS THEY WERE RATIONALLY BASED ON THEIR OBSERVATIONS AND WERE HELPFUL TO A DETERMINATION OF THE FACT IN ISSUE AS TO WHETHER THE DEFENDANT’S VERSION OF THE EVENTS WAS CREDIBLE

FACTS: The defendant objected to the trial court’s allowing four police officers to testify that the crime scene in a murder case appeared to be “staged”. The defendant argued that the officers were allowed to testify about the “staged” nature of the crime scene even though none of the officers had documented their observations in a report or communicated their observations to their superior officers. The defendant also argued that none of the officers were qualified as experts in the field of crime scene reconstruction and further that the probative value of the evidence was outweighed by its prejudicial effect and would confuse or mislead the fact finder.

HELD: The Court of Criminal Appeals found that the trial court had properly admitted the testimony of the four police officers regarding the crime scene appearing staged. The Court of Criminal Appeals found that pursuant to Tennessee Rule of Evidence 701(a) that the testimonies of the lay witnesses in question were: 1) rationally based on the perception of the witnesses; and 2) helpful to a clear understanding of the testimony or the determination of a fact at issue.

The court concluded that the trial records supported the trial court’s

conclusion and noted that the defense was allowed to extensively cross-examine the witnesses about whether their opinions were supported by proper foundation. The officers had testified generally about the fact that the placement of the chairs looked like they were simply overturned and not the result of a real altercation and also that there was nothing broken where the chairs and objects were overturned which gave further indication that it was not a real scene of a dispute but rather a “staged” crime scene. The court stated that in this case the officers’ lay opinion testimony did not require specialized skill or expertise because the concept of “staging” a crime scene could be easily understood by the jury. The court concluded that the trial court did not abuse its discretion in allowing the testimony under Rule 701. Finally, the court concluded that the testimony did not confuse the issues or mislead the jury but rather assisted the jury in determining whether the defendant’s version of the events was credible.

PRACTICE POINT: A court should be cautious in allowing this type of testimony, particularly where the witness is not a crime scene expert, due to the fact that such testimony would be extremely prejudicial and possibly not based upon anything real scientific. In this case, the defendant was attempting to claim self-defense, and it is dangerous to allow non-experts to come in and state that the scene looked “staged” without any real expertise. It is similar to requiring an accident reconstructionist in a car crash case rather than letting every officer at the scene give his/her opinion.

State v. Taylor, 39 TAM 52-22 (Tenn. Cr. App. 09-30-14)

LEADING QUESTIONS: NO ERROR IN ALLOWING CHILD SEX VICTIM TO TESTIFY PURSUANT TO LEADING QUESTIONS BY STATE

HELD: The trial court did not err in allowing the prosecutor to lead the victim during her testimony pursuant to a rape of a child case. The Court of Criminal Appeals stated that the trial court can allow leading questions of child sex victim on direct examination when necessary to fully develop the witness’s testimony.

State v. Smith, 39 TAM 47-17 (Tenn. Cr. App. 08-13-14)

LEADING QUESTIONS: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE DISTRICT ATTORNEY TO USE LEADING QUESTIONS WITH OWN WITNESSES AFTER WITNESSES DISPLAYED “REMARKABLE” LOSS OF MEMORY

FACTS: In this case involving second degree murder and other charges, the defendant maintained that the trial court erred in overruling the defense objections to the state’s leading questions of its own witnesses, effectively making hostile witnesses of their own witnesses.

HELD: The Court of Criminal Appeals found the trial court had not abused discretion in allowing the state’s questions over the defense objections. The court noted that the lay witnesses involved “exhibited remarkable loss of memory when asked about what normally would be a very traumatic event.” The Court of Criminal Appeals therefore concluded that the trial court properly overruled the defense counsel’s objection to the state’s questions and the trial court was justified in allowing the leading questions on direct examination of the witnesses as such questions were necessary to develop the testimony.

PRACTICE POINT: Judges should be very reluctant to allow leading questions of the parties’ own witnesses except in a situation where the witnesses are declared hostile witnesses by the trial court or as in this case where the court found the witnesses had exhibited remarkable loss of memory about events which would normally be very memorable.

State v. Smith, 39 TAM 47-16 (Tenn. Cr. App. 07-28-14)

OTHER BAD ACTS: ADMISSION OF PROOF OF PRIOR PHYSICAL ABUSE AND THREATS MADE BY DEFENDANT AGAINST VICTIM’S MOTHER WERE RELEVANT TO DEFENDANT’S INTENT AND MOTIVATION TO ASSAULT VICTIM

HELD: The Court of Criminal Appeals found that the trial court had not abused its discretion in admitting testimony in a rape of a child and

aggravated sexual battery case regarding the prior physical abuse and threats made by the defendant against the victim's mother. The court found that the evidence in question was relevant regarding the defendant's intent and motivation to assault the victim. The court reasoned that the defendant committed the threats to have an opportunity to abuse the child or that he abused the child because he was upset with the mother. The Court of Criminal Appeals found that the trial court had complied with the requirements of Tennessee Rule of Evidence 404 (d) by holding a hearing and determining that a material issue existed other than conduct in conformity with a character trait, announcing on the record the reasons for admitting the evidence and excluding portions of evidence for which the court determined the probative value would be outweighed by danger of unfair prejudice.

State v. Bolton, 39 TAM 45-15 (Tenn. Cr. App. 10-21-14)

OTHER BAD ACTS: IN SECOND DEGREE MURDER CASE, PRIOR VIOLENT BEHAVIOR TOWARD THE VICTIM WITHIN THE PREVIOUS YEAR WAS PROBATIVE OF THE DEFENDANT'S INTENT IN A SECOND DEGREE MURDER CASE

HELD: The trial court did not err in allowing witnesses to testify about an incident that occurred between the defendant and the victim in April 2006 regarding a broken car window and an incident that occurred between the defendant and the victim in October 2006 regarding another disturbance.

The Court of Criminal Appeals found that the evidence of the defendant's prior violent behavior toward the victim was probative of his intent in the present case. The court found that the intentional conduct in the previous occasions toward the defendant would reflect on whether the defendant acted knowingly toward the victim in the present case. Therefore, the state could use the prior bad act evidence to prove that the defendant acted intentionally on previous occasions.

The court also found that the prior bad acts evidence is probative to rebut the claim of mistake or accident if such claim is asserted as a defense.

In the present case, mistake or accident was always the crux of the defendant's case and therefore the trial court properly allowed evidence during the state's case in chief to rebut that claim.

State v. Wellington, 39 TAM 40-29 (Tenn. Cr. App. 06-09-14)

OTHER BAD ACTS: TRIAL COURT ERRED AND COMMITTED REVERSIBLE ERROR BY ALLOWING STATE TO PRESENT EVIDENCE OF OTHER SEXUAL ACTS THAT ALLEGEDLY OCCURRED BETWEEN DEFENDANT AND VICTIM OTHER THAN CHARGE FOR WHICH DEFENDANT WAS ON TRIAL

FACTS: The state had originally charged the defendant with three counts of rape of child but elected to go forward with only one count. On the first day of trial, defense counsel renewed his motion in limine to exclude evidence of other sexual acts, arguing that the trial court should limit the state's proof to evidence only of one rape of the child. The trial court overruled the motion and allowed the state to introduce the other proof basically of the original two other counts.

HELD: The trial court improperly allowed the state to present evidence through the victim's testimony and defendant's confession of other sexual acts that allegedly occurred between the defendant and the victim. The court noted that the state was well aware pretrial that it planned to elect the defendant's penetration of the victim's vagina with his pinky finger as the only event for which it was seeking a conviction. The trial court then allowed the state to proceed with incidences of other sex crimes around the same time period against the same victim. The Court of Criminal Appeals found that this was reversible error when coupled with the fact that the state had also been allowed to introduce into evidence drawings made by the victim before trial. The court also noted that the defendant's statement to

investigators about the other incidents should have been redacted so that only the allegation regarding penetration of the victim by defendant's pinky finger should have been allowed.

In regard to the drawings, the victim had made drawings during an interview with a child advocacy center representative. The court noted that the drawings should not have been allowed as they were hearsay statements and had not been drawn for the purpose of medical diagnosis or any exception to the hearsay rule.

State v. Smith, 39 TAM 47-17 (Tenn. Cr. App. 08-13-14)

POTENTIAL EXCULPATORY EVIDENCE: MOTION TO EXCLUDE TESTIMONY ABOUT PRIVATE SURVEILLANCE VIDEO PROPERLY DENIED DUE TO FACT THAT EVEN IF STATE HAD DUTY TO PRESERVE VIDEO, THE DEGREE OF NEGLIGENCE BY THE STATE IN FAILING TO DO SO WAS SIMPLE NEGLIGENCE

FACTS: The defendant filed a motion to exclude testimony about surveillance video footage pursuant to State v. Ferguson 2 S.W.3d,912 (Tenn. 1999). At the hearing, the state advised the trial court that the video captured the front facial view of the appellant. Officer Amundson would testify that he saw the video and the person in the video matched the photograph of the defendant, and that the third party witness would identify the defendant at trial as the man she saw in front of her window. The state also advised the trial court that the video was stored on the computer hard drive of the private citizen for a period of time but after thirty days, if not retrieved, it is gone and that the state no longer had the video available. The trial court ruled that the state had no duty to preserve the evidence but if it did, it did not act in bad faith.

HELD: The Court of Criminal Appeals held that the due process clause of the 14th Amendment and Article 1, Section 8, of the Tennessee Constitution afford every criminal defendant the right to a fair trial, which includes a constitutional duty on the part of the state to furnish the defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to potential punishment. The court noted that the Ferguson case imposed a

duty on the court to first determine whether the state had a duty to preserve the lost or destroyed evidence and that ordinarily the state has a duty to preserve all evidence subject to discovery and inspection under Tennessee Rule of Criminal Procedure 16 or other applicable law.

Secondly, if the proof demonstrates the existence of a duty to preserve evidence and evidence shows that the state has failed in that duty, the court must balance three factors: 1) The degree of negligence involved; 2) the significance of the destroyed evidence; 3) the sufficiency of the other evidence used at trial to support the conviction.

Based on these factors, the Court of Criminal Appeals ruled the trial court properly denied the defendant's motion to exclude testimony about the surveillance video because the video is privately owned and never under the state's possession or control. The court further stated that even assuming *arguendo* that the state had a duty to preserve the video, the degree of negligence in the state failing to do so was simple negligence. After the officer had viewed the evidence, he asked the private citizen if the police might get a copy of it but her computer hard drive had taped over the video and it was no longer available. The court also found that the significance of the destroyed evidence was not great in light of the officer's description of the driver and the vehicle, the private citizen identifying the defendant in court as the man she saw walking in front of her window, and the evidence linking the defendant to the owner of the Taurus automobile. The court concluded that the remaining evidence against the defendant was strong, and therefore the motion was properly overruled.

State v. Gaines, 39 TAM 49-28 (Tenn. Cr. App. 08-22-14)

PRIOR BAD ACTS: EVIDENCE OF THE DEFENDANT'S FINANCIAL CRIMES AS PRIOR BAD ACTS SHOULD NOT HAVE BEEN ADMITTED IN PROSECUTION OF DEFENDANT FOR FIRST DEGREE MURDER OF HIS WIFE

HELD: The trial court erred in admitting evidence of the defendant's financial crimes as prior bad acts in a case involving prosecution of the defendant for the murder of his wife. The court noted that the trial court had reasoned in admitting the evidence that the defendant killed the victim in order to conceal, continue, or cover up another crime which was his financial

fraud. The state was allowed to introduce six separate acts of financial fraud committed by the defendant against third party victims as a partial basis at least of why the defendant killed his wife. The state's theory was that the defendant was "running out of time" before the victim would discover that they were in financial ruin and this was a motivation for him to kill his wife.

The Court of Criminal Appeals found that the purported relevance of the defendant's financial crimes to his wife's murder was "extremely speculative." The error was found to be harmless in light of overwhelming evidence of the defendant's guilt.

State v. Caronna, 40 TAM 2-16 (Tenn. Cr. App. 11-18-14)

**PRIOR BAD ACTS: TRIAL COURT COMMITTED ERROR
IN ADMITTING EVIDENCE OF THE DEFENDANT'S
PRIOR BAD ACT AGAINST THE DAUGHTER OF A
FORMER GIRLFRIEND WHICH HAD OCCURRED
SOME THIRTY YEARS PRIOR TO THE
DEFENDANT'S TRIAL**

HELD: The trial court erroneously admitted the evidence of the bad act of the defendant allegedly occurring against the daughter of a former girlfriend some thirty years prior to the defendant's trial. The Court of Criminal Appeals stated that while the testimony could be somewhat probative of the defendant's intent and in order to rebut a claim of accident or mistake, the probative value is decreased by the distance in time from the prior bad acts, the dissimilarity in ages of the victims of the two episodes, and the difference in the actual crime committed. The court further found that the evidence was extremely prejudicial and the danger of unfair prejudice outweighed the probative value of the evidence. The court noted that Tennessee courts have repeatedly held that the admission of uncharged sexual activity of a defendant creates unfair prejudice that often warrants reversal of a conviction.

The court also noted that the prosecutor's closing argument included the prosecutor urging the jury to punish the defendant for a crime for which he was not on trial, the thirty year old crime. The court did find that the cumulative value of these errors necessitated the remanding of the case for a new trial.

State v. Gossett, 40 TAM 4-25 (Tenn. Cr. App. 11-21-14)

PRIOR CONSISTENT STATEMENT: ADMISSION OF FORENSIC INTERVIEWS OF VICTIMS AS SUBSTANTIVE EVIDENCE WAS APPROPRIATE SINCE DEFENDANT’S CROSS-EXAMINATION OF THE VICTIMS CHALLENGED THE CREDIBILITY OF THE VICTIMS

FACTS: In a case of aggravated sexual battery alleging the defendant abused his two step-granddaughters, the trial court allowed into evidence a forensic interview of the victims as substantive evidence pursuant to T.C.A. § 24-7-123.

HELD: The trial judge did not abuse its discretion in admitting forensic videos as prior consistent statements. The court noted that on cross-examination the defense counsel had asked the victims why they continued to go to the defendant’s residence after the abuse occurred, thereby insinuating they would have immediately stopped the visits if the abuse had actually happened. Cross-examination also challenged the credibility of the victims. As a result, the forensic interviews were admissible to rehabilitate the credibility of the victims and to corroborate their testimony that the abuse did in fact take place.

The court noted that since the videos were properly admitted as extrinsic evidence of prior consistent statements, the Court of Criminal Appeals did not need to address the defendant’s constitutional challenge to the statute or his claims that the forensic interviewers did not possess the statutory criteria for admissibility.

State v. Gossett, 40 TAM 4-25 (Tenn. Cr. App. 11-21-14)

PRIOR DRUG-RELATED CONVICTION OF DEFENDANT’S GIRLFRIEND: NO ERROR OF TRIAL COURT IN DENYING DEFENDANT’S REQUEST TO PRESENT EVIDENCE OF HIS GIRLFRIEND’S PRIOR DRUG-RELATED CONVICTION

FACTS: The defendant sought to present evidence of his girlfriend’s prior drug-related conviction and claimed that the trial court’s denial of such

request violated his constitutional right to present a valid defense. The trial court found that the probative value of the evidence would be outweighed by the danger of unfair prejudice.

HELD: The Court of Criminal Appeals found that the trial court did not abuse its discretion when it excluded the evidence of the girlfriend's prior conviction of possession with the intent to sell marijuana. The Court of Criminal Appeals found that the excluded evidence had little probative value and that the prior conviction would reveal neither her motive or her opportunity to commit the present crime.

The court also found that evidence of her prior conviction would be misleading pursuant to Tennessee Rule of Evidence 403, in light of the trial court's exclusion of the defendant's prior drug-related convictions.

PRACTICE POINT: In defending oneself from a drug charge, it would definitely appear relevant to show that a person in close proximity to the defendant, the defendant's girlfriend, would be a major suspect due to her ability to commit the crime and due to her having been convicted of a similar crime within the past three (3) years. Denial of the right to present this evidence would appear to be unfair and threaten the defendant's right to a fair trial. On the other hand, the last fact emphasized by the present case is very convincing and that is the fact that the trial judge had excluded evidence of the defendant's prior drug related convictions. It, therefore, would appear to be consistent for the girlfriend's conviction to also not be allowed. These are consistent rulings and being consistent in this case is very important to make it fair to both sides. If the defendant's convictions had come out, then the girlfriend's convictions definitely should have been allowed. Due to the fact that the trial court had denied the introduction of the defendant's prior convictions, it is fair to also not allow her conviction to be brought into evidence because such would be misleading, as found by the Court of Criminal Appeals.

State v. Tucker, 39 TAM 51-34 (Tenn. Cr. App. 09-09-14)

PRIVILEGED COMMUNICATION: TRIAL COURT DID NOT ERR IN ALLOWING POLICE CHAPLAIN TO TESTIFY ABOUT HIS CONVERSATION WITH DEFENDANT IN MURDER CASE AS THE EVIDENCE DID NOT ESTABLISH THAT DEFENDANT WAS SEEKING SPIRITUAL COUNSEL OR ADVICE FROM

THE CHAPLAIN AND THE COMMUNICATION WAS NOT CONFIDENTIAL

FACTS: The defendant contended that the trial court erred in allowing Metro police chaplain, James Duke, to testify about his confidential conversation with the defendant. The defendant maintained that his statements to Chaplain Duke were confidential and that he and the chaplain were the only two in the car when he made the statements. The defendant testified he knew the chaplain as both the police chaplain and as a chaplain before he became a police officer.

HELD: The Court of Criminal Appeals found that the trial court did not err in allowing the police chaplain to testify about his conversation with the defendant. The court noted that statements made to clergy members are generally considered privileged testimony under the clergy-penitent privilege as set out in T.C.A. § 24-1-206(a)(1), which states that:

“No minister of the gospel....of any religious organization or denomination usually referred to as a church, over 18 years of age, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to that person in a confidential manner, properly entrusted to that person in that person’s professional capacity, and necessary to enable that person to discharge the functions of such office according to the usual course of that person’s practice or discipline, wherein such person so communicating such information about such person or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.”

Chaplain Duke testified that he went to the scene as a chaplain and not as an investigating officer. He said that he offered condolences and offered to let the defendant sit in his car. The chaplain said that he did not pray with the defendant but that he heard the sergeant pray when the defendant was in his car. The chaplain said that he went to the victim’s mother’s house in his official capacity as a police Chaplain to make the death notification. He told the defendant that he did not need to know what happened but the defendant proceeded to make a statement to him.

The Court of Criminal Appeals stated that the language of the statute provides that a clergy member is prohibited from testifying about

information communicated when the penitent was “seeking spiritual counsel or advice” related to the information communicated. The appellate court found that the trial court had credited the chaplain’s testimony that the defendant made the statement about what happened because he thought Chaplain Duke needed to know to be able to tell the victim’s mother and that the chaplain had not prayed with the defendant and that the defendant did not seek religious counsel from him. The court concluded that the record reflected the defendant was not seeking spiritual counsel or advice when he made the statement and did not show that he intended for the communication to be confidential. The court therefore ruled that the trial court had not erred in admitting the evidence from the chaplain.

PRACTICE POINT: This case diminishes or gets perilously close to diminishing the confidential privilege that a person has with a pastor or minister. The focus on what the chaplain said himself seems to tread on dangerous ground when after the fact the chaplain can emphasize that he did not pray with the defendant or at least did not recall praying with him, even though he admitted he went to the scene as a chaplain and not as an investigator. It seems from the proof that the defendant would have known that he was a chaplain and that he was there giving consolation and comfort and was also going to the defendant’s mother’s home not as an investigator but as a chaplain. It seems that the chaplain had all the indicia of being a chaplain and was in fact sent there by other officers in that role. This appears to be another area where it can be a slippery slope to ignore a confidential privilege just because it is convenient for the prosecution in a case.

I would have probably preferred for the court to say it was a very close case and that the testimony should not have been allowed by the chaplain but in the context of the whole situation and overwhelming nature of the proof that it was harmless error.

State v. Cartmell, 39 TAM 46-15 (Tenn. Cr. App. 07-07-14)

RAPE VICTIM: REVERSIBLE ERROR IN ADMISSION OF PHOTOGRAPH OF CHILD-VICTIM’S VAGINAL AREA TAKEN DURING FORENSIC EXAMINATION

HELD: The Court of Criminal Appeals found that the trial court committed reversible error in admitting a photograph of a child-victim’s vaginal area taken during a forensic examination. The court found that the primary effect

of the photo was to elicit sympathy for the victim and contempt for the defendant while adding nothing of evidentiary value to the state's case. The court noted that the pediatric nurse practitioner testified extensively and in great detail at trial using schematic drawing and a power point presentation to explain the construction of the vaginal area and the reason for the lack of injury to the victim's vaginal area. The Court of Criminal Appeals stated that the photo was uncalled for and had almost no probative value on the issues that had not been covered by the nurse's testimony.

The court noted that during the testimony of the nurse practitioner, the state first introduced a photo of the victim that was taken prior to the examination which showed the victim fully dressed, standing in front of the measuring tape, and smiling. The court noted that the victim appeared young and vulnerable, and that immediately thereafter the state introduced the contested photo, which was in color and taken mere inches from the victim's vaginal area and reflected no injuries. The court noted that the contrast between the two photos, one shown right after the other, could not fail to elicit great sympathy for the victim and contempt for the defendant with basically no probative value to the picture.

PRACTICE POINT: This is a case which recognizes the extreme inappropriate conduct of the state in introducing explicit photos for the mere purposes of prejudicing the fact-finder against the defendant rather than having any real probative effect through the evidence itself. Here the picture reflected no physical damage to the victim, the expert witness had been allowed to testify in detail as to the impact on the victim and as to why there was no damage, and the court had noted this was a case where there was almost no physical proof against the defendant whatsoever.

State v. Chesteen, 39 TAM 50-20 (Tenn. Cr. App. 08-29-14)

RELEVANCE OF CHILD VICTIM'S EDUCATIONAL AND DISCIPLINARY RECORDS: STANDARDS OF RELEVANCY NOT MET WHEN DEFENDANT ASSERTED THAT RECORDS WERE NECESSARY DUE TO RUMORS THAT THE CHILD HAD LIED TO SCHOOL STAFF OR ADMINISTRATORS IN THE PAST

HELD: In a case involving allegations against the defendant of aggravated sexual battery of a twelve year old niece, the Court of Criminal Appeals held

that the trial court had not erred and had not abused its discretion in denying the defendant's request for production of the victim's educational and disciplinary records. The court found that the defendant's vague assertion that the victim was rumored to have lied to school staff or administrators in the past does not meet the requirements of relevancy, particularly since the victim's education was in no way tied to the crime at issue. The court also noted that the defendant was free to cross-examine the victim about her veracity which the defendant had done.

State v. Moore, 39 TAM 45-18 (Tenn. Cr. App. 07-02-14)

RELEVANCY: EVIDENCE THAT HARRIS, A KEY WITNESS IN THE CASE AND DEFENDANT'S EMPLOYER, HAD AN ONGOING AFFAIR WITH THE MURDER VICTIM WAS RELEVANT, AND IT WAS ERROR FOR THE TRIAL COURT TO DISALLOW QUESTIONING OF HARRIS ABOUT THE AFFAIR WITH THE DEFENDANT'S FORMER WIFE

FACTS: The defendant argued in this case involving felony murder, kidnapping and rape that the trial court erred in refusing to allow the defendant to question the witness, Harris, about his on-going affair with his former wife at the time of the victim's death. The defendant had contended that the affair was relevant for impeachment purposes and as evidence of a motive of Harris to either kill the victim or to have her killed. One of the defendant's theories of defense was that Harris committed the offenses.

HELD: The Court of Criminal Appeals found that it was clearly error for the trial court to refuse to admit said evidence as the evidence that Harris was involved in an extramarital affair at the time of the victim's murder was relevant as it tended to make the fact of his involvement in the crime more probable than it would be without the evidence. The Court of Criminal Appeals therefore concluded that the trial court committed error in excluding the evidence.

The court did find that the strength of the state's evidence against the defendant and the relatively weak probative value of the evidence sought to be introduced by the defendant rendered the error harmless under the facts of this case.

The Court of Criminal Appeals also looked at the defendant's

argument that the trial court's exclusion of the evidence deprived him of his due process right to present a meaningful defense. The court stated that in determining whether the constitutional rights to present a defense had been violated by the exclusion, "a court should consider whether: 1) the excluded evidence is critical to the defense; 2) the excluded evidence bears sufficient indicia of reliability; 3) the interest supporting the seclusion is substantially important. The court did conclude that the error was harmless beyond a reasonable doubt.

State v. Bell, 39 TAM 37-23 (Tenn. Cr. App. 05-30-14)

RELEVANCY OF TEXT MESSAGES: TEXT MESSAGES ABOUT THE DEFENDANT WANTING TO KILL HIS WIFE AND ABOUT HIS MARITAL TROUBLES DEEMED ADMISSIBLE TO SHOW DEFENDANT'S MOTIVE TO KILL WIFE

HELD: The Court of Criminal Appeals found that the trial judge had not erred or abused his discretion in admitting text messages exchanged between the defendant and a second co-defendant due to the fact that the text messages provided the background of the romantic relationship between the defendant and his co-defendant (Frame). The court found that the text messages were indicative of the motive to kill the defendant's wife as text messages were exchanged during the months leading up to the indictment about the defendant wanting to "choke and kill" his wife. The court found that the text messages about the defendant wanting to kill his wife, about the couple's marital troubles, and about the defendant's efforts to obtain money to pay for a weapon or to pay for another person to do the killing were evidence that the defendant had an intent to carry out murder.

State v. Dunkley, 39 TAM 41-13 (Tenn. Cr. App. 06-25-14)

STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS AND TREATMENT: DOCTOR ALLOWED TO TESTIFY ABOUT WHAT CHILD VICTIM STATED TO HER DURING MEDICAL EVALUATION

FACTS: The defendant claimed in a case involving rape of a child and aggravated sexual battery that Dr. Piercey should not have been allowed to testify about the victim's statements due to the fact they were inadmissible under Tennessee Rule of Evidence 803(4). Specifically, the defendant claimed that while the victim's statements were made for the purpose of diagnosis, they were inadmissible because they were not made for the purpose of treatment.

HELD: The trial court did not err in allowing testimony from Dr. Piercey of statements made by the victim and the victim's mother for the purpose of medical diagnosis and treatment. (Note that the court found that any objection as to statements made by the mother were waived due to failure to raise the issue at trial.) The Court of Criminal Appeals found that the record established that Dr. Piercey used the victim's statements to reach her diagnosis of "child sexual abuse" and to treat the victim pursuant to a detailed treatment plan, which included but was not limited to terminating all contact with the alleged perpetrator, testing the victim for sexually transmitted diseases, and determining that a rape kit was unnecessary because too much time had elapsed since the abuse. The court also found that the record established that Dr. Piercey did not inappropriately influence the victim because she had asked open-ended questions and had no knowledge of the allegations prior to speaking with the victim. The court also noted that the record was devoid of any sort of family feud or custody battle that would affect the trustworthiness of the victim's statements. The Court of Criminal Appeals therefore concluded that the trial court had not abused its discretion in determining that the victim's statements were admissible under the hearsay exception in Rule 803(4).

State v. Croom, 39 TAM 46-20 (Tenn. Cr. App. 07-11-14)

**STATEMENTS USED TO PROVE THE EFFECT ON A
LISTENER: NOT DEEMED TO BE HEARSAY
BECAUSE SUCH STATEMENTS ARE NOT USED TO
PROVE THE TRUTH OF THE MATTER ASSERTED**

FACTS: The defendant sought to question the witness, Whitehead, about matters Whitehead had discussed with the victim (Seekell) in order to "prove the effect these words had on Mr. Whitehead; and in order to establish Whitehead's motive for attacking the victim. The victim had previously

testified that both the defendant and Whitehead followed the victim out of the restaurant and proceeded to jump him and beat him. At trial, Whitehead attempted to testify that the victim told him things such as the victim had called him the “N” and “B” words. The trial court ruled that the testimony would amount to hearsay and would not be admissible.

HELD: The trial court improperly excluded the statements during the trial because statements offered to show their effect on the hearer are not deemed hearsay. The court agreed with the defendant that the statements were not offered for the truth of the matter but rather to establish Whitehead’s motive for assaulting the victim. The court found that the statements made by a third party to the witness Amanda and related to Mr. Whitehead serve no other purpose than to show their effect on Mr. Whitehead and serve as a reason or possible justification for his attack on the victims. The court found that the statements were not hearsay and therefore the trial court improperly excluded the statements which were offered to show their effect on the hearer. The court did find that the error was harmless under the circumstances and all the proof.

PRACTICE POINT: This appears to be another one of the dangerous type of cases where words exchanged that were very much fighting words could well have had an impact on the witness Whitehead and a significant impact on the fact finder. The defendant was ultimately convicted of simple assault and certainly this type of exchange and possible motivation for the attack by Whitehead could have been helpful to the defendant. The court said that the exclusion of the state did not prevent the defendant from presenting his theory that he was not involved in the attack on the victim, but the absence of the proof was certainly pretty significant.

State v. King, 40 TAM 3-22 (Tenn. Cr. App. 10-09-14)

STATE OF MIND HEARSAY EXCEPTION: WEIGHING OUT FACTORS IN REGARD TO HEARSAY EXCEPTION IS KEY ROLE OF TRIAL COURT

FACTS: In this case involving the defendant being convicted of a second degree murder of his wife, the trial and appellate courts dealt with several issues in regard to hearsay and relevancy. Since this is a textbook case on evaluation of these type issues, the following demonstrate key factors to look for in making certain rulings:

- 1) The trial court erred in admitting testimony by Barbour concerning

statements made by the victim. Barbour had testified that she asked the victim when she would have children, and the victim responded by telling her that she could not have children with the defendant because he had told her that if she (the victim) left him, he would kill her, the baby and himself before he paid child support. The trial court allowed the testimony to show the victim's "state of mind", reasoning that the victim's state of mind was relevant to understand the defendant's and the victim's relationship before her death.

The Court of Criminal Appeals held, however, that the statement concerning the victim's future children was not relevant because the victim did not have children and was not pregnant when she died. The court stated that Barbour's testimony about the victim's statements showed the victim feared defendant, and the victim's state of mind was relevant to rebut the defendant's statements to the police about the positive state of their marriage. The court noted though that there was plenty of evidence to rebut the defendant's statements about the positive state of the marriage and therefore the testimony about the victim's statements was cumulative on the issue of rebuttal. The court also found that the danger of unfair prejudice was great because the statements concerning the defendant's threatening to kill the victim, created a risk that the statements would inflame the jury. The court therefore concluded that the testimony of Barbour regarding the threats to kill her, the baby and himself should not have been admitted. It was ultimately concluded that the entry of this into evidence was harmless error.

2) The trial court did not err in admitting Lindblom's testimony concerning emails she received from the victim and the victim telling her that the defendant could have a divorce. The court noted that the victim's statement that she was agreeable to divorce was admissible hearsay because it showed the victim's state of mind, which was relevant to rebut the defendant's statements to the police about the positive state of the marriage.

3) The Court of Criminal Appeals also found that the trial judge had erred in admitting testimony by Rogers concerning a telephone call she received from the victim in which the victim had asked Rogers to pick her up from a nightclub because she was afraid to go home. The court pointed out that this was error because the victim never told Rogers why she was afraid to go home and no evidence suggested at the time that she was afraid to go home because she was afraid of defendant. The court therefore concluded that the statement did not rebut the defendant's claim of a happy marriage or show her state of mind concerning the marriage and was therefore not relevant and inadmissible. It was found to be harmless based upon the totality of the evidence.

4) The Court of Criminal Appeals also found that the trial judge did not err in allowing Prisco's testimony about her flirtatious relationship with the defendant before the victim's death. The court noted that although no evidence suggested that the defendant's relationship with Prisco was physical, the context of the text messages between Prisco and the defendant, while both were married to other people, were sexual in nature and were relevant to the defendant's and victim's relationship and probative of the defendant's motive for killing the victim.

5) The Court of Criminal Appeals also found that the trial court did not err in allowing a police officer to testify that the defendant had bragged about how poorly he treated his wife. These statements to the officer indicated that he played mind games with the victim and went to see other women which was relevant to the defendant's and victim's relationship and probative of his motive in committing murder.

6) The Court of Criminal Appeals found that the trial judge did not err in allowing testimony regarding the defendant's relationship with other women after the victim's death. The court noted that this was similar to the officer's testimony about defendant seeing other women when he was married and regarding Prisco's testimony about her relationship and the sexual text messages. The court stated that the defendant sending text messages to other women soon after the victim's death was relevant to show the defendant's motive and to impeach his statements about the happy marriage.

State v. Cartmell, 39 TAM 46-15 (Tenn. Cr. App. 07-07-14)

**VIDEO RECORDING OF DEFENDANT'S STATEMENT:
DENIAL OF DEFENDANT'S REQUEST TO PLAY
THE VIDEO IN FULL FOUND NOT TO BE AN ABUSE
OF DISCRETION**

FACTS: In this case in which the defendant was convicted of facilitation of felony murder and facilitation of aggravated robbery among other crimes, the defendant maintained that the trial court erred and abused its discretion in denying the defendant's request to play, in its entirety, a video recorded statement given by the defendant on November 3, 2010, based upon the trial court's decision to present the proof by a narrative in the interest of time.

HELD: The trial court did not abuse its discretion in denying the defendant's request to play the video in full. The Court of Criminal Appeals

pointed out that the recording was received into evidence as an exhibit by the judge and was not excluded. The video was therefore readily available for the jury to view during its deliberations had it chosen to do so.

The Court of Criminal Appeals also stated that while the defendant argued that the substance of the interview was most important and that showing the entire circumstances was important to the defense, the appellate court noted that the defendant's demeanor and circumstances surrounding the statement were shown in excerpts that were played at the trial. The Court of Criminal Appeals concluded that the court did not abuse its discretion by publishing the exhibit by way of the narrative in the interest of time. The court noted that the trial court did not exclude the evidence but required a time-efficient manner of presenting the evidence and permitted the defendant to present excerpts of the recording. The court found that this was not an abuse of the trial court's discretion in conducting the trial.

PRACTICE POINT: This case points out that a court conducting a trial has the discretion to conduct the trial in a time-efficient manner. It is important for a general sessions judges to allow reasonable proof and to allow audios or videos in their entirety when reasonably necessary to do so to have a fair trial. As long as the use of the trial court's power is reasonable, it is ok for the trial court (including general sessions courts) to regulate the way the proof is introduced.

State v. Kennedy, 39 TAM 48-14 (Tenn. Cr. App. 07-30-14)

**VIDEOTAPE FORENSIC INTERVIEW: VIDEO
RECORDED STATEMENTS OF CHILD SEX ABUSE
VICTIM MADE TO FORENSIC INTERVIEWERS
MAY BE USED AT TRIAL TO ESTABLISH "ACTS OF
SEXUAL CONTACT PERFORMED WITH OR ON
THE CHILD BY ANOTHER," AS THE STATUTE IS A
SPECIFIC AND LIMITED EXCEPTION TO THE
GENERAL RULE AGAINST ADMISSION OF
HEARSAY EVIDENCE**

FACTS: The defendant was indicted for seven counts of rape of a child. Prior to trial, the state sought permission to offer as evidence a video-recorded statement made by the child victim to a forensic interviewer. At the conclusion of the pre-trial hearing, the trial court refused to allow the

video-recorded statement as proof at trial. The Supreme Court granted the state an interlocutory appeal to determine whether T.C.A. § 24-7-123(Supp. 2014) violates the separation of powers, whether the video-recorded statement qualifies as an inadmissible hearsay evidence, and whether the use of the statement at trial would violate the defendant’s right to confront witnesses.

HELD: The Tennessee Supreme Court held that T.C.A. § 24-7-123 does not unconstitutionally infringe upon the powers of the judiciary and is a valid legislative exception to the general rule against the admission of hearsay evidence. The ruling of the trial court was reversed and the cause remanded for trial. The Supreme Court ruled that the state would be permitted to offer the video-recorded statement as evidence at trial, provided that the evidence is relevant and otherwise comports with the requirements of Section 24-7-123 and the Tennessee Rules of Evidence.

As to the separation of powers argument of the defendant, the Supreme Court concluded that the statute does not require the admission of the video-recorded statements that would otherwise be barred by established law but allows the admission if the requisite statutory conditions are met. The statute also does not allow the state to put a child witness on the stand without being subject to cross-examination and scrutiny for trustworthiness. The court therefore concluded that the general assembly did not encroach upon the powers of the judiciary by enacting the statute.

As to the hearsay objection of the defendant, the Supreme Court concluded that the video-recorded video of the child qualified as hearsay evidence. The court disagreed with the trial court that the video-recording did not fit with any exception to the general rule excluding hearsay evidence. The court noted that Tennessee Rule of Evidence 802 provides for admission if allowed “otherwise by law.” The Supreme Court stated that it had determined that the legislature acted within its constitutional limits by enacting this statute as a specific and limited exception to the general rule against the admission of hearsay evidence. Therefore, the recorded statement, although falling within the definition of hearsay, is admissible under the statute as a valid legislative exception to the general rule of excluding hearsay evidence.

In regard to the right of confrontation of the defendant, the Supreme Court did a Crawford analysis. The court found that under the Crawford analysis that the video-recorded statement would be testimonial in nature. The court went on to conclude as follows, “Consistent with these decisions, we hold that notwithstanding the testimonial nature of video-recorded statements taken pursuant to T.C.A. § 24-7-123, the admission of these

statements does not violate a defendant's right of confrontation so long as the child witness authenticates the video-recording and appears for cross-examination at trial, as required by our statute."

State v. McCoy, 39 TAM 49-2 (Tenn. S. Ct. 12-01-14)

GUILTY PLEA

COLLATERAL CONSEQUENCES OF GUILTY PLEAS: COURTS ARE NOT CONSTITUTIONALLY REQUIRED TO NOTIFY DEFENDANTS OF COLLATERAL CONSEQUENCES OF GUILTY PLEAS BUT ONLY OF DIRECT CONSEQUENCES

HELD: The loss of employment resulting from a guilty plea resulting in a felony conviction is a collateral consequence of a plea. The defendant's guilty pleas were not infirm because he was unaware that the felony conviction would adversely affect his employment or career.

Nugent v. State, 40 TAM 2-36 (Tenn. Cr. App. 10-30-14)

IMPLIED CONSENT LAW

IMPLIED CONSENT LAW: PROOF NOT SUFFICIENT TO CONVICT DEFENDANT OF IMPLIED CONSENT LAW WHEN DEFENDANT'S BLOOD WAS OBTAINED PURSUANT TO THE MANDATORY PROVISIONS OF T.C.A. § 55-10-406

HELD: The Court of Criminal Appeal held that once a defendant consents to testing and allows his or her blood to be drawn, the purpose of the implied consent statute has been satisfied, even if the defendant later revokes consent for a chemical analysis. The court also found that the same is true, when as the facts in this case established, a blood test is compelled, the purpose of

the statute has been satisfied, i.e., the defendant's blood has been drawn for the determination of his intoxication level. Therefore, the defendant's conviction for the implied consent violation was reversed and the case of violating the implied consent law was dismissed.

PRACTICE POINT: As pointed out in the opinion, after the defendant's arrest, the legislature amended T.C.A. § 55-10-406 so that it stated as follows: "Except as required by subsection (f), court order or search warrant, if such person, is placed under arrest, requested by law enforcement officer to submit either or both tests, advised of the consequences for refusing to do so, and refuses to submit, the test or tests to which the person refused shall not be given, and the person shall be charged with violating this subsection (a)." So the amended statute provided that if the person in fact refused to consent the test would not be given. Here the defendant did have a blood alcohol test conducted on him.

State v. Chrystak, 39 TAM 49-34 (Tenn. Cr. App. 08-13-14)

PRIOR INCONSISTENT STATEMENT

PRIOR INCONSISTENT STATEMENT: RECORDED INTERVIEW OF WITNESS PROPERLY ADMITTED INTO EVIDENCE AS FOUNDATION HAD BEEN PROPERLY LAID FOR INTRODUCTION FOR INCONSISTENT STATEMENT

HELD: The trial court did not err in this felony murder case in allowing the recorded interview of the witness (Nwaigwe) with the police to be entered into evidence. The statement of the witness regarding the overheard conversation was properly admitted. The Court of Criminal Appeals stated that introducing the statement after the conclusion of a witness's testimony does not violate Tennessee Rule of Evidence 613. The court also noted that Tennessee Rule of Evidence 803(26) merely requires that the declarant must testify at the trial or hearing and be subjected to cross-examination concerning the statement. Here the witness was asked on direct examination regarding the conversation he overheard between the defendants in which the defendant admitted to shooting three times and the witness denied overhearing the conversation. When reminded of his prior inconsistent

statement to the police, the witness continued to assert lack of memory regarding making the statement and regarding the conversation he purportedly overheard. The defense attorneys were also given the opportunity to cross-examine the witness. Therefore, a proper foundation was established for allowing into evidence the recorded interview with police by the witness which was inconsistent with his testimony.

On another part of the statement, the court found that the same witness was never confronted with the fact that he had previously told police that the defendant had called him to ask for a weapon. The court noted that this part of the recorded statement was played for the jury and that this was in error because the witness was never given an opportunity to explain or deny the prior inconsistent statement. The court did find that due to the overwhelming amount of proof that the error was harmless.

PRACTICE POINT: This case points out the fact that it is very important for purposes of prior inconsistent statements, that a witness be confronted with the fact that he has given a prior inconsistent statement and be allowed to explain or deny the statement. Failure to do so is a failure to establish a foundation behind allowing a prior inconsistent statement to be introduced into evidence.

State v. Springer, 39 TAM 43-14 (Tenn. Cr. App. 06-20-14)

PROBATION REVOCATION

PROBATION REVOCATION: WHEN REVOCATION OF PROBATION IS BASED SOLELY UPON DEFENDANT'S INABILITY TO PAY FINE OR RESTITUTION, TRIAL COURT MUST ARTICULATE A FINDING THAT DEFENDANT HAS NEGLECTED OR WILLFULLY REFUSED TO PAY AND DETERMINE IF ALTERNATIVES TO IMPRISONMENT ARE INADEQUATE TO MEET THE STATE'S INTEREST IN PUNISHING A DEFENDANT

HELD: Because trial judge failed to state on the record whether the defendant "willfully" failed to make restitution payment or whether he unsuccessfully attempted without fault to make payment, the trial court's judgment is reversed. The case was remanded for an evidentiary hearing

during which the court was required to make findings relative to reasons behind the defendant's failure to make restitution payment and whether alternative measures to incarceration were inadequate to meet the state's interest.

State v. Pierce, 40 TAM 1-29 (Tenn. Cr. App. 10-14-14)

PROSECUTORIAL MISCONDUCT

IMPROPER CLOSING ARGUMENT: IMPROPER CLOSING ARGUMENT DUE TO PROSECUTOR GIVING PERSONAL EXPERIENCE AT DISNEY WORLD

FACTS: In a child rape case, the prosecutor made the following closing argument over defense counsel's objection:

“Let me tell you something. I remember taking my daughter, my two daughters at the time, to Disney World. And we went on that trip, and that's been several years ago. And I can't tell you any of the clothes I had on, and I can't tell you what she was wearing. I can't really remember what the temperature was that night. But I will never forget the look..... I will never forget the look on her face when the fireworks went off. And don't tell me it didn't happen because I can't remember the specific date, and don't tell me that it didn't happen because I cannot remember the clothes or the shoes that I wore. That will forever be burned in my brain.”

HELD: The Court of Criminal Appeals found that the prosecutor improperly used personal examples as a way to vouch for the victim's credibility. In light of the other errors in the case, the court found that the prosecutor's improper argument was not harmless. The other errors included allowing other sexual acts of the defendant to come into evidence, improper drawings being allowed by the victim into evidence, and the improper closing arguments.

State v. Smith, 39 TAM 47-17 (Tenn. Cr. App. 08-13-14)

**IMPROPER COMMENT BY PROSECUTION:
PROSECUTOR DIRECTED JURY’S ATTENTION TO
DEFENDANT’S FAILURE TO TESTIFY AND
THEREBY IMPROPERLY COMMENTED ON
DEFENDANT’S STATE AND FEDERAL
CONSTITUTIONAL RIGHT TO REMAIN SILENT**

FACTS: The lead prosecutor began the state’s final closing argument by walking across the courtroom, facing the defendant, and declaring in a loud voice, while raising both arms to point at and gesture toward the defendant, “Just tell us where you were! That’s all we’re asking!”

HELD: Tennessee elects for the first time to adopt a two part test for ascertaining whether the prosecutor’s remarks amount to improper comment on the defendant’s exercise of her constitutional right to remain silent and not testify. The Supreme Court stated that the two part test inquires as follows: (a) whether prosecutor’s manifest intent was to comment on the defendant’s right not to testify, or (b) whether prosecutor’s remark was of such character that jury would necessarily have taken it to be comment on defendant’s failure to testify.

The Supreme Court concluded that the prosecutor’s remark was improper and was not a permissible summation of trial testimony of the witnesses. The court noted that the prosecutor’s question was phrased in first person plural and as a demand that the defendant explain herself. The Supreme Court also noted that the prosecutor’s actions before and during the argument reinforce this perception, and the prosecutor’s language also conveyed the message that asking the defendant to explain her whereabouts was entirely reasonable and the least the defendant can do if she expected to be acquitted of the crime. The Supreme Court noted that the prosecutor’s argument thereby implicitly encouraged the jury to view the defendant’s silence as a tacit admission of guilt. The court noted that the prosecutor’s unconstitutional argument was not harmless and required reversal of the defendant’s conviction, particularly since the comments came at a critically important junction in the trial—the state’s final rebuttal argument to the jury.

The defendant thereby had no opportunity to respond to the argument. The court also noted that the evidence of the defendant's guilt was entirely circumstantial and was not overwhelming and therefore would not be deemed harmless error.

PRACTICE POINT: This is a very important development in case law in Tennessee regarding prosecutor's commenting on the defendant's silence as a tacit admission of guilt. This can happen in General Sessions Court as well as other courts and is important to have a good command of this issue.

State v. Jackson, 39 TAM 35-2 (Tenn. S. Ct. 08-22-14)

RAPE

RAPE BY COERCION: CONSENT IS NOT CONSIDERED A DEFENSE TO THE OFFENSE OF RAPE BY COERCION BECAUSE A MINOR VICTIM MAY NOT CONSENT TO CRIMES OF RAPE

HELD: The trial court had properly ruled that consent was not a defense to the offense of rape by coercion. The Court of Criminal Appeals stated that since a minor victim may not consent to the crimes of rape of a child or statutory rape, it followed that a minor victim may also not consent to the offense of rape by coercion.

State v. Chandler, 39 TAM 41-17 (Tenn. Cr. App. 07-07-14)

RIGHT OF CONFRONTATION

CONFRONTATION CLAUSE: RIGHT OF CONFRONTATION WAS NOT COMPROMISED WHEN MEDICAL EXAMINER FOR HAMILTON COUNTY WAS ALLOWED TO TESTIFY REGARDING AUTOPSY EVEN THOUGH HE DID NOT PERFORM OFFICIAL AUTOPSY ON VICTIM;

EXAMINER'S TESTIMONY WAS BASED ON HIS OWN EXAMINATION AND NOT ON FINDINGS BY THE PATHOLOGIST

HELD: The Court of Criminal Appeals found that the trial judge had not committed error in allowing the Hamilton County Medical Examiner to testify about the victim's cause of death, even though the medical examiner had not performed the official autopsy on the victim. The Court of Criminal Appeals found that the testimony of the medical examiner was based upon an external exam of the victim's body that the medical examiner had done himself and that his conclusion related to the cause of death was based upon his own examination and not on the findings contained in the Knoxville pathologist's report. The court specifically found that the issue of confrontation was not implicated due to the fact that the medical examiner only testified about his own observations and his own conclusions from his examination.

State v. Glenn, 39 TAM 41-12 (Tenn. Cr. App. 07-07-14)

RIGHT TO COUNSEL

RIGHT TO COUNSEL: CONDITIONING DEFENDANT'S REQUEST FOR CONTINUANCE IN ORDER TO HIRE AN ATTORNEY UPON THE DEFENDANT'S ACCEPTING BOND TERMS THAT WOULD RENDER HIM INCARCERATED WAS VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT WHICH IMPLICATED HIS RIGHT TO COUNSEL

FACTS: In this case which involved the defendant being convicted of driving on suspended license, possession of marijuana, and possession of drug paraphernalia, the defendant requested a continuance in order to hire an attorney. The defendant had not previously requested a continuance at any of the prior dates and had always appeared when he was supposed to. The trial court agreed to grant the continuance, conditioned upon the defendant's having his bond raised. The court cited factors of delay and increase of flight risk as his reasons for doing so.

HELD: The Court of Criminal Appeals found that the trial court's conditioning the defendant's request for continuance to hire an attorney upon the defendant's accepting bond terms which would render him incarcerated was a violation of his constitutional rights and implicated his right to counsel. The court found that the violation of the defendant's constitutional rights was further exacerbated by the fact that the primary officer on the case was scheduled to be deployed and due to the officer's impending unavailability, the defendant would either have to remain incarcerated until the officer returned or agree to waive the issues such as chain of custody in order to proceed to trial.

The court found that this was a violation of the defendant's right to counsel, and, based upon that, the defendant's convictions for driving on suspended license, possession of marijuana, and possession of drug paraphernalia were reversed.

State v. Hufford, 39 TAM 51-33 (Tenn. Cr. App. 09-08-14)

RIGHT TO COUNSEL: RECORD FAILED TO SUPPORT A VALID WAIVER BY DEFENDANT OF HIS RIGHT TO COUNSEL, INCLUDING THERE WAS NO WRITTEN WAIVER OF RIGHT TO COUNSEL IN RECORD

FACTS: While in general sessions court, the defendant executed a waiver of his right to counsel, a waiver of his right to a preliminary hearing, and a waiver of his right to be tried only upon indictment of grand jury. The case went up to criminal court where the defendant repeatedly informed the trial court that he had waived his right to counsel and that he had represented himself in a prior criminal case and he wished to represent himself in the case. On the day of trial, which came up by information only and not by indictment, the defendant signed a waiver of his right to be tried only upon presentment or indictment of the grand jury. On the same day, the prosecutor and defendant signed an information charging the defendant with aggravated assault. Defendant was subsequently convicted after his trial while he represented himself, and the trial court imposed a three year probationary sentence.

HELD: The Court of Criminal Appeals held that the defendant did not intelligently and knowingly waive his right to counsel when the trial court did not conduct any penetrating and comprehensive examination of all the circumstances under which the defendant asserted his right of self

representation. The court also found that the defendant represented himself at trial without knowing all the facts essential to a broad understanding of the whole matter. The court also noted that there was no written right of counsel in the record and the trial had effectively commenced without the defendant having an opportunity to file any motions, review the elements of the offense, determine any lesser included offense, or to learn the range of punishment he was facing.

Significantly, the Court of Criminal Appeals found that a waiver of the right to counsel at general sessions court level for a felony charge does not satisfy the obligations of the criminal court under Tennessee Rule of Criminal Procedure 44 in order to determine whether the defendant has waived his or her right to counsel. The aggravated assault conviction was vacated and the case remanded to the trial court for further proceedings.

PRACTICE POINT: This case in referring to trial courts, states as follows: “...the trial court in determining whether he was knowingly and voluntarily waiving his right to counsel, should have inquired about his age, education, legal training, work history, knowledge of the seriousness of the charges, or of the dangers of proceeding at all stages of the criminal case without having counsel before determining whether he was competent to represent himself”. This practice point would suggest that general sessions courts, though dealing with less serious offenses, should also make reasonable inquiries about defendants before determining whether the person is competent to represent himself or herself. Some convictions are very minor such as traffic type offenses which are Class C, but many of the charges in general sessions courts have very serious lifelong implications for defendants and therefore we should reasonably satisfy ourselves as to the fact that the defendant has a full understanding of the consequences of the nature of the plea, the seriousness of the charges and the inherent dangers of representing himself or herself. As a general sessions judge, I understand that we have many cases to deal with and some are much less serious than others, but the consequences to defendants are simply too significant even with misdemeanor charges to not consider the importance of this obligation.

State v. Fletcher, 39 TAM 49-20 (Tenn. Cr. App. 08-11-14)

RIGHT OF DEFENDANT TO TESTIFY IN HIS OR HER OWN BEHALF

FUNDAMENTAL RIGHT TO TESTIFY: REQUIREMENT THAT COURT DURING A TRIAL HAVE A PROCEDURE TO QUESTION THE DEFENDANT ABOUT HIS KNOWLEDGE OF THE FUNDAMENTAL RIGHT OF THE ACCUSED TO TESTIFY IN A CRIMINAL TRIAL

HELD: Each court during a trial should have a procedure for questioning the defendant regarding his decision at trial to not testify. In the case of Momon, the court established a procedure for questioning the defendant regarding this decision at his trial designed to “protect the fundamental right of the accused to testify in a criminal trial and to insure that any waiver of that right was personal, knowing, and voluntary.”

PRACTICE POINT: It is the best procedure when conducting a trial on the merits to advise the defendant of his right to testify in his own defense and to make sure that any waiver of that right was personal, knowing and voluntary.

State v. Puckett, 40 TAM 2-23 (Tenn. Cr. App. 11-20-14)

SEARCH AND SEIZURE

CONSENT TO SEARCH RESIDENCE: INITIAL WARRANTLESS ENTRY INTO RESIDENCE BY OFFICERS DID NOT CONTAMINATE THE LATER CONSENT GIVEN BY THE DEFENDANT TO GO THROUGH AND “CLEAR THE HOUSE”

FACTS: Members of the drug task force were performing an investigation and developed facts that the defendant had made many purchases of sudafed by examining the registry of sudafed purchases. Based upon the information developed by the drug task force agents, the agents decided to conduct a “meth interview/investigation” at the defendant’s residence. As the agents

proceeded up the “rutted and pitted” driveway and reached the crest of the driveway, the agents observed a male and female near an open garage door, at which time the female upon seeing the officers took off running and yelled something about the “effing taskforce.” The female ran in through the garage and into the house. One agent followed her through the garage up some steps and into the house and pulled out his weapon as he went through a “fatal funnel”, an area that was dark and dangerous. After going through the darkness, he went into a room where the defendant and his son were in the room where the son was watching TV and the defendant was on the phone. The officer testified that he immediately holstered his weapon and asked the defendant and his son to exit the residence with him so that they would not feel intruded upon. After they had stepped out, he asked for permission to go back into the house and search for the woman. The defendant gave permission for the agents to re-enter the home and search the residence. While in the residence, the agents observed evidence incriminating the defendant, including an active meth lab in the garage/basement area.

HELD: The trial court properly denied the defendant’s motion to suppress the items seized during the search of the home. The Court of Criminal Appeals noted that the trial court had clearly credited the testimony of the law enforcement officers over that of the defendant’s son and that the Court of Criminal Appeals would defer to the factual findings and resolution of the conflicts in the evidence to the trial court. The defendant’s son had testified that one of the officers had pointed his gun directly at the son and the defendant, whereas the officer stated that he never pointed the gun at the occupants. The court noted that even though it was at night, the defendant and his son were awake. The encounter was not hostile and the officer had only briefly un-holstered his weapon to proceed to follow the woman who had run into the house. The court noted that the officer re-holstered the weapon and removed himself from the home and requested that the defendant and his son speak with him on the back porch.

The court noted that the pivotal question was whether the defendant’s consent to search was contaminated by the officer’s illegal entry into the home. The court stated that a consent to search that is preceded by an illegal seizure is not a fruit of the poisonous tree if the consent is both 1) voluntary and 2) not an exploitation of the prior illegality.

The court stated that three factors must be considered: 1) temporal proximity of the legal seizure and consent; 2) the presence of intervening circumstances; 3) the purpose and flagrancy of the official misconduct. The court noted that the purpose of the officer’s initial entry weighed against the

flagrancy of the misconduct and that he only entered the residence because he was uncertain of whether another individual in the home might arm herself and return. The court also noted that the brief time in the residence before exiting also weighed against flagrancy. The court noted that the only factor in the defendant's favor was the encounter occurred in a secluded location at the defendant's residence. The court found, however, that the voluntary consent was sufficiently attenuated from the unlawful seizure considering the three factors and concluded that the trial court did not err in denying the defendant's motion to suppress.

State v. Hammock, 39 TAM 42-22 (Tenn. Cr. App. 07-15-14)

DEFENDANT'S STATUS AS PAROLEE: SEARCH WARRANT NOT NEEDED FOR SEARCH AND SEIZURE OF DEFENDANT'S TELEPHONE RECORDS, HIS PERSON, AND HIS VEHICLE DUE TO HIS BEING ON PAROLE

HELD: The trial judge did not err in denying the defendant's motion to suppress the evidence obtained by the police pursuant to a search warrant. The Court of Criminal Appeals found that the trial court had properly concluded that the defendant was on parole at the time of the homicide and had been advised that he was subject to Tennessee parole conditions. The Court of Criminal Appeals found that accordingly a search warrant was not needed for search of the defendant's person or vehicle in light of his parole status and his acknowledgment that he was subject to Tennessee parole conditions which authorize law enforcement to conduct searches. The court concluded that the defendant's status as a parolee meant that a search warrant was not needed for search and seizure of defendant's telephone records, his person, and his vehicle.

State v. Cotham, 39 TAM 48-12 (Tenn. Cr. App. 07-31-14)

OFFICER OBSERVATION OF APPARENT HAND TO

HAND DRUG TRANSACTION SUPPORTED ARREST OF DEFENDANT AND JUSTIFIED SEARCH INCIDENT TO LAWFUL ARREST

FACTS: In the present case involving sale of cocaine, three officers testified at the motion to suppress hearing that they were familiar with both the defendant and his vehicle from previous interactions. The cumulative testimony of the officers was that they were familiar with the confidential informant and with the defendant, and on the day in question, the defendant was observed sitting in the same location in which he conducted previous drug transactions. Each of the three officers saw the defendant and another person with whom they were familiar engage in a hand to hand transaction. One officer with the use of binoculars could see the third party give the defendant money which the defendant placed in his left front pocket. The transaction was a brief matter consisting of one to two minutes.

HELD: The Court of Criminal Appeals found that based upon this type of information, there was in fact probable cause to arrest the defendant because the facts and circumstances known to the officers were “sufficient to warrant a prudent person in believing that defendant had engaged in narcotics transaction.”

The Court of Criminal Appeals also found that since there was sufficient probable cause to arrest the defendant, the subsequent searches of the defendant’s car and his person were justified pursuant to the search incident to lawful arrest exception to the warrant requirement.

State v. Lucas, 39 TAM 49-29 (Tenn. Cr. App. 08-21-14)

INVENTORY SEARCH: INVENTORY SEARCH IN ACCORDANCE WITH ROUTINE ADMINISTRATIVE PROCEDURES INVOLVED IN BOOKING AND PROCESSING AN ARRESTEE IN A DETENTION FACILITY IS AN EXCEPTION TO THE WARRANT REQUIREMENT

FACTS: Defendant was stopped for driving on a suspended license, the second time within a month, and was taken to the booking area of the Montgomery County Jail. The defendant filed a motion to suppress claiming that “once a magistrate orders a person released upon their personal

recognizance then that person is no longer under arrest or in custody.” The defendant therefore asserted that the officer’s search was unlawful under the 4th Amendment because the defendant had a reasonable expectation of privacy and there was no new probable cause to allow law enforcement to seize the defendant after he had been ordered released.

HELD: The Court of Criminal Appeals held that an inventory search “in accordance with routine administrative procedures” involved in booking and processing an arrestee through a detention facility is a well recognized exception to the warrant requirement. The court found that law enforcement authority in such cases “extends to performing a detailed inventory search of all personal effects in the arrestee’s possession, and possibly of the vehicle in which he was riding at the time of the arrest.” The court cited a case by the United States Supreme Court, Maryland v. King (2013) where it was held that an inventory search incident to arrest was not based on the “fair probability that contraband or evidence of a crime will be found” but rather on the “administrative and security concerns inherent to formally processing an arrestee.” The court noted that the justification for such a search includes protection of owner’s property, protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger.

Specifically, the officer in the present case testified that the defendant requested to use the bathroom while he was in the booking area, “in the secured zone of the jail.” The court found that the officer’s testimony was clear that although the defendant eventually was to be released on his own recognizance, the defendant was still in the midst of normal administrative booking procedures at the time he was searched. The officer had testified that after being taken in front of a magistrate, an arrestee still must go through the booking process, even in such an instance that the defendant would be granted a bond on his own recognizance.

State v. Johnson, 39 TAM 35-23 (Tenn. Cr. App. 05-15-14)

**ISSUE OF STALENESS OF SEARCH WARRANT
INFORMATION: COURT FOUND THAT IN CHILD**

SEXUAL EXPLOITATION CASES, INFORMATION DISCOVERED FOUR MONTHS EARLIER WAS NOT STALE

FACTS: Defendants pled guilty to sexual exploitation of a minor and reserved the issue of whether the information received several months prior to obtaining and executing the search warrant was too stale to support probable cause.

HELD: The Court of Criminal Appeals found that the information underlying the search warrant was sufficient to establish probable cause and upheld the trial court's denial of the defendant's motion to suppress. The Court of Criminal Appeals noted that the detective had received information from a detective in another county approximately four months earlier but that it had taken approximately one month to ascertain the location of the defendants and their computers. Therefore, the court stated there was only a three month delay between the execution of the search warrant and the time the information was connected to the address set out in the search warrant.

The Court of Criminal Appeals stated that given the nature of the evidence sought (child pornography on the defendant's computers), the magistrate could reasonably have concluded that the child pornography discovered by the officers in August 2010 remained on the defendant's computers at the time the search warrant was issued four months later. The Court of Criminal Appeals made specific note that appellate courts have overwhelmingly declined to extend the protections of the Fourth Amendment to invalidate search warrants related to child pornography on staleness grounds, even in cases with the delay of greater than four months between execution of search warrant and date provided in search warrant affidavit.

State v. Ewing, 39 TAM 36-22 (Tenn. Cr. App. 06-11-14)

**“KNOCK AND ANNOUNCE” RULE: NO VIOLATION OF
“KNOCK AND ANNOUNCE” RULE AS EVIDENCE**

ESTABLISHED THAT DEFENDANT UNDER THE FACTS HAD NOTICE OF AN INVESTIGATION IN PROGRESS, AS WELL AS NOTICE OF THE POLICE AUTHORITY AND THE PURPOSE OF THE POLICE PRESENCE AT THE RESIDENCE (TO EXECUTE A SEARCH WARRANT)

FACTS: Armed with a search warrant, officers who were wearing vests arrived at the defendant's residence and as they were exiting the raid van the officers identified themselves as police officers and yelled out, "Police officers, search warrant!" There was a man standing on the defendant's porch speaking with someone inside the residence who announced the police presence by yelling, "Bum rush!" as the man fled the defendant's residence and as the screen door to the defendant's residence closed. Proof also established that a detective had knocked on the door and announced his presence and purpose and after no response opened the screen door and walked into the residence causing no property damage.

HELD: The Court of Criminal Appeals stated that from all the evidence that the proof was sufficient to establish that the defendant had notice of an investigation in progress, as well as notice of the police authority and the purpose of the police presence at the residence. The court concluded that there is no violation of the "knock and announce" rule.

State v. Tucker, 39 TAM 51-34 (Tenn. Cr. App. 09-09-14)

**PROBABLE CAUSE FOR SEARCH OF DEFENDANT:
PROBABLE CAUSE ESTABLISHED FOR SEARCH
OF DEFENDANT DUE TO OFFICER SMELLING**

**ODOR OF MARIJUANA ON OR ABOUT THE
DEFENDANT AND FACT THAT IT WOULD BE
IMPRACTICAL FOR OFFICER TO LEAVE SCENE
TO OBTAIN SEARCH WARRANT DUE TO THREAT
OF ESCAPE OR DESTRUCTION OF EVIDENCE**

FACTS: The defendant argued there was no probable cause for search of the defendant's person saying that probable cause did not exist solely due to the officer's detection of the odor of raw marijuana. The defendant argued that there was a difference of officer's detecting a "strong" or "intense" odor of marijuana as opposed to a faint smell of marijuana. The defendant maintained that if it was only a faint smell of marijuana that evidence must be corroborated by another officer before probable cause to search is established.

HELD: The Court of Criminal Appeals stated that it refused to make such a distinction. The court found that the trier of fact at the suppression hearing, being the judge, the trial court is in a better position to assess the witness's credibility and determine the weight of the evidence and value to be afforded it. The court noted that the officer had testified on his training and experience in prior arrests, testified that he recognized the smell of raw marijuana on the defendant's person.

The court noted that in regard to "whether the smell of marijuana alone can establish probable cause, our case law reflects it can."

The court went on to state that even with probable cause, there needed to be exigent circumstances to justify the warrantless search. The court found that there were exigent circumstances under the facts since the officer had already asked the defendant about the origins of the odor of marijuana, alerting the defendant to the issue of drug detection. The court noted that the officer could not have left the defendant to get a warrant or detained the defendant while another officer obtained a search warrant without risking an escape attempt or possible destruction of the evidence. The court therefore found that exigent circumstances were present to justify the search without a search warrant.

State v. Crosby, 39 TAM 51-36 (Tenn. Cr. App. 09-09-14)

**SEARCH WARRANT: SEARCH WARRANT
ESTABLISHED SUFFICIENT NEXUS BETWEEN**

CRIMINAL ACTIVITY AND RESIDENCE TO BE SEARCHED

HELD: The trial judge did not err in denying the defendant's motion to suppress drugs discovered as a result of a search of his residence. The court found that the affidavit in support of the search warrant established a sufficient nexus between the criminal activity and the residence to be searched. The court stated that the affidavit in question established ongoing criminal activity plus direct observation by law enforcement officers through the course of an investigation within 30 days of the issuance of the search warrant. This was all combined with the detective's statement that he believed drugs and proceeds of drugs sales would be located at the residence based upon his experience, all of which established that the nexus would persist to the date of the search. The court also noted that the informant had been monitored by the officers during the purchases.

State v. Hogan, 40 TAM 2-20 (Tenn. Cr. App. 11-03-14)

SEARCH WARRANT AFFIDAVIT BY AN OFFICER: INFORMATION THAT ILLEGAL NARCOTICS WERE BEING SOLD AT A TARGET RESIDENCE WAS MERE CONCLUSORY ALLEGATION WHICH COULD NOT ESTABLISH PROBABLE CAUSE FOR THE SEARCH

FACTS: A detective's statement in an affidavit in support of a search warrant stated that the detective had received information that illegal narcotics were being sold at a target residence.

HELD: The statement of the detective was mere conclusory allegation on the part of the detective which could not reliably establish ongoing criminal activity at the residence to justify issuance of a search warrant. The court noted that because there was not sufficient probable cause to justify the search warrant, the conviction must be vacated and dismissed. The court

found that the trial court had erred in denying the defendant's suppression motion.

State v. Hall, 39 TAM 43-19 (Tenn. Cr. App. 10-03-14)

**STANDING TO CONTEST SEARCH OF MOBILE HOME:
NO STANDING DUE TO FACT THAT DEFENDANT
HAD ABANDONED PREMISES**

FACTS: Defendant and her husband were convicted of especially aggravated robbery and especially aggravated kidnapping in connection with offenses committed against their 83-year old landlord.

HELD: The trial judge properly denied the defendant's motion to suppress evidence seized during a search of the mobile home due to lack of standing. The Court of Criminal Appeals noted that while the fact that the defendant and her husband were behind in rent for their mobile home would not automatically preclude a finding that they intended to return to the home, additional factors clearly suggested that the couple intended to abandon the premises. The court found that this opinion of abandonment was buttressed by the fact that the tenants had lured their landlord over to the residence to assault and rob him and then tied him up prior to their departure. The Court of Criminal Appeals noted that one would be hard pressed to believe that the defendants could remain as tenants after inflicting such a beating on the landlord and stealing his money. The couple was also apprehended hundreds of miles away in Colorado.

The Court of Criminal Appeals found that the couple had abandoned the premises and had no standing to contest the search. The key issue in abandonment is whether the lessee had a reasonable expectation of privacy in the property as of the date of the search. Under these circumstances, there would have been no reasonable expectation of privacy.

State v. Thomas, 39 TAM 46-18 (Tenn. Cr. App. 07-14-14)

**STOP OF VEHICLE NEAR SCENE OF AGGRAVATED
ROBBERY: STOP FOUND TO BE REASONABLE
DUE TO EARLY HOUR OF OFFENSE, LIGHT**

TRAFFIC, GENERAL SIMILARITY OF VEHICLE WHICH MET DESCRIPTION AND LICENSE INFORMATION GIVEN, PROXIMITY OF VEHICLE TO CRIME, AND FAST RESPONSE OF POLICE OFFICER

HELD: In a case involving an aggravated robbery in which allegations had been made and conveyed about ski masks and a shooting, the Court of Criminal Appeals found that the trial judge had properly denied the defendant's motion to suppress the evidence seized as a result of the stop of the vehicle. The Court of Criminal Appeals concluded that given the early hour and light traffic, the general similarity of the co-defendant's car with the description of the suspects' vehicle and the license number information, the proximity of the vehicle to the crime physically, the layout of the complex which had only one route in and out, and the fast response of the police, led to the conclusion that the officer had reasonable suspicion to initiate a brief investigatory stop of the defendant's vehicle.

The defendant also argued that asking the occupants of the car to step out constituted a search of the car that was prohibited by the 4th Amendment. In answer to that claim, the Court of Criminal Appeals stated that the lawful stop authorizes officers, as a matter of course, to require drivers to exit their vehicles. In the present case, the Court of Criminal Appeals noted that the officers responded to a call regarding a robbery in which a firearm had been used, so there was a reasonable particularized suspicion that the occupants might be armed. As a part of the investigatory stop, the court found that the officer could ask the occupants of the car to step out without running afoul of the 4th Amendment. Upon the suspects exiting the vehicle, the ski mask and wallet became visible within the plain view doctrine. Additionally, by the time the occupants exited the vehicle, the officer had significant additional information in connection with the offenses.

State v. McKissack, 39 TAM 38-22 (Tenn. Cr. App. 06-04-14)

STOP OF VEHICLE: OFFICERS PASSING BY BLACK PICKUP TRUCK WHICH MET DESCRIPTION SUPPLIED BY 911 DISPATCHER COUPLED WITH FACT THAT THE PICKUP TRUCK IMMEDIATELY

ACCELERATED PROVIDED PROPER REASONABLE SUSPICION AS BASIS FOR INVESTIGATORY STOP OF DEFENDANT'S VEHICLE

HELD: The trial court properly denied the defendant's motion to suppress evidence obtained as a result of a stop of the defendant's vehicle. The officer had testified that the 911 dispatcher gave him a description of a black pickup with a possible drunk driver. The officer noted that as he passed the vehicle meeting the description, he simultaneously heard the vehicle accelerate, which caused the officer to activate his emergency blue lights and follow the vehicle in an attempt to get it to pull over.

The Court of Criminal Appeals found that based upon the dispatcher's description of the defendant's vehicle and the defendant's behavior when her vehicle passed the officer's patrol car, the totality of the circumstances supported a finding of the trial court that the officer had specific and articulable facts sufficient to arise to the level of reasonable suspicion as the basis for an investigatory stop of the defendant's vehicle.

State v. Wellington, 39 TAM 40-29 (Tenn. Cr. App. 06-09-14)

TRAFFIC STOP: OFFICER FOUND TO HAVE REASONABLE SUSPICION FOR TRAFFIC STOP AFTER OBSERVING LEGS HANGING OUT OF THE CAR WINDOW FROM THE KNEES DOWN

FACTS: The defendant maintained that the trial court had erred when it failed to suppress the results of the traffic stop, contending that reasonable suspicion did not exist to support the traffic stop because hanging one's legs from the knees down outside of a car window is not a prohibited offense.

HELD: The court found that the initiation of the investigatory stop by the police officer was based upon reasonable suspicion, supported by specific and articulable facts that a criminal offense has been or is about to be committed, based upon the totality of the circumstances in this case.

The court noted that T.C.A. § 55-9-603(a)(1) states that no person shall operate a motor vehicle on any highway unless all passengers four years of age and older are restrained by a safety belt, the offense classified as a Class C misdemeanor. The court noted that prior case law states that an officer's observation of a violation of the statute creates probable cause to

justify a traffic stop.

The court noted that the officer had stopped the defendant's vehicle when he observed the defendant hanging both of his legs out of the window. The officer believed the defendant was in violation of the seatbelt law because he could not see the defendant's upper body and believed the seatbelt could not be properly fastened when the defendant was reclining in such a manner. The defendant argued that the officer's testimony was not credible because the report did not state anything about a seatbelt law violation but only that the defendant's legs were hanging out of the window, which defendant maintained was not an offense of applicable law. The court distinguished the case of State v. Jonathan Frederick Walker (Tenn. Cr. App. 09-21-09) where the court found that an officer lacked reasonable suspicion or probable cause to initiate a traffic stop based upon a suspected seatbelt violation, when the officer's headlights illuminated the interior of the defendant's vehicle. In Walker, the trial court simply found that the officer's testimony was not credible with regard to his ability to determine under those facts that the defendant had not fastened his seatbelt. The Court of Criminal Appeals found that in the present case, the trial court had credited the testimony of the officer unlike the Walker case where the trial court had not credited the testimony of the officer.

PRACTICE POINT: The reference to these cases regarding seatbelts is good as a reminder to us that we are still to closely evaluate officer testimony in regard to their ability to observe so called seatbelt violations. The lighting conditions, the purported perspective of the officer, and many other considerations can go into the court's assessing whether or not the officer had a good basis for stopping the vehicle. It is important for general sessions judges to carefully consider the totality of the proof and whether or not there is a stop based upon reasonable suspicion.

State v. Phifer, 39 TAM 52-27 (Tenn. Cr. App. 09-23-14)

**VALIDITY OF SEARCH WARRANT: DEFENDANT'S
ARGUMENT THAT THE SEARCH WARRANT WAS
FACIALLY INVALID BECAUSE IT DID NOT
CONTAIN THE WORD "PROMPTLY" FOUND TO BE
WITHOUT MERIT**

FACTS: The defendant argued that the search warrant was facially invalid in this case involving possession of cocaine with intent to sell based on the fact that the search warrant did not contain the word “promptly.” The defendant argued that because TRCP 41(c)(2)(B) states that the search warrant shall command the law enforcement officer to search promptly the person or place named,” that the warrant in this case was invalid. The state responded that the requirement that the search warrant be returned within five (5) days is indication that law enforcement must act with promptness. The trial court denied the motion, finding that the warrant was issued and executed within five (5) days and returned within five (5) days and that suffices under the law.

HELD: The Court of Criminal Appeals found that the defendant’s argument was without merit and that the search warrant was not facially invalid. The court noted that Tennessee Rules of Criminal Procedure 41 imposed procedural safeguards which were intended to secure the citizens of the state of Tennessee against carelessness and abuse in the issuance and execution of search warrants. The court noted that Rule 41 (c) commanded law enforcement to search promptly the person or place named and to seize the specified property or person. The court also noted that Rule 41 (e)(3) requires that the warrant must be executed within five (5) days of its authorization, and Rule 41 (f) requires that the executing officer “promptly” return a written inventory of the items seized. The court noted that the search warrant in this case was issued and executed on the same date, being March 16, 2011. The search warrant also ordered the executing officer to return all items seized within five (5) days.

The Court of Criminal Appeals noted its review of Rule 41 did not reveal a requirement that the term “promptly” must be used in a search warrant in order for the search warrant to be valid. The court noted that the purpose of the Rule is to protect against warrants becoming stale. The Court of Criminal Appeals stated that it agreed that the requirement that the search warrant be executed within five (5) days and the requirement that the officer return the written inventory insures that officers act promptly in executing a warrant once a magistrate has found probable cause. The court concluded that these requirements included in the search warrant effectively “command” the officer to act “promptly” in compliance with Rule 41(c)(2)(B).

State v. Tucker, 39 TAM 51-34 (Tenn. Cr. App. 09-09-14)

WARRANTLESS INSTALLATION OF GPS TRACKING DEVICE: PLACEMENT OF GPS TRACKING DEVICE ON DEFENDANT’S VEHICLE CONSTITUTES “SEARCH” FOR PURPOSES OF THE 4TH AMENDMENT, AND EVIDENCE MUST BE EXCLUDED BECAUSE PROBABLE CAUSE TO ARREST THE DEFENDANT WAS NOT GENERATED FROM A MEANS INDEPENDENT OF THE CONSTITUTIONAL VIOLATION

FACTS: Metro police officers attached a GPS device to the defendant’s vehicle without obtaining a search warrant.

HELD: Relying upon the United States Supreme Court recent decision of United States v. Jones, 132 S.Ct. 945 (2012), the Court of Criminal Appeals concluded that the use of the GPS device in this case constituted a search and because officers conducted a search without a warrant, the evidence obtained from the search must be excluded unless the search falls within one of the exceptions to the warrant requirement. The court found that none of the exceptions applied to justify the warrantless use of the GPS device, including: 1) consent to search; 2) search incident to arrest; 3) plain view; 4) stop and frisk; 5) hot pursuit; 6) search under exigent circumstances.

The State of Tennessee asked the court to adopt the “good faith” exception to the exclusionary rule to find that the search was constitutional. The Court of Criminal Appeals noted that the Tennessee Supreme Court had yet to recognize “good faith” as an exception to the exclusionary rule and that the court did not believe that it was their role to do so in this case. The court therefore found that the trial court’s reasoning allowing the search was incorrect and that the search was unlawful.

The court examined if there was any independent justification for the conviction such as the confession given by the defendant after the search had been conducted. The Court of Criminal Appeals concluded that the defendant’s confession was not sufficiently attenuated from the illegal search. 1)The court found that the temporal proximity of the arrest to the confession weighed in favor of the suppression because the time from the arrest to the statement was less than three hours. 2) The court did find that the defendant was aware of his right against self incrimination which weighed slightly against the suppression of the statement. 3) The third factor weighed in favor of suppression because there is no evidence that the defendant spoke with anyone before giving his statements. 4) The fourth

factor weighed slightly in favor of attenuation as there was nothing in the record to suggest that the officers in the case were attempting to purposefully violate the defendant's 4th amendment rights rather than mistakenly believing they had probable cause to arrest the defendant. As a conclusion to all the factors, the court did conclude that the defendant's confession was not attenuated from the illegal search and must be suppressed.

State v. Phifer, 39 TAM 52-27 (Tenn. Cr. App. 09-23-14)

WIRETAPPING: NO ERROR BY TRIAL JUDGE IN DENYING MOTION TO SUPPRESS AS THE DETECTIVE'S APPLICATION FOR WIRETAP INCLUDED A COMPREHENSIVE EXPLANATION OF INVESTIGATIVE TECHNIQUES WHICH HAD EITHER BEEN TRIED WITHOUT SUCCESS OR REJECTED AS UNLIKELY TO YIELD SUCCESS

HELD: The trial court correctly concluded that the state had made the required showing of necessity in its application for wiretaps. The court noted that the detective's application for the wiretapping contained nearly ten pages of information on the variety of investigative techniques or why those techniques had either been unsuccessful previously or would not be successful if utilized. The detective had noted that the use of physical or video surveillance would be unlikely to yield information regarding each individual's role within the drug conspiracy and that physical surveillance would carry with it the risk of detection that could threaten the entire investigation. The detective also explained that placement of undercover officers or direct questioning of the defendants would be unlikely to yield success in exposing the conspiracy.

The court also noted that the comprehensive explanation provided a strong basis for the issuance of the wiretapping order and that the detective need not have shown that wiretaps were the absolute last resort, only that most common investigative techniques had either been tried or seriously considered before resort to the wiretap applications in the case.

State v. Darnell, 40 TAM 2-21 (Tenn. Cr. App. 11-20-14)

SENTENCING

JUDICIAL DIVERSION: DETERRENCE VALUE TO ACCUSED IS LEGITIMATE FACTOR FOR TRIAL COURT TO CONSIDER

FACTS: In a case of arson, the trial judge properly denied the defendant's request for judicial diversion. The court noted that the trial court did not deny diversion solely because the crime was arson. The "circumstances of the offense" was not the only factor in the trial court's determination. The Court of Criminal Appeals noted that the trial judge looked not only at a "general risk of harm" but also the specific risk of harm to responding firefighters due to the conduct of the defendant.

In discussing the deterrence value factor, the trial court focused on the deterrence value to the defendant rather than deterrence value to others. The trial judge expressed concern over the way the defendant had set up the fire which showed a well thought out mind set rather than a person simply impaired through alcohol and drugs. The Court of Criminal Appeals noted that the deterrence value to the specific accused is a legitimate factor for a trial court to consider.

State v. King, 39 TAM 34-27 (Tenn. Cr. App. 05-15-14)

PLEA AGREEMENT: NO CONTRACT EXISTED BETWEEN DEFENDANT AND STATE BECAUSE THE STATE HAD REVOKED ITS PLEA OFFER AT THE TIME THE DEFENDANT ACCEPTED THE PLEA AGREEMENT IN WRITING

HELD: The Court of Criminal Appeals found that in the present case, involving the rape of a child, no plea agreement ever existed between the parties. The court noted that although the defendant signed the paperwork to enter into the guilty plea pursuant to an offer made by the state to the

defendant, the offer had been withdrawn by the time the defendant signed the paperwork. The Court of Criminal Appeals found that the trial court correctly concluded that because the offer “had not been accepted at the time it was revoked,” there was no contract between the defendant and the state and therefore the state did not breach the agreement.

State v. Bufford, 39 TAM 35-18 (Tenn. Cr. App. 05-20-14)

SEXUAL EXPLOITATION OF A MINOR

SOLICITING SEXUAL EXPLOITATION OF A MINOR: EVIDENCE SUFFICIENT TO SHOW REASONABLE FACT FINDER THAT THE DEFENDANT THROUGH ORAL COMMUNICATION INTENTIONALLY COMMANDED OR INDUCED VICTIM TO REVEAL HER BREASTS TO HIM ON TWO DIFFERENT OCCASIONS

HELD: In a case in which the defendant was convicted of two counts of soliciting sexual exploitation of a minor, the Court of Criminal Appeals found that the facts established that the defendant had exploited the twelve year old victim, daughter of his girlfriend, by giving the victim money if she allowed him to look at her in her bra and underwear, followed by which he encouraged the victim to be even more revealing in her disrobing by paying more money if she wore more provocative undergarments and if she took off additional clothing.

The Court of Criminal Appeals found that a reasonable jury(fact finder) could have found that the defendant, through oral communication, intentionally commanded, hired, persuaded, induced, or caused the victim to reveal her breasts to him on two different occasions.

State v. Ritchie, 39 TAM 35-21 (Tenn. Cr. App. 05-19-14)

SEX OFFENDER REGISTRY

SEX OFFENDER REGISTRY: OUT OF STATE SEXUAL

OFFENDER WHO IS REQUIRED TO REGISTER IN MICHIGAN IS SUBJECT TO THE REQUIREMENTS OF THE TENNESSEE SEXUAL OFFENDER REGISTRATION ACT UPON HAVING SUFFICIENT CONTACT WITH THE STATE OF TENNESSEE

FACTS: The defendant was charged with violating the sexual offender registration act by establishing his primary residence within 1000 feet of a licensed daycare facility. Upon motion of the defendant, the trial court of Tennessee dismissed the charge, holding that the defendant, who had been convicted in Michigan in 2008 of criminal sexual conduct in the third degree, did not meet the statutory definition of sexual offender.

HELD: An out of state sexual offender required to register in Michigan is subject to the requirements of the Tennessee Sexual Registration Act upon having sufficient contact with the state of Tennessee. The court noted that T.C.A. § 40-39-203 requires the defendant to register in Tennessee because the defendant was required to register in Michigan where the offense was committed. When the defendant establishes sufficient contacts with Tennessee by establishing his residence in the state, the requirements of registration act were triggered.

State v. Harbin, 39 TAM 45-19 (Tenn. Cr. App. 10-15-14)

VEHICULAR HOMICIDE BY RECKLESS CONDUCT

VEHICULAR HOMICIDE AND RECKLESS

ENDANGERMENT: ELEMENTS OF CRIMES WERE SATISFIED BY DEFENDANT'S PASSING OF A VEHICLE ON A HILL, AFTER DARK, AND IN NO PASSING ZONE, ALL OF WHICH POSED A SUBSTANTIAL RISK TO THE SAFETY OF OTHERS

HELD: The Court of Criminal Appeals found that the elements of the vehicular homicide by reckless conduct and reckless endangerment with a

deadly weapon were sufficiently met by the proof of the defendant's reckless conduct. The court found that the defendant's actions were reckless beyond a reasonable doubt due to the fact that the defendant attempted to pass another vehicle on a hill, after dark, and in a no passing zone. The no passing zone was indicated by double yellow line and the passing of the other vehicle posed a substantial risk to the safety of others, especially those traveling in an opposite direction. The court noted that the risk is only heightened when the road is going up a blind hill, when there is no chance to see any oncoming traffic until it is too late. The court also found that it was appropriate for the jury (fact-finder) to reject the defendant's defense of sudden emergency in that the defendant's actions were a conscious decision to avoid getting stuck behind a slower moving vehicle rather than an instantaneous response to another vehicle pulling out suddenly and dangerously close to him.

State v. Krasovic, 39 TAM 41-14 (Tenn. Cr. App. 06-26-14)

VENUE

VENUE: EVIDENCE ESTABLISHED THAT OFFENSES OCCURRED IN MADISON COUNTY, TENNESSEE BY A PREPONDERANCE OF THE EVIDENCE

HELD: In this case involving sexual crimes against a child, the Court of Criminal Appeals noted that venue is not an element of the offense which must be proved beyond a reasonable doubt; it is a jurisdictional fact which must be proved by a preponderance of the evidence.

The Court of Criminal Appeals noted that the victim had testified that at the time of the offense she was living at "407 Burkett" in Jackson with her mother and that the abuse had occurred at the home on Burkett Street. Another witness testified that she was employed as a guidance counselor by the Jackson-Madison County School System where the child was a student at the time. Dr. Lisa Piercey testified that she examined the child at the Madison County Child Advocacy Center for the alleged offense.

The Court of Criminal Appeals found that all of this testimony taken together was sufficient to prove venue by a preponderance of the evidence, and that the jury could reasonably conclude from the entire proof that the

offenses occurred in Madison County.

PRACTICE POINT: Venue must be proved by a preponderance of the evidence based upon the totality of the entire proof.

State v. Henderson, 39 TAM 47-18 (Tenn. Cr. App. 07-28-14)

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Judge Stokes was elected Judge of the Sevier County General Sessions and Juvenile Court for an eight year term which began on September 1, 1998. He was re-elected for a third eight-year term which began September 1, 2014. Prior to his

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