

**TENNESSEE GENERAL SESSIONS JUDGES**  
**CONFERENCE**

**OCTOBER 2023**

**Criminal Law and Ethics Update**  
**Memphis, Tennessee**

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# **CRIMINAL LAW UPDATE**

## **OCTOBER 2023**

### **BURDEN OF PROOF**

**BURDEN OF PROOF: TRIAL COURT ERRED IN RULING (IN A CASE IN WHICH THE DEFENDANT WAS CHARGED WITH SECOND DEGREE MURDER) THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KNEW THE SUBSTANCE BEING UNLAWFULLY DISTRIBUTED OR DELIVERED WAS FENTANYL OR CARFENTANIL**

**FACTS:** The defendant was charged with second degree murder through the delivery of Fentanyl pursuant to TCA 39-13-210. In a proposed jury instruction, the trial court held that the state must prove beyond a reasonable doubt that the defendant knew the substance being lawfully distributed or delivered was Fentanyl or Carfentanil. The state had disagreed, arguing that the statute required only that the defendant act recklessly in distributing or delivering Fentanyl. Specifically in instructing the jury, the trial court had added this phrase to the pattern jury instruction:

“In addition to the definitions hereinafter set forth for intentionally, knowingly or recklessly, the state must have proven beyond a reasonable doubt from all the evidence in the case that at the time of the alleged delivery of the subject pill to the victim, the defendant knew the pill contained or could have contained Fentanyl.”

**HELD:** The Court of Criminal Appeals held that Tennessee Code Annotated 39-13-210(a)(3) does not require the state to prove that the defendant knew that the substance being delivered was Fentanyl or Carfentanil. The Court of Criminal Appeals stated that instead, the state may satisfy the elements of proof by proving beyond a reasonable doubt that (1) the defendant disregarded a substantial and unjustifiable risk that the substance delivered to the user was Fentanyl or Carfentanil; and (2) the defendant's disregard of that risk constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint.

The court therefore vacated the trial court's order and remanded the case to the trial court for further proceedings consistent with the opinion.

State v. Hollon, 671 S.W. 3d 561 (Tenn. Cr. App. 3/14/23)

## **CONFESSION**

**FAILURE TO READ DEFENDANT HER MIRANDA WARNINGS: DEFENDANT'S CLAIM THAT HER SECOND STATEMENT TO LAW ENFORCEMENT SHOULD HAVE BEEN SUPPRESSED DUE TO FAILURE TO READ HER HER MIRANDA RIGHTS FOUND NOT TO BE WELL TAKEN DUE TO THE FACT THAT THE PROOF ESTABLISHED THAT THE DEFENDANT WAS NOT IN CUSTODY DURING THE QUESTIONING**

**FACTS:** In a case in which the defendant was convicted of first-degree murder among other charges, the defendant argued that the trial court had erred in failing to grant her motion to suppress. Specifically, the defendant maintained that her second statement that was given to Special Agent

Davidson, and in which she acknowledged knowing the location of the victim's drugs and money, should have been suppressed because it occurred at the same location as her first statement and dealt with the same subject matter and included questions that were different from her first statement. The defendant asserted that since no Miranda warnings were given for that interrogation, said statement should be suppressed.

**HELD:** The Court of Criminal Appeals found that the defendant was not in custody for purposes of Miranda and the defendant had provided no proof to show otherwise.

The court noted that the Miranda principle only applies to the questioning of an individual who has been taken into custody or otherwise deprived of his or her freedom by the authorities in a significant way. Accordingly, the CCA noted that Miranda warnings “are only required when a suspect is (1) in custody and (2) subjected to questioning or its functional equivalent.”

The court noted that the test for determining if an individual is in custody for Miranda purposes is whether under the totality of the circumstances a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with the formal arrest.

The court noted that the defendant bears the initial burden of proving custody for the purposes of Miranda before the burden shifts to the state to prove the voluntariness of the statement.

The court noted in the present case the defendant failed to meet her burden of proving custody for the purposes of Miranda concerning the statement that she made to Special Agent Davidson regarding her knowledge of the whereabouts of Mr. Turner's drugs and money. At the suppression hearing, the defendant did not present any proof to support her contention that she was in custody at the time she made the statement in the lobby of the sheriff's office.

In reviewing the record as a whole, the CCA found that it was clear that the defendant was not in custody when she made the statement to Special Agent Davidson. Davidson testified that on the day of the shooting she obtained a Mirandized statement from the defendant at the sheriff's

office because the defendant may have had some useful information about the incident. Special Agent Davidson testified that three days later as she was walking through the lobby of the sheriff's office, she saw the defendant and approached her. Davidson testified that as they spoke in the lobby, the defendant "divulged that she saw money and drugs in Mr. Turner's dresser." At the suppression hearing, Davidson testified that there were other people in the lobby during her conversation with the defendant and that the conversation lasted less than five minutes.

The total facts regarding the conversation would not lead to the conclusion by a reasonable person that she would have been deprived of movement to a degree associated with the formal arrest, the Court of Criminal Appeals concluded. Therefore, the record indicated the defendant was not in custody for purposes of Miranda and the defendant provided no proof to contradict the same.

State v. Sparks (Tenn. Cr. App. 11/23/22)

**WERE THE DETECTIVE'S TACTICS IMPERMISSIBLY COERCIVE?: SIXTH CIRCUIT FINDS THAT DETECTIVE'S TACTICS IN OBTAINING CONFESSION FROM DEFENDANT DID NOT EMPLOY UNLAWFUL COERCION BECAUSE THE DETECTIVE'S THREAT TO OBTAIN A WARRANT WAS LAWFUL AND THE TOTALITY OF THE CIRCUMSTANCES INDICATED THAT THE INCRIMINATING STATEMENTS WERE MADE VOLUNTARILY**

**FACTS:** As stated by Circuit Judge Thapar of the Sixth Circuit Court of Appeals: "One October evening in 2020, a man walked into a Walgreen's in Columbus, Ohio. He was wearing dark clothes, and his pants and shoes had white stains on them. The man placed a pack of gum on the counter and

asked the clerk for cigarettes. When the clerk requested identification, the man reached into his pocket and pulled out what looked like a handgun wrapped in a blue bandana. After demanding the cash from the register, the man fled with the money and the cigarettes. He might have gotten away with it --- after all, a man of similar description had gotten away with about a dozen armed robberies in the area over the preceding months. But the robber made a crucial mistake: he left the pack of gum.”

The police tested the gum, and found the defendant’s fingerprint on it, got an arrest warrant for the defendant, and when the defendant learned of the warrant, he voluntarily went to the police station and met with Detective Todd Agee. Detective Agee questioned the defendant Jacobs about the Walgreen’s robbery and other robberies, showing him pictures and crime scenes and pointing out that the stains on the robber’s clothes in some of the pictures looked like stains presently on Jacobs’s jacket. Detective Agee also told Jacobs that his fingerprint was found on the pack of gum. “When Jacobs denied involvement in the robberies, Detective Agee highlighted the strength of the fingerprint evidence against him.” Detective also said he had a warrant written up to search his father’s home, where the defendant was living at the time, as well as the defendant’s vehicle. Detective Agee then stated:

“I’ll get a search warrant signed, and I’ll go over to your dad’s house, and I will dump everything in that house out looking for those clothes .... and I’m going to take that jacket because the stains on it match the stains on the robber’s clothes .... This is not a threat. This is not me saying something. This is what I am going to do because I have to find that evidence. I’ve got to find those guns. And I’ll do a search warrant on your dad’s house because that’s where you’re staying, and I’ll look for it. And I’ll toss the whole place until I find my evidence.”

The detective also told Jacobs that he would face a severe sentence given the number of robberies, the strength of the evidence, and the denial of responsibility. Then Detective Agee told him that things might be different if Jacobs “wanted to change his story.” Jacobs then made his first incriminating statement: “Just a minute. The weapons --- them is gone.”

The opinion points out that then Detective Agee gave Jacobs some time to think about it and left him alone for a few minutes. When he asked to call his mother and girlfriend, Detective Agee at first declined but then offered to let him use the Detective’s own phone and offered him “anything he needed to eat or drink.” Jacobs requested water which the detective gave him.

Pretrial, Jacobs moved to suppress the incriminating statements he made during the interview. The District Court granted the motion and found that Detective Agee used tactics in the interview which were impermissibly coercive, thereby rendering the defendant’s statements involuntary. The government filed an interlocutory appeal.

**HELD:** The Sixth Circuit Court of Appeals held that the defendant’s statements were not improperly coerced and found that the incriminating statements were admissible, thereby reversing the suppression order and remanding the case for further proceedings.

In reviewing the issue of coercion of his confessions, the court considered the following principles:

1. Courts have long condemned coercion of confessions, and when a defendant claims that the confession is coerced, the government must show by a preponderance of the evidence that the confession was voluntary.
2. Police action is only coercive when it overbears the accused’s will to resist, which requires three things to be true:
  - i. The police activity is objectively coercive;
  - ii. The coercion in question was sufficient to overbear the defendant’s will; and
  - iii. The defendant’s will was in fact overborne as a result of the coercive police activity.



Looking at the three prongs in regard to coercion, the court found that the defendant's confession was voluntary.

First, the court found that the detective did not engage in any objectively coercive conduct as the detective spoke in a conversational tone, offered Jacobs's food and drink, never brandished a weapon or handcuffs, and did not threaten or use violence. The court noted the interview was also relatively short and that even though Detective Agee did warn that he would obtain a warrant to search Jacobs's father's house and Jacobs's car, a threat to perform a lawful search is not objectively coercive. The court noted that all agreed that Detective Agee could have lawfully searched the house and the car.

Second, the court found that the detective's conduct wasn't sufficient to overbear Jacobs's will. The court noted that he had been given a properly issued Miranda warning which makes it less likely that police conduct will overbear a suspect's will. The court noted that Jacobs was sophisticated enough that the detective's conduct would have not overborne his will as the defendant had previous experience with the criminal justice system, was forty-three years old, had two years of college education, and wasn't drunk or otherwise impaired.

Third, the court noted that the timeline and substance of the interview suggested that the defendant confessed because of the strength of the evidence against him and the prospect of a long sentence, not because of any coercive conduct. The court noted that the detective had walked the defendant through the roughly dozen robberies he was suspected of and outlined the evidence against him, including emphasizing the defendant's fingerprint on the gum. The court noted that the defendant made his first incriminating statement after the detective discussed the likelihood of a severe sentence. The court noted that all facts suggested that the defendant's incriminating statements were not the result of police coercion, but instead attempts to mitigate the damage once he realized he couldn't avoid responsibility for his crimes.

In regard to the language used by Detective Agee the court noted that the detective's language, "although forceful," still referred to a search of the premises and not "wanton destruction of property," at his father's house. The court noted that the District Court's recasting the detective's statements

as being threats to ransack or destroy the home were not accurate as the detective never threatened anything in those terms nor did he state he would throw everything outside. The court noted that at most the detective had threatened a thorough but lawful search, even if it was “inartfully” expressed by the detective.

The court also noted that in considering the totality of the circumstances, the detective spoke with a calm demeanor and only threatened a thorough but limited search of the father’s home. The Sixth Circuit also noted that while the District Court considered a break in the interview a “tactic used to overcome Jacobs’s will,” the Sixth Circuit said that generally the opposite is true, that “incessant questioning without any breaks can support a finding of coercion.” The court also noted that while the detective at first declined to allow the defendant to call his family members, that he shortly thereafter allowed the defendant to call family members on the detective’s own phone, which was a contradictory indication to the interview being coercive.

Therefore, the court concluded that the totality of the evidence and circumstances indicated that the incriminating statements were voluntary, and the judgment of the District Court was reversed.

**PRACTICE POINT:** What a great opinion to read. The prose of Circuit Judge Thapar was enjoyable to read. I will check the internet to see if he has written any good novels.

United States of America v. Ronald Lee Jacobs, United States Court of Appeals for the Sixth Circuit, No. 22-3488 (3/28/23)

## **DEFENSE OF NECESSITY**

**DEFENSE OF NECESSITY: THE URGENCY OF THE DEFENDANT’S AVOIDING A THIRD PARTY’S USE OF A GUN AGAINST THE DEFENDANT CLEARLY OUTWEIGHED THE HARM SOUGHT**

## TO BE PREVENTED BY THE LAW (PROHIBITING DEFENDANT'S POSSESSION OF A GUN AS A CONVICTED FELON)

**FACTS:** In a case in which the defendant was convicted of being a felon in possession of a firearm along with other charges, the defendant asserted that the trial court had erred by failing to instruct the jury on the defense of "necessity", claiming that the defense of necessity was fairly raised at trial as his "entire course of conduct, based on his uncontroverted testimony at trial, demonstrated that he possessed the firearm out of necessity in order to avoid a greater harm."

**HELD:** The Court of Criminal Appeals concluded that the trial court did in fact err by failing to instruct the jury on the general defense of necessity. The CCA found that a jury could have inferred that the defendant "reasonably believed that his obtaining possession of the gun used by Mr. Armstrong was immediately necessary to avoid the imminent harm of Mr. Armstrong regaining control of the gun and continuing to use it against the defendant and that the urgency of avoiding Mr. Armstrong's use of the gun against defendant clearly outweighed the harm sought to be prevented by the law prohibiting defendant's possession of a gun as a convicted felon."

The court added that a jury could have inferred that "the necessity of defendant's possession of the gun was further established by the fact that Mr. Hawkins was shooting at (and shot) defendant as he attempted to run from the scene."

The court noted that the common law of defense of necessity is codified in TCA 39-11-609 which provides that conduct is justified if:

1. The person reasonably believes the conduct is immediately necessary to avoid imminent harm; and
2. The desirability and urgency of avoiding the harm clearly outweigh the harm sought to be prevented by the law proscribing the conduct, according to ordinary standards of reasonableness.

The court noted these two subsections contemplate “a balancing between the harm caused by the conduct constituting an offense, and the harm the defendant sought to avoid by the conduct.”

In response to the state’s claim that any error by the trial court was harmless beyond a reasonable doubt, the court noted that the defendant testified that he was being shot at as he ran from the scene and that he was afraid and panicking because he thought Mr. Armstrong and Mr. Hawkins were still after him. The court stated that a reasonable jury could have concluded “that defendant was still acting out of necessity as he possessed the gun while he ran from the scene and that he dispossessed himself of the gun by placing it inside a trash can within minutes of the shooting.”

State v. Simpson (Tenn. Cr. App. 10/31/22)

## **DUI**

### **DUI STOP: FAILURE OF STATE TO PRESERVE VIDEO FOOTAGE OF THE STOP AND ARREST DID NOT PREVENT THE DEFENDANT FROM RECEIVING A FUNDAMENTALLY FAIR TRIAL AND THE DEFENDANT EXPERIENCED NO MEASURABLE DISADVANTAGE BECAUSE OF THE MISSING RECORDING**

**FACTS:** In a case in which the defendant was convicted of DUI third offense, Officer Kimsey on 12/14/17 observed a vehicle cross center line several times and drift back into the lane of travel. The vehicle was stopped approximately a mile down the road and contact was made with the defendant who smelled strongly of an intoxicating substance. The defendant performed poorly on field sobriety tests and he was charged with a DUI offense.

The defendant asserted that the state was grossly negligent for failure to preserve the video footage of the traffic stop and that the trial court erred when it denied the defendant's motion to dismiss the case for denial of his fundamental right to a fair trial.

**HELD:** The Court of Criminal Appeals concluded that, under the facts and circumstances of the case, the defendant received a fundamentally fair trial and experienced no measurable disadvantage because of the missing recording.

The court went through the Ferguson factors to determine whether the state had a duty to preserve the evidence. The court found that the state did have a duty to preserve all evidence including the video of the traffic stop based upon the fact that it could have included "potentially exculpatory evidence," and the defendant may have been able to use the video to impeach Officer Kimsey during cross-examination.

The court then proceeded to the three-prong factors of Ferguson to determine whether or not the trial court should have dismissed the case as the consequence of failure to preserve the evidence and whether or not the jury instruction regarding the missing evidence was a sufficient remedy for the Ferguson problem.

1. The court concluded that the conduct was simple negligence as opposed to gross negligence because even according to the defendant's motion the recording was destroyed due to corrupted software.
2. The court held that the destroyed evidence was not extremely significant, finding that the officer's testimony about the defendant's driving, the defendant's appearance, and the results of the field sobriety tests, along with the defendant's admission of drinking 5-6 beers, was substantial evidence against the defendant regardless of the loss of the video recording. The results of a blood test also indicated a significant level of alcohol in the defendant's blood.
3. In regard to the sufficiency of the evidence to support the conviction, the court noted that the defendant's blood alcohol content was .177, there were visible indicators of the defendant's intoxication, and the defendant's

admission to drinking 5-6 beers and his performance on field sobriety tests presented sufficient evidence for the conviction as a matter of law.

The Court of Criminal Appeals therefore found that the remedy that the trial court chose, giving an instruction to the jury about the missing recording, was sufficient to address the issue as the defendant otherwise received a fundamentally fair trial and had experienced no measurable disadvantage because of the missing recording.

**PRACTICE POINT**: This is a good case to review regarding the Ferguson factors as the court addressed all of the factors point by point and explained its findings on each point.

State v. Bowen (Tenn. Cr. App. 4/14/23)

**STATUTE OF LIMITATIONS: EVEN THOUGH THE GRAND JURY INDICTED THE DEFENDANT FOR DUI ON 1/7/19 AND THE DUI OFFENSE OCCURRED ON 12/14/17, MORE THAN TWELVE MONTHS AFTER THE OFFENSE OCCURRED, THE STATE HAD TIMELY COMMENCED PROSECUTION WITHIN THE STATUTE OF LIMITATIONS**

**FACTS**: The defendant was charged with DUI third offense on 12/14/17. A warrant for driving under the influence was issued on 12/15/17. The preliminary hearing was held in Sessions Court on 8/7/2018, the date that the case was bound over to the grand jury. The grand jury indictment was filed on 1/7/19.

The defendant asserted that he was indicted outside the statute of limitations for misdemeanor offenses and that the trial court should have dismissed the DUI charge against him.

**HELD:** The Court of Criminal Appeals held that the defendant’s motion to dismiss for failure to comply with the statute of limitations was not well taken due to the fact that the state had timely commenced prosecution within the statute of limitations. The court noted specifically that the offense occurred on 12/14/17 and that the DUI charge was issued on 12/15/17. The court stated that the issuing of a warrant is one of the methods for commencement of a prosecution provided for in TCA 40-2-104. The defendant was ultimately convicted of “driving under the influence, per se” and the warrant did not use the language “per se”, but the Court of Criminal Appeals found that using the term “driving under the influence” was sufficient to commence the state’s prosecution of the offense. The court found that the arrest warrant charging the defendant with driving under the influence was sufficient notice of the charge.

The court also noted that the defendant had appeared in court for a preliminary hearing on 8/7/2018, the date it was bound over to the grand jury, and that the grand jury subsequently filed its indictment on 1/7/19. The court noted that even though the date of the grand jury indictment was more than twelve months after the offense occurred the timing of the preliminary hearing and the grand jury proceedings were indeed timely pursuant to TCA 40-2-104.

**PRACTICE POINT:** This is put in the outline just to note these are rather routine events in Sessions Court in which an offense occurs and a warrant is filed the same day or the next day, followed by a preliminary hearing months into the future, followed by an indictment which can be a few months later and subsequently a trial on the merits.

State v. Bowen (Tenn. Cr. App. 4/14/23)

## **EVIDENCE**

### **AUTHENTICITY OF FACEBOOK COMMUNICATIONS OF DEFENDANT: FACEBOOK MESSENGER ACCOUNT BORE DEFENDANT'S NAME AND PHOTOGRAPHS AND THE CONTENT OF THE MESSAGES CONTAINED DETAILS SPECIFIC TO THE DEFENDANT, ALL OF WHICH WERE SUFFICIENT TO ESTABLISH DEFENDANT AUTHORED THE FACEBOOK MESSAGES**

**FACTS:** In a case involving felony murder and other charges, the defendant maintained that the trial court had erred by admitting Facebook Messenger communications into evidence, arguing that the state had failed to properly authenticate the messages because there was no testimony from witnesses with personal knowledge that the account belonged to the defendant, nor were there distinctive characteristics as to establish the authenticity of the account.

**HELD:** The Court of Criminal Appeals concluded that the circumstances were sufficient to establish that defendant authored the Facebook messages as the Facebook Messenger account bore the defendant's name and photographs, the content of the messages contains details specific to the defendant, such as his cell phone number, and the messages referenced people associated with the defendant, including the victim. The court also noted that Amanda Foster testified that she had communicated with defendant through the Facebook Messenger account and that she had no reason to believe there was anyone other than the defendant communicating with her. Foster had further testified that she spoke to the defendant in person and the defendant acknowledged conversations that they had through the messenger account.



The Court of Criminal Appeals noted that the state is “not required to affirmatively prove that a defendant was the author of a social media communication to authenticate it,” and the challenge to the authenticity goes to the weight of the evidence and not its admissibility.

The court noted that in State v. Linzy (Tenn. Cr. App. 8/18/17), a panel of the Court of Criminal Appeals stated that “evidence from social media and emails was authenticated when the prosecution offered corroborating circumstantial evidence.” The corroborating circumstantial evidence consisted of a witness who knew the defendant’s Twitter account, a witness who knew the victim’s Twitter account, and witnesses who had seen certain photographs on the defendant’s and the victim’s Facebook pages. The court had noted in the case that by examining cases from other jurisdictions, the CCA panel had concluded that the defendant’s challenge to the authentication goes to the weight of the evidence and not its admissibility.

The court noted that the trial court’s admission of the testimony in the present case was consistent with prior decisions of the court.

State v. Meadows (Tenn. 2/28/23)

**BEST EVIDENCE RULE: THE BEST EVIDENCE RULE IS A RULE OF PREFERENCE RATHER THAN EXCLUSION, AND THE RULE DOES NOT EXCLUDE EVIDENCE BUT RATHER REQUIRES THE INTRODUCTION OF THE BEST AVAILABLE FORM OF THE EVIDENCE**

**FACTS:** In a case in which the defendant was convicted of aggravated sexual battery, the defendant contended that the trial court abused its discretion in admitting testimony that a police investigator saw search

history for pornographic material on the defendant's cell phone, the defendant claiming that the evidence violated the best evidence rule.

**HELD:** The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in admitting the testimony of the police investigator that he saw search history for pornographic material on the defendant's cell phone. The Court of Criminal Appeals reached the decision based upon the following findings:

1. The CCA noted that Tennessee Rule of Evidence 1002, known as the best evidence rule, provides that to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in the rules of evidence. The court noted that the best evidence rule is a rule of preference rather than exclusion. The rule does not exclude evidence but rather requires the introduction of the best available form of the evidence. The court further pointed out that it was not clear from the record why the cell phone was not available at trial, but the court noted that the defendant himself had acknowledged that he had pornography on his cell phone, testifying that he would not dispute the investigator's testimony that he had seen a search history for pornographic materials. The trial court had found the testimony about the pornographic search history as admissible as corroborating evidence that would support the allegation that the touching by the defendant of the victim was for the purpose of sexual gratification. The CCA also noted that as factors in its decision to admit the evidence that the victim was consistent in his accounts to the various interviewers, was forthright with the trial court, and did not appear to the trial court to exhibit behavioral concerns.

2. The court also noted that the defense counsel did not object on the basis of hearsay but only on the basis of the best evidence rule and therefore the court would consider the issue of violation of the hearsay rule as having been waived by the defendant.

3. The other corroborating factors pointed out by the trial court as mentioned above also substantiated the trial court's basis for admitting the proof.

Based upon all of these factors, Court of Criminal Appeals found that the trial court did not abuse its discretion in admitting the testimony and overruled the best evidence objection.

State v. Morgan (Tenn. Cr. App. 1/12/23)

**CHAIN OF CUSTODY AND AUTHENTICATION OF EVIDENCE FROM DEFENDANT'S CELL PHONE: TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THE STATE SUFFICIENTLY ESTABLISHED CHAIN OF CUSTODY OF CELL PHONE AND AUTHENTICATION OF EVIDENCE EXTRACTED THEREFROM, SPECIFICALLY FINDING THAT THE REPORT OF A FORMER OFFICER HAD BEEN SUFFICIENTLY CORROBORATED BY A CURRENT OFFICER**

**FACTS:** At a jury-out hearing, Investigator Day testified that he saw the cell phone in the defendant's vehicle on the day of the crimes and instructed other officers to seize it. Officer Sandborn had brought the telephone to Investigator Day, following which former Officer Smith came and got the phone off of Day's desk. Investigator Day testified that he believed Smith had taken the phone to his desk which was in the same room and that the cell phone never left the office.

Officer Morris testified that she received the Cellebrite data extracted from the defendant's cell phone by Officer Smith Morris and testified that the data stays the same and could not be manipulated. She concluded that based on her training and expertise, Smith's Cellebrite report was a fair and accurate representation of the data extracted from the defendant's cell phone. Officer Morris admitted on cross-examination that she began working on the case only two weeks prior to the trial and

that she had not been involved in the original data extraction performed by Officer Smith.

The trial court found that the cell phone chain of custody had been properly established and that the data extraction was sufficiently authenticated by the state through the testimony of Officer Morris.

**HELD:** The Court of Criminal Appeals held that the trial court did not abuse its discretion in determining that the chain of custody for the cell phone was sufficiently established and also finding that the trial court did not abuse its discretion by finding that the cell phone extraction report had been properly authenticated by Officer Morris' testimony.

(1) In regard to the chain of custody, CCA concluded that Investigator Day had seen the telephone and instructed other officers to collect the telephone. Officer Sandborn delivered the telephone to Day at his office in an unmarked envelope, which Day said looked to be the same cell phone as he had seen in the defendant's vehicle. Day gave the cell phone to Smith to process the data through a data extraction, and Smith returned the cell phone to Day after completing the extraction with the phone never leaving the office.

Therefore, the CCA found that there was a sufficient chain of custody for the admission of the cell phone into evidence.

(2) In regard to authentication of the Cellebrite data extraction report, the court noted that Tennessee Rule of Evidence 901 provides that authentication of evidence is a condition precedent to its admissibility and that authentication is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

The CCA noted that Rule 901 can be established in several ways including by (1) testimony by a witness with knowledge of the facts; (2) the distinctive characteristics and the like, including appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with other circumstances; (3) The process or system, with

evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

The CCA found that the trial court did not abuse its discretion in finding the cell phone extraction report being sufficiently authenticated even though Officer Smith was not there to testify about his results. The court noted that Officer Morris' testimony established that the software produced to report could not be manipulated and that the report generated by Smith was an accurate report as confirmed by Morris as her extraction of data matched that of the report of Officer Smith and contained the same number of entries as the data extraction report produced by Officer Smith and by Officer Morris.

**PRACTICE POINT:** The trial court has discretion in accepting evidence and making conclusions, and Tennessee Rule of Evidence 901 provides several avenues for the same which in this case came directly from (1) testimony of a witness with knowledge (Officer Morris); (2) the distinctive characteristics of the evidence including data extracted from cell phones and (3) evidence of the process or system, whereby the process or system is explained and the result or production of the evidence tends to reflect an accurate result.

State v. Holmes (Tenn. Cr. App. 11/7/22)

**EVIDENCE OF OTHER CRIMES OR WRONGS: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY OF THE DEFENDANT'S DRIVING TO THE HOME OF MS. RAMOS IN MORRISTOWN AND FIRING FIVE GUNSHOTS AT HER AFTER PREVIOUSLY HAVING DRIVEN TO THE HOME OF MS. RAMOS' MOTHER AND KILLING HER BY SHOOTING HER IN THE HEAD, AS A SUBSEQUENT BAD ACT IN A DIFFERENT COUNTY THAN THE MURDER VENUE WAS SUFFICIENTLY RELATED TO THE MURDER TO BE ADMISSIBLE UNDER THE RULES OF EVIDENCE**

**FACTS:** The facts were succinctly stated in the court record as follows:

“This case arises out of the October 25, 2014, shooting death of Bennie Bowlin, who was the mother of Kathy Ramos, a woman with whom the Defendant had an extramarital affair. At trial, the State presented evidence to show that the Defendant, whose proposal that Ms. Ramos enter into a polygamous marriage with him had been rejected by both his wife and Ms. Ramos, became angry and jealous at the thought of Ms. Ramos with other men. The defendant acquired a gun and ammunition, told his wife of his intention to kill either Ms. Ramos or someone that Ms. Ramos loved, drove to the victim’s Tuggle Hill Road home in Rogersville, and shot the victim in the head when she answered the door. He then drove to Ms. Ramos’ Lincoln Avenue home in Morristown and fired five gunshots through her bedroom window, striking Ms. Ramos once in the leg. Afterward, the defendant drove to his Morristown home, where he was arrested by the police. The defendant contended that the trial court abused its discretion in admitting Rule 404(b) evidence related to his alleged attempt to murder Ms. Ramos, as the defendant maintained that the Morristown shooting of Ms. Ramos was not relevant to show his intent as to the killing of the victim and that, even if relevant, its probative value is outweighed by the danger of unfair prejudice.

**HELD:** The Court of Criminal Appeals held that the trial court did not abuse its discretion in admitting the evidence of the shooting of Ms. Ramos, as the Court of Criminal Appeals agreed with the trial court that “the intertwined evidence in the two cases was relevant and admissible as a part of a common scheme or plan to show the defendant’s intent in the victim’s killing. The court noted that the evidence was relevant and admissible to explain the defendant’s motive and to help the state establish the defendant’s identity as the killer.

The Court of Criminal Appeals also stated that it agreed with the trial court that the probative value of such evidence was not outweighed by the danger of unfair prejudice.

The court noted that Tennessee Rule of Evidence 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait, but it may however be admissible for other purposes. The court noted that the conditions which must be satisfied for allowing such evidence are as follows: (1) the court must hold a hearing outside the jury's presence upon request; (2) the court must determine that material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; (3) the court must find proof of the other crime, wrong or act to be clear and convincing; and (4) the court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Cases in which other “bad act” evidence of accused will be admissible include those in which the evidence is introduced to show motive, intent, guilty knowledge, identity, absence of mistake or accident, a common scheme or plan, completion of the story, opportunity, and preparation.

The Court of Criminal Appeals noted that the trial court conducted a pretrial hearing, at which time the state introduced evidence about the connection between the Hawkins and Hamblen County shootings through the testimony of several officers. The trial court properly found that the Hamblen and Hawkins County shootings were part of a common plan or scheme and that the “extremely interconnected” and “largely inseparable” evidence in the two cases was relevant to show the defendant’s intent. The court found that the probative value outweighed the danger of unfair prejudice to the defendant.

State v. Jackson (Tenn. Cr. App. 4/13/23)

**EVIDENTIARY ISSUES ARISING IN RAPE OR SEX ABUSE CASES:  
COMMON ISSUES IN SEX ABUSE CASES OCCURRING IN THE  
PRESENT CASE INCLUDED (1) STATEMENTS MADE BY  
VICTIM TO THIRD PARTIES TO ESTABLISH THAT THE  
MISCONDUCT WAS REPORTED IMMEDIATELY AND/OR TO  
EXPLAIN THE PERSONALITY CHANGE IN THE VICTIM; (2)  
EXCITED UTTERANCES WHICH MAY BE MADE TO A THIRD  
PARTY AND THAT TIMING IS JUST ONE FACTOR TO  
CONSIDER IN THE ADMISSIBILITY OF THE SAME; (3)  
A VICTIM'S PREVIOUS SEXUAL VICTIMIZATION MAY BE  
RELEVANT TO EXPLAIN THE VICTIM'S CONDUCT DURING  
OR AFTER THE ASSAULT; AND (4) EXPERT TESTIMONY  
REGARDING THE CHARACTERISTICS OF VICTIMS OF SEX  
CRIMES**

**FACTS:** The evidence established by the state was that the victim (D.J.) went on a date with defendant, who had given her the false name Kevin; although they had agreed to go to an indoor movie theater, defendant drove D.J. to a drive-in theater. Defendant began to touch D.J.'s leg following which she asked him to stop. The defendant, who is a foot taller than D.J. and outweighed her by about eighty-five pounds, began to straddle her after which she pleaded with the defendant to stop and ultimately the defendant penetrated the victim. The defendant said that he was going to take D.J. to a hotel, but she persuaded the defendant to pull over at a nearby gas station so that she could use the restroom. When D.J. went inside the restroom, she locked the door and called the police to report the assault.

D.J. was ultimately taken to a rape crisis center, where Officer Javer interviewed her and she was examined by Ms. DiScenza. Both testified about how upset she was and DiScenza noted a laceration to her pubic area.



The defendant was convicted of aggravated rape and sentenced to twenty-five years. The defendant maintained that the court had committed several errors justifying reversal of the conviction.

**ISSUE #1:** The defendant maintained that the statement made by D.J. to Ms. Taper a short time after the incident was hearsay as the defendant claimed that the statement was offered for the truth of the matter that the rape had occurred.

**HELD:** The Court of Criminal Appeals concluded that the trial court had properly determined that the testimony was not hearsay as the statement made by D.J. to Ms. Taper was not offered for the truth of the matter asserted. The court found that the statement made by D.J. to Ms. Taper shortly after the incident was introduced to establish that D.J. reported the incident to Ms. Taper and also to explain D.J.'s personality change, both of which the court found were relevant to D.J.'s credibility in the case. The Court of Criminal Appeals noted that Ms. Taper was not asked to provide any details of the incident and the court instructed the jury that it was not to consider the statement for its truth and explained:

“So, any questions that the state asked of Ms. Taper that goes to anything that somebody might have told her is not being offered to show that those things that were reported are actually true, but simply for those purposes that goes to the credibility of a witness, and also to show whether or not there was a report made to someone of an alleged event or some crime that may have been committed. It’s not being offered to say these things are actually true.”

The court also noted that the jury indicated affirmatively that it understood the instruction, and the court noted that a jury is presumed to have followed the trial court’s instructions.

**ISSUE #2:** Defendant contended that the trial court erred by finding that D.J.’s statements describing the rape and her assailant to Officer Javer at the Rape Crisis Center were properly admitted as excited utterances pursuant to the excited utterance exception to the hearsay rule, as

defendant argued that the statements were offered for their truth and that they were not made contemporaneously because D.J. was no longer in danger.

**HELD:** The Court of Criminal Appeals held that the trial court had properly allowed the statements into evidence as excited utterances. The court noted that a statement related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is admissible as an excited utterance, if (1) an event or condition that is sufficiently startling to suspend the normal reflective thought process of the declarant has occurred; (2) the statement must relate to the startling event or condition which requires proof that the statement deals with the effect or impact of the event or condition; and (3) the statement must have been made while the declarant is under the stress or excitement from the event or condition. The court noted that the ultimate test under the third prong is whether the statement suggests spontaneity and whether the statement has a logical relation to the shocking event.

The court further noted that the length of time between a startling event and the statement does not automatically preclude the statement being admissible as an excited utterance. The court noted that in the present case, D.J. had been raped by an acquaintance with enough force to cause injury, which was a serious event. Officer Javier testified that D.J. was upset, terrified, and traumatized when they spoke. The court noted that although the exact interval between the rape and the interview with Officer Javier was not known, D.J. had immediately called the police and was taken to the Rape Crisis Center where Officer Javier spoke with D.J. at midnight on July 4. The court found that the record supported the trial court's finding that D.J. was still in the state of distress when she spoke to Officer Javier, and therefore the excited utterance was properly allowed by the trial court.

**ISSUE #3:** The defendant maintained that the trial court erred by admitting D.J.'s testimony that she was molested while in foster care, the defendant arguing that was irrelevant and unfairly prejudicial because it elicited sympathy from the jury.

**HELD:** The Court of Criminal Appeals held that the admission of the sexual violence against her while she was in foster care was relevant, due to the fact that defense counsel had cross-examined D.J. at some length about whether she tried to call for help or leave the car when the defendant went to the liquor store or when he had touched her leg, or during the rape, or after the rape. Defense counsel had also asked D.J. whether she struggled against the defendant and whether he had a gun. Defense counsel had also used the lack of a physical struggle, an attempted escape, and lack of a weapon, along with the fact that D.J. was able to exit the car at the gas station, to attack her credibility.

The Court of Criminal Appeals therefore found that the trial court's finding, given defense counsel's questioning, that D.J.'s explanation of her passivity was relevant was in fact justified by the proof. The court noted that D.J. testified that she learned to "go with the program until you can be safe" when she was abused in foster care. D.J. had further testified that she did not struggle or fight with the defendant because she "prioritized survival and that her goal was to go home to her children."

The Court of Criminal Appeals therefore found that the trial court did not abuse its discretion by allowing the testimony. The court noted that while the trial court could have given an explanation about the probative value and the waiting process, any error was harmless in light of the overwhelming evidence of defendant's guilt. The court also noted that defense counsel had not only emphasized D.J.'s failure to fight or try to escape as a reason to doubt her credibility, counsel had also utilized D.J.'s prior sexual abuse as a reason she may have fabricated the allegations against defendant.

**ISSUE #4:** The defendant maintained that the trial court erred by allowing Ms. DiScenza to testify about the reasons why victims sometimes were not forthcoming about their sexual histories.

**HELD:** The Court of Criminal Appeals found that the trial court properly admitted her testimony about why some victims withheld information as within the scope of her expertise. Her testimony was based upon her extensive professional experience, which routinely included questioning

rape victims about their recent sexual history. Ms. DiScenza had testified that victims were sometimes reluctant to reveal their personal information.

**PRACTICE POINT**: This is a good case to review in regard to a case involving aggravated rape or sexual misconduct toward a victim as it discusses several of the issues that come up in these types of cases and the balancing test that judges may have to perform in deciding whether to admit certain evidence, particularly when it can be information outside the scope of the present case, but which impacts the presentation of the evidence.

State v. Tolliver (Tenn. Cr. App. 3/29/23)

**LAY OPINION TESTIMONY: TESTIMONY OF SEVERAL LAY WITNESSES TO THE EFFECT THAT THE DEFENDANT DID NOT “LOOK AFRAID,” THAT THE DEFENDANT “ACTED HAPPY” ABOUT WHAT SHE HAD DONE IN STABBING THE VICTIM, THAT A WITNESS DID NOT BELIEVE DEFENDANT’S VERSION OF THE EVENTS, AND OTHER SIMILAR TESTIMONY WAS FOUND TO BE ADMISSIBLE AS IT WAS “RATIONALLY BASED ON THE PERCEPTION OF THE WITNESS,” “HELPFUL TO A CLEAR UNDERSTANDING OF THE WITNESS’S TESTIMONY,” AND WAS “WITHIN THE RANGE OF KNOWLEDGE OR UNDERSTANDING OF ORDINARY LAYMEN”**

**FACTS**: In a case in which the defendant was convicted of second-degree murder, the defendant maintained that the admission of testimony of multiple witnesses was improper lay opinion testimony under Tennessee Rule of Evidence 701 and was irrelevant under Rule 401, and was unfairly prejudicial under Rule 403.

Specifically, the defendant maintained that the following testimony was inadmissible as improper “lay person” testimony:

1. The testimony of the victim's mother that she did not believe the defendant was afraid as she "acted happy about it";

2. Mr. Galbreath's testimony that defendant did not look afraid prior to the stabbing;

3. Mr. Blair's testimony that "it just looked like anger to me" as opposed to defendant looking afraid;

4. Ms. Blair's testimony that she did not believe the woman who committed the stabbing was afraid based on her actions;

5. Ms. Hutson's testimony that she did not believe the defendant's version of the events;

6. Ms. Hutson's testimony that after seeing the defendant pick up an object and take off after the victim "I saw a look in her face, and I knew what she was gonna do."

**HELD:** The Court of Criminal Appeals held that the witnesses' testimonies regarding defendant's demeanor were rationally based on the witnesses' perceptions and were helpful to the jury on the issue of the defendant's mental state. The CCA found that the witnesses' testimony was relevant.

The court recognized that the concept of relevancy is "implicit" in the requirement that the lay opinion be helpful. The court also found that the defendant failed to establish that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. The court also noted that the admission of the evidence did not breach a clear and unequivocal rule of law and therefore did not rise to the level of plain error.

The court noted the following principles in regard to consideration of this type of evidence:

1. In order for evidence to be admissible, it must be relevant.

2. Even if the evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the fact finder.

3. A lay witness may give testimony in the form of an opinion or inference if it is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

4. Lay opinion should be based on admissible facts that are in evidence.

5. To be admissible a lay opinion should be within the range of knowledge or understanding of ordinary laymen.

6. A witness's lay opinion is admissible when the fact finder could not readily draw its own conclusions on the issue without the witness's lay testimony or where the witness cannot effectively testify without stating the inference or opinion.

7. If an opinion is based upon a lay witness's own observations, his or her conclusions require no expertise and are within the range of common experience, making the opinion admissible.

8. The distinction between an expert and a non-expert witness is that a non-expert witness's testimony results from a process of reasoning familiar in everyday life and an expert's testimony results from a process of reasoning which can be mastered only by specialist in the field.

The Court of Criminal Appeals noted that testimony regarding a defendant's demeanor is proper lay testimony under Rule 701.

The Court of Criminal Appeals therefore concluded that the testimony of the multiple witnesses did qualify as lay opinion testimony under TRE 701, was relevant under TRE 401, and was not unfairly prejudicial under TRE 403.

State v. Hamilton (Tenn. Cr. App. 9/28/22)

**PRIOR BAD ACT: THE TRIAL COURT PROPERLY DETERMINED THAT THE VIDEO ON THE DEFENDANT'S PHONE SHOWING CRACK COCAINE COOKING ON A STOVE NEXT TO SMALL BAGGIES CONTAINING WHITE POWDER AND WHICH ALSO SHOWED THE DEFENDANT'S FACE WAS PROPERLY ADMITTED SINCE THE SAME WAS RELEVANT AND INTENDED TO PROVE THE DEFENDANT'S IDENTITY AND HIS INTENT TO SELL THE ILLEGAL SUBSTANCE**

**FACTS:** In a case in which the defendant was indicted for possession of .5 grams or more of cocaine with the intent to sell in a drug-free zone, and other charges, the proof at trial showed that Officer Pace stopped the defendant's vehicle for running a stop sign. The defendant fled from the rear driver's side seat of the car, following which when the vehicle was searched, officers recovered a loaded .45 caliber pistol and a bag of cocaine in the rear driver's side floor board. The defendant's cell phone was found on the rear driver's seat, and the cell phone contained a video of someone cooking powder cocaine to make crack cocaine. The defendant's face was visible on one portion of the video.

The defendant argued that the trial court erred by allowing the state to introduce the video and the still images found on the defendant's phone under Tennessee Rule of Evidence 404(b). The defendant claimed that it was highly prejudicial to permit the improper character evidence of him allegedly cooking crack cocaine while being on trial for possession of crack cocaine and particularly due to the fact that the state's case was entirely circumstantial and based on constructive possession of the cocaine.

**HELD:** The trial court did not abuse its discretion in admitting the video and still images as evidence.

The court noted that since the defendant was charged with possession of .5 grams or more of cocaine with the intent to sell in a drug

free zone, the state needed to prove the defendant knowingly possessed a controlled substance with intent to sell the controlled substance.

The court noted that the trial court held a hearing outside of the jury's presence and determined that the video on defendant's phone showing crack cocaine cooking on a stove next to small baggies containing white powder and also reflecting the defendant's face was relevant to prove the defendant's identity and his intent to resell the illegal substance. The court also determined that the probative value of the video and still images from the video outweighed the risk of unfair prejudice because the content of the evidence outweighed the prejudicial effect.

The court noted that there was no doubt that the proof offered by the state was evidence of a "bad act," and the CCA also noted that the trial court had substantially complied with the procedural requirements of Rule 404(b) so that the court would only review the case on an abuse of discretion.

The court found that under the law the trial court had (1) appropriately determined the factual basis of the video as properly supported by evidence in the record; (2) that the trial court properly identified and applied the most appropriate legal principles applicable to the decision; and (3) the trial court had properly made its determination within the range of acceptable alternative dispositions.

The Court of Criminal Appeals noted that it was a "close call," but that the Appellate Court would not substitute its judgment for that of the trial court. The trial court was found to have had a proper hearing outside the jury's presence, and determined that the video on the defendant's cell phone was relevant to prove his identity and his intent to resell the illegal substance, and that the probative value of the video and still images from the video outweigh the risk of unfair prejudice because the content of the evidence outweighed the prejudicial effect.

State v. Amos (Tenn Crim. App. 11/3/22)



**PRIOR BAD ACTS: IN A CASE IN WHICH THE DEFENDANT WAS CHARGED WITH FIRST DEGREE MURDER, THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY ALLOWING EVIDENCE ABOUT A PREVIOUS DOMESTIC ASSAULT AGAINST THE MURDER VICTIM**

**FACTS:** In a case in which the defendant was convicted of first-degree premeditated murder, the defendant maintained that the trial court had erred by allowing Officer King to testify about the defendant's prior domestic assault of the victim, claiming that the evidence was inadmissible pursuant to Tennessee Rule of Evidence 404(b). The state responded by arguing that the evidence was admissible to show the defendant's intent and premeditation.

The trial court held a hearing to determine whether the state would be allowed to present evidence of the domestic assault that the defendant allegedly committed against the victim on 6/17/16. A general sessions warrant was issued after the assault and the defendant was arrested on 1/27/17. The domestic assault charge was dismissed later when the victim's body was found in a car trunk, and a subsequent indictment alleged that the defendant had killed the victim between March 28 and April 10, 2017.

The trial court held a pretrial hearing to determine the admissibility of the domestic assault charge against the defendant, and Officer King was called to testify at the hearing. Officer King acknowledged that he was present when his partner was talking with the victim of the domestic assault and testified that the victim was "upset" and that he heard her say that "she had gotten into an altercation with her husband." Officer King had other responsibilities at the scene and did not hear everything that the victim said. King did testify that he heard the victim state that her husband hit her in the eye, and he saw that her eye was swollen shut. King was also present when she wrote a brief statement that evening for the police report.

The trial court found that Officer King's testimony about the victim's statements was admissible under the excited utterance exception to the hearsay rule, and he found that the proof of the prior assault was clear and convincing. The trial court found that the evidence was admissible to show motive because the victim was going to be a witness against the defendant in the domestic assault case and to show the defendant's premeditation and intent to harm the victim. The trial court also found that the probative value of the evidence was not outweighed by the danger of its prejudicial effect. Later, the trial court revisited the issue and found that the trial court no longer thought the prior domestic assault was relevant to show the defendant's motive to kill the victim (as the state did not present any proof of the pending domestic assault case to the jury) but the evidence was still relevant to show intent to harm the victim.

**HELD:** The Court of Criminal Appeals concluded that the trial court acted within its discretion by allowing the evidence of the prior domestic assault on the issue of intent, and the court also found the evidence was admissible to show motive and identity of the perpetrator.

Specifically, the court noted the following principles in regard to these types of issues:

1. Generally, a party may not introduce evidence of an individual's character or a particular character trait in order to prove that the individual acted in conformity with that character or trait at a certain time. Such evidence may be admitted pursuant to Tennessee Rule of Evidence 404(b) for the purposes of showing identity, motive, common scheme or plan, intent, or the rebuttal of accident or mistake defenses, if the evidence is found to be relevant by the trial court.
2. Before a trial court may permit evidence of a prior crime, wrong, or act, the following procedures must be met pursuant to Tennessee Rule of Evidence 404(b):
  - (a) The court upon request must hold a hearing outside the jury's presence;

(b) The court must determine a material issue exists other than conduct conforming with a character trait and must state the basis for its ruling on the record.

(c) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

(d) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

The Court of Criminal Appeals noted that the trial court had appropriately considered all of these issues at a pretrial hearing and found that the evidence met the conditions of the rule.

The Court of Criminal Appeals focused specifically on the fact that the evidence of the previous domestic assault helped establish the defendant's identity as the perpetrator, was relevant to show the defendant's motive for harming the victim and by extension the defendant's identity as the perpetrator.

State v. Summerville (Tenn. Cr. App. 2/2/23)

**REBUTTAL WITNESS: IT WAS NOT IMPROPER FOR TRIAL COURT TO ALLOW REBUTTAL WITNESS TO TESTIFY ABOUT THE DEFENDANT'S PRIOR ACT OF SELLING DRUGS DUE TO THE FACT THAT THE DEFENDANT'S TESTIMONY THAT HE HAD NEVER SOLD DRUGS "OPENED THE DOOR" TO THE STATE'S CALLING THE REBUTTAL WITNESS TO CONTRADICT DEFENDANT'S TESTIMONY**

**FACTS:** In a case in which the defendant was convicted of multiple counts of sale or possession of drugs or drug paraphernalia, the defendant contended that the trial court had erred by allowing the state's rebuttal

witness, Ms. Wooley, to testify about the defendant's selling and exchanging drugs with her. The defendant maintained that this testimony was not presented during the state's case-in-chief and that the witness's testimony exceeded what was necessary to impeach the defendant.

The defendant also argued that he was unable to make a fully informed decision about his testifying because Ms. Wooley did not testify during the state's case-in-chief. Since he was not able to make a fully informed decision about testifying, he argued that allowing the state to call Ms. Wooley as a rebuttal witness violated his rights under Momon v. State (Tenn. 1999).

**HELD:** The Court of Criminal Appeals held that the trial court did not err in allowing the state to introduce the rebuttal testimony of Ms. Wooley, finding that the defendant's credibility was a material issue in the case, and Ms. Wooley's testimony was relevant because it "directly contradicted the defendant's claims that he had never sold drugs."

The court noted that evidence is "relevant and generally admissible when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The court further noted that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or is misleading to the trier of fact, or results in undue delay, a waste of time, or needless presentation of cumulative evidence.

The court concluded that based upon the nature of the testimony of Ms. Wooley and the fact that the defendant's credibility was a material issue, the trial court had properly allowed the evidence because it directly contradicted defendant's claims of never having sold drugs. The court also noted that the records supported the trial court's finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Defendant's testimony "opened the door."

State v. Stinson (Tenn. Cr. App. 9/27/22)

**SNAPCHAT MESSAGE TO VICTIM FROM DEFENDANT:**

**DEFENDANT’S MESSAGE TO VICTIM IN WHICH HE CALLED HER NAMES AND SUGGESTED THAT SHE FOLLOW THROUGH WITH HER THREATS TO COMMIT SUICIDE WAS ADMISSIBLE AS IT WAS RELEVANT TO SHOW WHY THE VICTIM’S PARENTS DEVELOPED CONCERNS ABOUT THE DEFENDANT**

**FACTS:** In a case in which the defendant was convicted of first-degree premeditated murder, the defendant maintained that the trial court erred in admitting his Snapchat message to the victim, as the defendant claimed its primary purpose was to “elicit emotions of bias, sympathy, hatred, contempt, retribution, or horror.” Defendant argued that the trial court used the wrong standard of review under Tennessee Rule of Evidence 403 by finding that the probative value of the evidence merely outweighed, rather than substantially outweighed, the danger of unfair prejudice.

**HELD:** The Court of Criminal Appeals held that the trial court did not abuse its discretion in admitting the evidence. The court noted that under TRE Rule 403, relevant evidence, which is generally admissible under Rule 402, “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of accumulative evidence.”

The court noted that the defendant had attempted to flip the burden by “misreading the rule to require exclusion of evidence unless there is a finding that its probative value substantially outweighs the danger of unfair prejudice.” The Court of Criminal Appeals noted that Rule 403 does not require such a heightened burden for the admission of relevant evidence. The Court of Criminal Appeals stated that it agreed with the state that the Snapchat message was relevant to show why the victim’s parents developed concerns about the defendant and that the probative value is not substantially outweighed by the danger of unfair prejudice.

The court also noted that the state sought to introduce two of the defendant's Snapchat messages to the victim to show why the victim's parents developed concerns about the defendant. The trial court had excluded one of the Snapchat messages in which the defendant made threats to kill one of the victim's parents, as the trial court found that the threats made to kill Ms. Walker were too prejudicial. The testimony of the parents and other witnesses helped explain to the jury why the witnesses felt that the relationship was toxic and why it led the victim to end her relationship with the defendant, thereby giving a motive for the murder. The trial court found that the probative value of the Snapchat message in which the defendant called the victim names and suggested she go through with her threats to commit suicide did outweigh the danger of unfair prejudice and were therefore admissible.

State v. Gaul (Tenn. Cr. App. 2/27/23)

**“UNAVAILABLE WITNESS”:** EVEN IF A WITNESS IS FOUND TO BE “UNAVAILABLE”, TRE 804 REQUIRES THAT THE EVIDENCE MUST SATISFY ONE OF THE EXCEPTIONS TO THE HEARSAY RULE FOR UNAVAILABLE DECLARANTS AND THE PROOF IN THIS CASE DID NOT ESTABLISH ANY EXCEPTION AT ALL, SINCE THE WITNESS HAD NOT PREVIOUSLY TESTIFIED AT A PRELIMINARY HEARING NOR WAS THE STATEMENT OF THE WITNESS MADE AGAINST HER PECUNIARY OR PROPRIETARY INTEREST OR SUBJECT HER TO CIVIL OR CRIMINAL LIABILITY

**FACTS:** In a case in which the defendant was convicted of violating Tennessee Sex Offender Registration Act, the defendant objected to the state's proof in which Detective MacPherson obtained a statement of Ms. Patton that the defendant had lived with her at 702 Freedom Lane and that she and the defendant had lived together off and on for five years and had

a child together. The detective testified that Ms. Patton stated that the defendant helped pay utilities at the address and that Ms. Patton stated that the defendant was aware of the requirements to register a secondary address. The detective had confirmed that she had not had any contact directly or indirectly with the defendant and that she was not involved in his reporting requirements.

**HELD:** The Court of Criminal Appeals held that Ms. Patton’s statements were indeed hearsay and inadmissible and that the error was not harmless. The CCA ordered that a new trial be held.

On appeal, the state conceded that the trial court had erroneously admitted the testimony. The CCA found that no party on the appeal disputed that the testimony of Detective MacPherson was made out of court and offered by the state for the truth of the matter asserted.

The court noted that one category of exceptions to the hearsay rule is found under TRE 804 which allows a hearsay statement to be admitted into evidence and considered by the jury when the hearsay declarant is “unavailable” and also satisfies one of the narrow exceptions provided in Rule 804(b) to the hearsay rule.

The court noted that it would set aside the issue of whether the state made a sufficient showing at trial that Ms. Patton was actually unavailable, as the record noted that the state issued a subpoena and that the deputy who had attempted to serve the subpoena testified that he received the subpoena and attempted to serve it at the address listed on the day before trial. The deputy stated that he was unable to locate Ms. Patton, even though neighbors confirmed that she and the defendant lived at the place identified on the subpoena. The deputy did not leave a business card.

Regardless of the issue of unavailability of the witness, the Court of Criminal Appeals noted that the trial court did not find, and the state did not argue, that Ms. Patton’s hearsay statements fell within any one of the five categories identified in Rule 804(b). The court noted that there was no finding that Ms. Patton’s statements were made against her pecuniary or proprietary interests or that they tended to subject her to criminal or

civil liability. The court also noted that Ms. Patton had not previously testified about these events in a preliminary hearing or any other hearing and therefore that exception did not apply. The court specifically held that Ms. Patton's hearsay statements were not admissible through any exception that was contained in TRE 804(b).

**PRACTICE POINT:** Rule TRE 804(b) clearly provides that the state must make a showing that the defendant is actually "unavailable" by satisfactory proof and further prove that there is an exception under Tennessee Rule of Evidence 804(b), which was not accomplished in this case.

State v. McGill (Tenn. Cr. App. 2/16/23)

### **USE OF NICKNAMES: USE OF NICKNAMES DURING A TRIAL SHOULD GENERALLY BE AVOIDED AND TRIAL COURT SHOULD CLOSELY MONITOR ANY MISUSE**

**FACTS:** In the present case in which the defendant was convicted of attempted first-degree murder, the defendant maintained that the trial court erred in allowing the use of his nickname, "Shoota," because it unfairly prejudiced the jury against him.

The facts established that the state mentioned the defendant's nickname multiple times, including during the state's opening statement; the first witness, the victim, testified that he knew the defendant as "Shoota." Following the victim's testimony, the state elicited the defendant's nickname from three additional witnesses, admitted several pieces of incriminating evidence containing the nickname, and also used the nickname during its closing argument.

**HELD:** The Court of Criminal Appeals found that the state's repeated use of the defendant's prejudicial nickname throughout the trial was improper. The trial court had ruled that the nickname itself was



prejudicial “in a shooting case” but that the probative value substantially outweighed the danger of unfair prejudice.

Even though the Court of Criminal Appeals found that the state’s repeated use of the defendant’s prejudicial nickname throughout the trial was improper, the court did conclude that the error was harmless. The court concluded that a review of the record did not show that the prosecution “saturated” the trial with the defendant’s nickname to the extent the record affirmatively showed that it affected the jury’s verdict. The court noted that the proof of the defendant’s guilt was overwhelming which included the defendant’s own incriminating text, Facebook messages, jail calls, and jail visitation videos which linked him to the shooting and established him as the perpetrator.

State v. Fouse (Tenn. Cr. App. 10/10/22)

**TRIAL COURT’S EXCLUSION OF CHILD’S TESTIMONY: IN AN ADJUDICATORY HEARING IN CIRCUIT COURT ON THE ISSUE OF DEPENDENCY AND NEGLECT, THE ORDER OF THE TRIAL COURT PRECLUDING THE STEPFATHER FROM CALLING THE CHILD AS A WITNESS WAS FOUND TO BE IN ERROR AND THE JUDGMENT OF THE TRIAL COURT WAS VACATED AND REMANDED FOR FURTHER PROCEEDINGS**

**FACTS:** In a case in which the Department of Children’s Services filed a dependency and neglect petition claiming that the stepfather had sexually abused the seven-year-old child, the trial court precluded the stepfather from calling the seven-year-old child victim as a witness. The trial court found that it had the authority to preclude a child from testifying if the probative value of the child’s testimony is “substantially outweighed by the risk of severe emotional or psychological harm to the child from testifying.”

The trial court found that the risk of harm to the minor child “Kansas” from testifying outweighed any probative value that her testimony might have had. The stepfather wanted to call the child as a witness to prove his theory that the child had been “coached” in regard to the abuse allegations.

The stepfather appealed requesting that the Court of Appeals find that a trial court lacks authority to deny a parent from calling an otherwise competent witness to testify at a deposition or an adjudicatory hearing.

**HELD:** The Court of Appeals concluded that trial courts do not possess discretion to exclude a competent child’s testimony based upon potentially emotional or psychological harm. The Court of Appeals did find that the court can still consider the balancing test of Tennessee Rule of Evidence 403 wherein Rule 403 provides: “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, a waste of time, or needless presentation of accumulative evidence.

The Court of Appeals noted that the trial court had considered two approaches in regard to these issues. The trial court had noted that some appellate courts have held that trial courts lack the authority to preclude a child from testifying so long as the child is competent to testify. The second approach provides that certain appellate courts have held that trial courts maintain the authority to preclude a child from testifying if the probative value of the child’s testimony is “substantially outweighed by the risk of severe emotional or psychological harm to the child from testifying.” The Court of Appeals noted that the trial court had adopted the latter approach.

The Court of Appeals noted however that even though the parties had treated this as a case of first impression in Tennessee, the Court of Appeals had previously addressed the issue in State Department of Human Services v. Norton (Tenn. Ct. App. 1996). In Norton the state presented testimony of an expert witness that it would not be in the best interest of the child to testify. The Norton court determined that the trial court had

erred in precluding the child's testimony, finding that TRE 601 states that "every person is presumed competent to be a witness except as otherwise provided in these rules or by statute." The comment to the rule provided that children are included but that the presumption was rebuttable. Therefore, the Court of Appeals had previously held that barring operation of some other rule, trial courts lack the discretion to preclude the testimony of a witness so long as the witness is competent. The court noted that by so concluding, the Norton court explicitly rejected consideration of the child's best interest or the propriety of forcing the children to testify in court in excluding the potential testimony.

The court noted that in the present case, DCS offered testimony similar to the Norton case as the state had claimed that forcing the child to testify would potentially cause her to suffer what the therapist called "re-traumatization."

The court also concluded that the error was not harmless due to the fact that the stepfather did not request to call the child as a witness to challenge her memory but rather to elicit whether the child had been coached to fabricate the sexual abuse allegations. The court found that if the facts had established that the child had been coached "then such testimony certainly could have affected the outcome of the trial."

**PRACTICE POINT:** The court includes this case in the outline because the issue could arise in a criminal case in General Sessions Court or in a dependency and neglect case in Juvenile Court. In the event that any judge has a case of this nature it would be important to read this case as the case addresses other issues pertaining to dependency and neglect including a discussion of Tennessee Rule of Evidence 403 and its possible application to the case and Tennessee Rule of Evidence 803(25).

In Re: Kansas B. (Tenn. Ct. App. 10/12/22)

## **FERGUSON ISSUE**

### **WHETHER OR NOT EVIDENCE WAS LOST OR DESTROYED BY THE STATE: NO VIDEO EVER TRULY EXISTED FOR THE STATE TO LOSE OR DESTROY SO THE EVIDENCE PREPONDERATED AGAINST THE TRIAL COURT’S RULING THAT THE STATE WAS AT FAULT IN THE LOSS OF THE “VIDEO RECORDING”**

**FACTS:** On 1/3/19, THP Trooper Joey Story was returning to his home in Rutherford County after working security at the governor’s residence. While traveling behind a white pickup truck on Highway 96, Story observed a truck cross over the right shoulder line of the road, being the fog line, and the trooper claimed that the truck crossed the fog line at least three more times. The trooper’s patrol car was equipped with a Mobile Video System (MVS) that continuously records and deletes until the system is activated, at which time the system preserves what is being recorded and what had been recorded during thirty seconds prior to the activation. The trooper ultimately activated his emergency lights (which also activates the MVS).

The defendant was ultimately charged with driving under the influence and possession of a firearm while under the influence.

The defendant moved to suppress the evidence, arguing that the state did not have probable cause or reasonable suspicion for the traffic stop, emphasizing that the video evidence of the defendant’s driving was erased and deleted as a result of a malfunctioning recording system. The trooper testified that the system had failed to activate for whatever reason, the trooper hypothesizing that the system was old and just failed to activate due to a malfunction.

The trial court granted the defendant’s motion to suppress the evidence finding that the loss of the video evidence constituted a violation of the state’s duty to preserve potentially exculpatory evidence under the

Ferguson case. The trial court specifically noted that Trooper Story was not negligent in failing to activate or in destroying the video, and that the state's inaction in failing to get new equipment could not be found to be negligent, but that by leaving the obsolete equipment in the field the Tennessee Department of Safety (TDS) ran the risk that relevant evidence could be lost, which was the result in the present case. Thereby, the trial court found that the state had breached its duty to preserve evidence.

**HELD:** The Court of Criminal Appeals reversed the judgment of the trial court and reinstated the indictment concluding that (1) the video was not lost or destroyed by the state; (2) that a Ferguson violation is not applicable to a suppression hearing based on reasonable suspicion or probable cause for a traffic stop; (3) that the trial court misapplied the "degree of negligence" Ferguson factor by equating perceived public policy decisions on the part of the state to negligence; and (4) found that the defendant's right to a fair trial could be protected without dismissal of the indictment.

This case presented several important factors in regard to an analysis under the Ferguson principle:

1. The Ferguson case requires the trial court to first determine whether the state had a duty to preserve the evidence;
2. The trial court should next determine if the state breached that duty;
3. If the court finds that the state breached its duty the court looks to three factors to be considered and weighed which are (i) the degree of negligence involved; (ii) the significance of the destroyed evidence; and (iii) the sufficiency of the other evidence used at trial to support the conviction.

The Court of Criminal Appeals noted that after balancing these three factors, the trial court may then impose an appropriate remedy, which can include dismissal of the case if the court finds that the fundamental fairness of a trial conducted without the missing evidence would present a constitutional issue.

The Court of Criminal Appeals concluded that the evidence preponderated against the trial court's finding that the video was lost or

destroyed by the state as the evidence showed that the video recording of the defendant's driving never existed. The court noted that it did not matter if the MVS malfunctioned when the trooper pressed the button on his belt or if the trooper failed to push the button to activate the MVS. The court said that the result would be the same in either event as the video of the defendant driving simply was not captured and saved to the MVS and therefore there was no video for the state to lose or destroy.

4. The court further concluded that a Ferguson violation cannot be asserted in a pre-trial motion to suppress evidence based on the lack of reasonable suspicion for a traffic stop. The court noted that at the time of the seizure Trooper Story was required to have specific and articulable facts that the defendant had committed a criminal offense in order for the traffic stop to be constitutionally valid. The court noted that to make this determination the trial court was limited to the facts and circumstances within the knowledge of Trooper Story at the time he activated his blue lights. In a true Ferguson motion, the trial court must assess the sufficiency of the evidence that the state intends to introduce at trial. Based on that fact, the CCA concluded that a Ferguson violation cannot be asserted in a pre-trial motion to suppress evidence based on the lack of reasonable suspicion for a traffic stop.

5. The court noted that if it had determined that the state had a duty to preserve the video and that the state breached its duty that it would still determine that the Ferguson factors did not support dismissal of the indictment. The court noted that in Ferguson the appellate court had determined that the evidence was destroyed as a result of the negligence of the state, being the loss of the dashcam video which had existed.

In this case, the CCA noted that the trial court found that Trooper Story was without fault in the loss of the video recording because the non-existence of the video was a consequence of policy choices made by the Tennessee Department of Safety. The trial court stated that "TDS's inaction cannot be found to be negligent. ... "By leaving the obsolete equipment in the field, TDS was running the risk that relevant evidence could be lost, just as it was in this case." The CCA noted that the trial court had stated that

the unreliability of the obsolete video was well known among the fellow troopers performing their duties. The court noted there was “no proof in the record concerning TDS’s reason for not updating Trooper Story’s MVS,” that there was no proof in the record concerning what the other troopers knew about the reliability of the MVS; and that the trial court did not find either the TDS or Trooper Story had committed simple negligence, gross negligence or acted in bad faith.

The CCA said that “we are unwilling to expand the Ferguson ‘degree of negligence’ factor to include decisions based on perceived social wisdom, assumed political practicability, or potential economic factors.” The CCA concluded that the factor weighed heavily against dismissal of the indictment. The CCA concluded that the defendant’s right to a fair trial can be protected without dismissal of the indictment.

**PRACTICE POINT:** While this case has some important discussion about the Ferguson rule, I would note the following cautionary tales that are present in this case, as follows:

1. There were suggestions in the factual statements about the case about the activity of the trooper involved. For instance, the opinion stated that the trooper testified that he pressed the button on his belt to wirelessly activate the MVS at which time the trooper thought the camera would be activated and that it should have started but it must have been a malfunction in the unit. During cross-examination, the trooper explained that his main focus was on the defendant’s driving habits and he was not watching the head unit to see if it came on. He stated that he thought the unit came on because it never really had given him a problem in the past. The trial judge himself asked the trooper about when he became aware of the fact that the video did not activate when he pressed the button on his belt following which the trooper stated that it was quite some time before he actually watched the video so that he probably didn’t know about it until probably having discussions with the prosecutor in preparation for the case. Upon being questioned about the number of times that defendant had crossed the fog line, the trooper answered that he didn’t remember and he could not recall how many times he had said that the defendant had

crossed the fog line. When asked about the affidavit of the complaint, the trooper stated that he had not looked at or read the affidavit of complaint and did not know why the affidavit of complaint stated what it did.

When questioned about the operational procedure and responsibilities pursuant to the general order regarding the MVS system the proof showed that there was a seven-step inspection of the MVS that was supposed to be performed to ensure system integrity. This included that prior to the beginning of each shift, troopers are to turn the audio and video on and give a test count from one to five, should play it back to verify proper operation, and that the officers “must” report any malfunction, damage or deviation in operation conditions of the recording equipment immediately to a supervisor or on duty supervisor or dispatcher. The trooper testified that he did not report the malfunction to the immediate supervisor or anyone else at the time because he didn't know there was a malfunction.

The trial judge went on to state that after reviewing the proof that he did not think that the trooper was negligent in how he handled the case.

As a cautionary tale for judges and without referring to the specifics of this case, it can be important for judges to realize that an unclear memory by an officer, and inability to remember the details of a case (particularly noting the availability of narratives and incident reports and sometimes body camera footage and the like) a failure to follow clear procedures that are set out in manuals, flippant responses and testimony, and the failure to properly explain traffic stops or make the same clear are all factors that judges should seize upon in making rulings in an unapologetic manner. Constitutional rights and principles involving criminal law are established, including a presumption of innocence, to require the state to carry the burden of proof at each level of the case. Judges and other officials with responsibilities in the judicial system should and must have the integrity to face the responsibilities that we have in analyzing evidence and make hard decisions even if that is a decision which will not be pleasing to law enforcement officers or others that we have in court on a regular basis.



This case demonstrated a case where certain facts troubled the trial judge. The trial judge proceeded to dismiss the case based upon numerous factors including several which I have discussed in this note. The trial judge also went to the trouble of noting that neither the trooper nor other troopers were at fault because the troopers had to deal with the equipment they were issued. In some cases, we as judges can attempt to reach a certain result without placing any blame at the feet of officers or other officials who appear in court. Most important is that we as judges do our duties and make judgments, which can be simply to conclude that the state has not met its burden of proof based upon the facts, including poor memories of officers, poor execution of responsibilities by officers, failure to preserve evidence, sloppy testimony based upon the fact that officers did not bother to review the reports or narratives or their video proof which was available to them before they came into court to testify about very important matters in which judges have very important responsibilities. Making the proper calls based upon the proof before the court, the entirety of the evidence, and based on the law is our most important ethical function on a day-to-day basis.

2. Systemic failures on the part of a police department in regard to maintaining recordings, video recordings and the like can also be a factor in determination of credibility of individual officers and/or a department. It can also be used by unscrupulous law enforcement officers or departments to make sure there is no evidence existing to contradict their testimony. The absence of legitimate recordings (which are now made as a part of regular policy of police departments) can suggest a desire for such recordings not to be utilized or found. All of us know this has become a key factor in cases across the nation. Good recordings can be utilized to corroborate what effective law enforcement accomplishes during an investigation or a traffic stop or in the alternative can be used to show that unlawful procedures have resulted in unconstitutional behavior on the part of officers. These checks and balances are essential parts of a legal system which is seeking justice and fairness for all participants.

State v. Crass (Tenn. Cr. App. 11/22/22)

## **FUNDAMENTAL RIGHT TO CROSS-EXAMINE WITNESSES**

**RIGHT TO AN EFFECTIVE CROSS-EXAMINATION: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING CROSS-EXAMINATION OF COOPERATING WITNESS, AS EVEN THOUGH THE TRIAL JUDGE IMPOSED LIMITATIONS THE DEFENSE WAS ALLOWED TO CROSS-EXAMINE THE COOPERATING WITNESS ABOUT OFFENSES IN WHICH HE HAD BEEN CHARGED AND THE FACT HE RECEIVED A “VERY FAVORABLE RESOLUTION TO HIS CASE” AS COMPARED WITH THE CONVICTIONS AND SENTENCING EXPOSURE HE WOULD HAVE FACED IF CONVICTED WITHOUT THE COOPERATION**

**FACTS:** In a case in which the defendant was convicted of facilitation of first-degree felony murder, among other charges, the defendant contended that the trial court denied his fundamental constitutional right to cross-examine witnesses by ruling that he could not cross-examine the cooperating witness (Mr. Nolbert) and Det. Loeffler about the potential sentence Mr. Nolbert faced if he had been convicted at a jury trial and about the sentence he received as a result of his guilty plea in cooperation with the state.

The state responded that the trial court did not abuse its discretion in limiting cross-examination as the trial judge was merely limiting cross-examination so that the potential penalties that the defendant could receive were not revealed to the jury in violation of statute.

**HELD:** The Court of Criminal Appeals held that based on the facts of the present case, the trial court did not abuse its discretion in limiting cross-examination of Mr. Nolbert about further specifics of his actual and

potential sentences, and the defendant was not deprived of due process by the court's limits on cross-examination.

The Court of Criminal Appeals specifically noted that the jury in the present case heard the statements that Det. Loeffler made during the defendant's interview about possible punishments and that the defense was allowed to cross-examine Nolbert about the offenses with which he had been charged and the offenses in which he pleaded guilty pursuant to the plea agreement. The court also noted that the defense was allowed to cross-examine Nolbert about his cooperation with the state and the fact that he had received a very favorable resolution to his case as compared with the conviction and sentencing exposure he faced if he had gone to trial. The court noted that any further information about the specific sentence Nolbert received as a result of his plea agreement would have been of "minimal additional probative value" in impeaching his credibility and in showing any bias he had in favor of the state.

The court noted the following key principles in cases of this nature:

1. Evidence is relevant and generally admissible when it has any tendency to make the existence of any fact that is of consequence to the termination of the action more probable or less probable than it would be without evidence.
2. Relevant evidence however may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, along with other considerations.
3. The Sixth Amendment and due process clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense, which includes the right to present witnesses favorable to the defense.
4. Due process protects a criminal defendant's right to confront and cross-examine witnesses, and a denial of the right to an effective cross-examination is "constitutional error of the first magnitude and amounts to a violation of the basic right to a fair trial."

5. The propriety, scope, manner and control of the cross-examination of witnesses however remains with the discretion of the trial court, and a court may limit cross-examination due to factors such as harassment, prejudice, issue confusion, witness safety, or merely repetitive or marginally relevant interrogation.

6. The Tennessee Supreme Court has ruled that “proof suggesting that a witness received or had reason to expect leniency from the state typically constitutes relevant evidence of bias.”

7. TCA 40-35-201(b) provides basically that in all contested criminal cases, except for capital cases, “the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses.”

8. Ultimately, “the confrontation clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”

State v. Johnson (Tenn. Cr. App. 3/20/23)

## **HARASSMENT**

**WHETHER DEFENDANT “INTENTIONALLY COMMUNICATED A THREAT TO ANOTHER PERSON”: TRIAL JUDGE ERRED BY DISMISSING THE HARASSMENT CHARGES DUE TO THE FACT THAT THE ISSUE OF WHETHER OR NOT DEFENDANT’S CONDUCT CONSTITUTED HARASSMENT SHOULD HAVE BEEN LEFT UP TO A DETERMINATION BY THE JURY (FACT FINDER)**

**FACTS:** Officer Fillyaw testified that in June 2020, DCS filed a report with the Monroe County Sheriff's Office about "threats being placed toward a couple of their case managers." Officer Fillyaw was sent some videos by DCS which had been posted on the defendant's Facebook account. Fillyaw testified that he watched the videos, which were "for public view," and that the videos showed the defendant "threatening that if they came by on her property, that she would commit bodily harm to those case workers." In the first video, the defendant used graphic language in asking what pushes people to the last resort of killing and stated: "So if I have to f\*\*king kill, I will." The video went on to state that a gun is not the only thing at her disposal but that she could crush a skull with a potted plant, use a kitchen knife, throw a f\*\*king T.V. on the case worker and "electrocute the f\*\*king b\*tch."

The second video spoke very derogatorily toward the judge, calling her a "f\*\*king, s\*\*tty-a\*\* f\*\*king b\*tch," and alluded to the fact that she thought "they want me to like go vandalize them or f\*\*king kill them or something."

In the third video she said similar things about the "f\*\*king police officer" and referred to the fact that he had made himself a f\*\*king target." A fourth video made derogatory comments about the case manager and stated that she would "knock the backside off of J.B."

After an initial hearing in the case, the judge dismissed the charge of retaliation based upon the officer's testimony that the defendant never said she would "get" the judge as alleged in the indictment. The trial court found Officer Fillyaw to be a credible witness and accredited his testimony that Ms. Brown and Ms. Smiley, DCS case workers, were fearful and scared and stated that some of the defendant's statements were in fact "threatening." The trial court noted that it was unable to determine to whom the threatening statements were directed but that he would be premature in judging the state's case without hearing the totality of their case.

A few months later, the defendant had renewed her motion in regard to dismissing the case and the trial court granted the dismissal of the harassment charges.

**HELD:** The Court of Criminal Appeals concluded that the trial court erred by dismissing the harassment charges, finding that the trial court's conclusion of there being no "threat" to be a factual determination which should have been made by the jury and not the court.

The Court of Criminal Appeals noted that before an accused can be convicted of harassment as charged in the case, the state must prove beyond a reasonable doubt that: (1) the defendant intentionally communicated a threat to another person; (2) the defendant intended the communication to be a threat of harm to the victim; and (3) a reasonable person would perceive the communication to be a threat of harm.

The court noted that the defendant had argued that her speech was protected because she was publicly commenting on what she considered to be corruption and racial discrimination by DCS employees. The court noted that the trial court never addressed whether or not the alleged threats were appropriate free speech comments but the trial court simply had found that "the communications did not constitute a threat per the statute." The CCA therefore disagreed with the defendant's argument that the trial court dismissed the charges on constitutional grounds.

The Court of Criminal Appeals therefore concluded that the trial court had inappropriately dismissed the charges of harassment without giving an opportunity for the trial to proceed and for the ultimate fact finding of whether the conduct constituted harassment to be left for determination by the jury.

**PRACTINCE POINT:** If a General Sessions Judge has an issue regarding the charge of harassment at a preliminary hearing, the court will be charged with the responsibility of determining whether or not the state had met its probable cause burden to show that a defendant had intentionally communicated a threat to another person; whether the defendant intended the communication to be a threat of harm to the victim; and

whether a reasonable person would perceive the communication to be a threat of harm.

If there is a charge that comes before a General Sessions Judge in a trial, the General Sessions Court would be charged with the responsibility as a fact finder of determining whether the facts established proof of the three elements of harassment beyond a reasonable doubt.

State v. Tekle (Tenn. Cr. App. 3/31/23)

### **IDENTITY OF THE PERPETRATOR**

#### **IDENTITY OF THE PERPETRATOR: THE IDENTITY OF THE PERPETRATOR IS AN ESSENTIAL ELEMENT OF ANY CRIME, AND THE STATE HAS THE BURDEN OF PROVING “IDENTITY” BEYOND A REASONABLE DOUBT**

**FACTS**: The defendant was charged and convicted of attempted first-degree murder and employing a firearm during the commission of a dangerous felony. The defendant maintained that the evidence was insufficient to prove his identity as the perpetrator of the offenses. Specifically, the defendant maintained that his identity had not been established beyond a reasonable doubt and he maintained that the convictions rested entirely on the uncorroborated testimony of the victim and the victim’s statements to the police. The defendant contended that the victim had motive to lie to protect an unnamed lover, that there were no witnesses to the crime, that the victim failed to identify the defendant in the first photographic line-up, and that the defendant may not have even been in the state at the time of the shooting.

**HELD:** The Court of Criminal Appeals held that viewing the evidence in the light most favorable to the state, there was ample evidence for a rational trier of fact to conclude the defendant committed the offenses.

The CCA noted as follows: (1) The victim was familiar with the defendant because the two had worked together for one to two months at Burger King. The court noted that even if masks were worn at Burger King, the two socialized outside of work together and had engaged in a sexual relationship. (2) Secondly, the victim identified the defendant as the shooter moments after the shooting occurred, and the victim called his mother and his boss informing them that the defendant shot him to ensure they knew the perpetrator's identity. The victim's mother corroborated that testimony, saying that she received a call that evening from the victim wherein he identified the defendant as the perpetrator. (3) The victim's identification of the defendant remained consistent throughout the investigation, and the victim never identified anyone other than the defendant. The CCA noted while receiving emergency medical care and screaming in pain on the ground, the victim identified the defendant as the shooter to Officer Payne and said he and the defendant worked together at Burger King. (4) The incident was recorded by Officer Payne's body camera and played for the jury.

The court noted that hours after the shooting and while the victim was in critical care, the victim was unable to identify the defendant in a photographic line-up. The court noted that the victim explained that at that time he was on heavy medication and that he did not remember speaking to the officers. The next morning, the victim had been removed from critical care, and the court noted that he "immediately" identified the defendant for Sergeant Cordero in a second photographic line-up.

The court concluded that the jury had accredited the victim's repeated identification of the defendant, which was their province to do.

State v. Owens (Tenn. Cr. App. 12/7/22)



## **JUDGE'S QUESTIONING OF A WITNESS**

### **TRIAL COURT'S QUESTIONING OF A VICTIM: TRIAL COURT PROPERLY ASKED QUESTIONS OF A VICTIM OF A DOMESTIC ASSAULT AND AGGRAVATED KIDNAPPING AFTER THE VICTIM ADVISED SHE DID NOT RECALL MANY DETAILS, MAINTAINED THAT SHE DID NOT WISH TO TESTIFY, AND ATTEMPTED TO AVOID ANSWERING PROSECUTOR'S QUESTIONS**

**FACTS:** In a case in which the defendant was convicted of aggravated kidnapping and domestic assault, the defendant maintained that the trial court's questioning of the victim at trial amounted to an improper comment on the evidence.

The facts established that when the state called the victim to testify, she repeatedly stated that she did not wish to testify, that she loved the defendant, and that she could not recall the events of 1/24/19. The victim was sworn in and she did testify that the defendant became angry and "intimidated" her with a gun "for a few hours." She testified she did not know whether the gun was "real" but that "people with guns scare me." She testified that she was afraid and "cowering" inside the residence, among other testimony. The victim testified the defendant waved the gun but did not do anything else to her. In response to questioning by the state, the victim stated that although she recalled testifying at a prior hearing, she did not recall the substance of her testimony, explaining that since she was a recovering addict it "kind of" affected her brain.

The trial court then questioned the victim as follows:

THE COURT: Let me ask a couple of questions here regarding the elements of the offense.

At any point during that morning, did [the defendant] hit you or strike you in any way?

THE WITNESS: Maybe.

THE COURT: When you say “maybe,” why do you say maybe, not yes or no? Do you not remember or ----

THE WITNESS: Yeah.

THE COURT: Yeah, you don’t remember?

THE WITNESS: No

THE COURT: Okay.

After this exchange, a hearing was held outside the jury’s presence during which the state played the recording of the victim’s testimony at the preliminary hearing. The victim affirmed that listening to her prior testimony had refreshed her recollection of the events, but once the jury returned to the courtroom, the victim refused to answer any other questions. The trial court then found that the victim was unavailable as a witness and allowed the state to present the victim’s testimony from the preliminary hearing pursuant to TRE 804(b)(1).

**HELD:** The Court of Criminal Appeals concluded that the trial court’s questions were proper and that due to the victim’s evasiveness the trial court properly asked impartial questions to the victim in an attempt to clarify her testimony.

The Court of Criminal Appeals noted the following principles in regard to issues of this nature when the trial court may ask questions of a victim or witness:

1. The Tennessee Constitution prohibits judges from making any comment with respect to matters of fact. Tennessee Constitution article VI, section 9.
2. The purpose of the rule is to avoid giving the jury any impression as to the judge's feelings or to make any statement which might reflect upon the weight or credibility of evidence of which might sway the jury.
3. It is natural that jurors should be anxious to know the mind of the court and follow it; therefore, a court cannot be too cautious in its inquiries.
4. TRE 614(b) permits the interrogation of witnesses by the trial judge. Previous cases have noted that: "So long as the inquiry is impartial, trial courts may ask questions to either clarify a point or to supply any omission."
5. The trial judge's questioning should not be hostile, such that it constitutes a "rigid cross-examination" of the witness.
6. When a court has improperly commented on the evidence, the comments must be considered in the overall context of the cases to assess prejudice.

After considering the above principles, the Court of Criminal Appeals concluded that the trial court's questions were proper and that the defendant was not entitled to any relief on this issue.

**PRACTICE POINT:** While, of course, General Sessions Judges do not have juries to consider, similar considerations are important for a General Sessions Judge, including:

1. It is important for a judge not to give any impression as to his or her own feelings which might indicate any kind of bias or prejudicial thought on the part of the judge.
2. TRE 614(b) allows for interrogation of witnesses by a judge but emphasizes that the inquiry should be impartial and should be in order to clarify a point or supply any omission, doing so objectively.

3. It is important for the judge not to come across as hostile or trying to promote the position of either party.

For these types of reasons, it is important for a judge to be cautious in any kind of a questioning that the court conducts in a hearing of a witness or victim or party.

State v. Brush (Tenn. Cr. App. 4/12/23)

## **JUVENILE SENTENCING**

### **AUTOMATIC LIFE SENTENCE: THE TENNESSEE SUPREME COURT HELD THAT AN AUTOMATIC LIFE SENTENCE WHEN IMPOSED ON A JUVENILE HOMICIDE OFFENDER WITH NO CONSIDERATION OF THE JUVENILE’S AGE OR OTHER CIRCUMSTANCES VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

**FACTS:** The defendant challenged the constitutionality of Tennessee’s mandatory sentence of life imprisonment when imposed on a juvenile homicide offender.

On 11/15/15, sixteen-year-old Tyshon Booker was riding around with another juvenile in Knoxville with the twenty-six-year-old victim. Later in the afternoon, the defendant shot the victim six times in the back, the side of his chest, and the right shoulder resulting in the death of the victim.

**HELD:** The Tennessee Supreme Court held that Tennessee’s automatic life sentence with a minimum of fifty-one years when imposed on juveniles violates the Eighth Amendment. The court stated, “In sum, Tennessee’s automatic life sentence when imposed on juvenile homicide offenders is an outlier when compared with the other forty-nine states.” The court noted

that such a sentence lacks individualized sentencing which serves as a bulwark against disproportionate punishment, and it goes beyond what is necessary to accomplish legitimate penological objectives.

As explanation for its ruling, the court stated the following:

“From Thompson, Roper, Graham, Miller, Montgomery, and Jones, we know that juveniles are constitutionally different than adults for sentencing purposes; juveniles have lesser culpability and greater amenability to rehabilitation. To be clear, we are not holding that a juvenile may never receive a life sentence in Tennessee. But consistent with Supreme Court precedent, the sentencer must have discretion to impose a lesser punishment and to properly consider an offender’s youth and other attendant circumstances. Tennessee’s sentencing scheme for juvenile homicide offenders-----which automatically imposes the most extreme punishment short of life without parole in the United States-----fails to recognize that ‘children are constitutionally different from adults for purposes of sentencing.’ The current automatic sixty-year sentence does not square with the United States Supreme Court’s interpretation of the Eighth Amendment.”

In its opinion, the Tennessee Supreme Court summarized case law throughout the United States and stated as follows:

“In short, Tennessee is out of step with the rest of the country in the severity of sentences imposed on juvenile homicide offenders. Automatically imposing a fifty-one-year-minimum life sentence on a juvenile offender without regard to the juvenile’s age and attendant circumstances can, for some juveniles, offend contemporary standards of decency.”

**PRACTICE POINT:** Just to note for the record this opinion was by Justice Lee in which Special Judge William Koch, Jr. joined and in which Justice

Kirby filed an opinion concurring in the judgment. Justice Bivens filed a dissenting opinion in which Justice Page joined.

State v. Booker (Tenn. Supreme Court 11/18/22)

## **JUVENILE TRANSFER HEARING**

### **JUVENILE TRANSFER HEARING: DUE PROCESS VIOLATIONS STEMMING FROM THE JUVENILE JUDGE NOT FOLLOWING THE STATUTORY PROCEDURE FOR APPOINTMENT OF A SUBSTITUTE JUDGE FOUND NOT TO HAVE A MATERIAL IMPACT ON THE OUTCOME OF THE DEFENDANT’S CASE DUE TO THE FACT THAT THE DEFENDANT RECEIVED A FULL AND FAIR HEARING IN COMPLIANCE WITH JUVENILE STATUTES**

**FACTS:** The seventeen-year-old defendant was charged with aggravated robbery, felony theft and other charges in juvenile court, and the state filed a petition seeking to transfer the defendant to adult court for prosecution as an adult. Prior to the transfer hearing, the juvenile court judge signed an order appointing the juvenile magistrate to hear the matter. The juvenile magistrate judge presided over the defendant’s transfer hearing and found probable cause to transfer the defendant to the Bradley County Criminal Court to be tried as an adult. At the close of the transfer hearing, the juvenile magistrate judge advised defense counsel that she was sitting as a “substitute judge.”

The defendant was subsequently convicted by a Bradley County Criminal Court jury of aggravated robbery and felony theft among other

charges and received a concurrent term of eleven years for the aggravated robbery and three years for the felony theft of property.

On appeal, the defendant's principle complaint was that the juvenile transfer hearing was "marred by procedural defects" because (1) the order by the juvenile court judge appointing the juvenile magistrate judge was "silent regarding any necessity or good cause for the juvenile judge to be absent;" and (2) the transfer hearing was conducted by a judge who did not identify herself as a "substitute judge" until the end of the hearing, the defendant claiming that said action deprived the defendant of an opportunity to object and appeal to the elected juvenile court judge.

**HELD:** The Court of Criminal Appeals held that the due process violation stemming from not following the statutory procedure for appointment of a substitute judge could not be said to have had a material impact on the outcome of the defendant's case, and therefore the court concluded that the defendant was not entitled to relief. The CCA noted that the record was sufficient to show that the juvenile defendant received a full and fair hearing in compliance with the statutes pertaining to transfer hearings prior to being transferred to criminal court.

The Court of Criminal Appeals noted that the defendant had argued that the transfer hearing was "void ab initio", claiming that the juvenile judge failed to comply with TCA 16-15-209, 17-2-109, and 17-2-122, all statutes governing the procedure to appoint another judge when the elected judge is absent. The defendant maintained that the juvenile court was required to establish "necessity" to support the appointment of a substitute judge and that no reason for the appointment was given. The defendant also argued that because the transfer statute provides no interlocutory appeal from the juvenile court transfer determination that the appeal process was the first opportunity for the defendant to challenge the "misapplication of the law" in his juvenile court proceeding.

The state had contended that even if procedural errors were made, the defendant was not entitled to relief because the juvenile magistrate judge was acting as a de facto judge under color of law pursuant to Tennessee law.

The Court of Criminal Appeals noted: “In our view, the juvenile court judge invoked Section 37-1-107, the juvenile magistrate judge specific statutory provision, in appointing the juvenile magistrate judge to hear the defendant’s case.” The court emphasized that “this statutory provision did not require the juvenile court judge to show good cause or a necessity for being absent nor did it require any other additional steps for the appointment of the juvenile magistrate judge to preside over the defendant’s case.”

The CCA also noted that “for reasons unknown, the sitting juvenile magistrate judge said that she was sitting as a substitute judge after she had determined probable cause to transfer the defendant to be tried as an adult.” The CCA pointed out that defense counsel had no credible basis in law to object on procedural grounds prior to the transfer hearing since the judge who heard the case was the “sitting juvenile magistrate judge.” The CCA noted that “we are troubled by the juvenile magistrate judge’s curt instruction to defense counsel after the transfer hearing that she was serving as a substitute judge, rather than a juvenile magistrate judge. The CCA stated, “A sitting juvenile magistrate judge could not change her status on a whim. We caution against this practice because, as evidenced by the facts of this case, it creates unnecessary procedural deficiencies and potential due process concerns.” The court noted that the defendant did not object on this ground at the transfer hearing.

The Court of Criminal Appeals also noted (and this is important for juvenile judges to understand and recognize) that “there is no civil or interlocutory appeal from a juvenile court’s decisions that a child should be dealt with as an adult in the criminal court.”

The CCA noted, “Based on a plain reading of the statute, the ruling of a lawyer juvenile judge is not reviewable by the criminal court and the criminal court has no alternative but to accept jurisdiction over the juvenile.” Therefore, the CCA did agree with the defendant that the first opportunity for the defendant to challenge the issues regarding the juvenile court transfer hearing were after the conviction in the criminal court.



Importantly, the CCA determined that “the effect of the juvenile magistrate judge’s change in her status to a substitute judge did not impact the defendant’s right to appeal to the elected juvenile court judge. The court noted that an “appeal of a transfer hearing may occur if and only if a non-lawyer judge presides at the transfer hearing in juvenile court,” and that is not what occurred in the present case.

For the record, the CCA noted that the juvenile judge did not comply with any of the statutory provisions regarding appointing a substitute judge in his absence prior to the entry of the order by the judge. The CCA noted that the order of appointment was silent regarding any necessity for appointing a substitute judge. The CCA concluded, however, that the procedural errors in the case did not require reversal.

The court concluded with the following findings:

- (1) “We first conclude that the substitute judge, who is in fact a sitting juvenile magistrate judge, served as a de facto judge acting under the color of law.”
- (2) The court noted that the defendant in fact did not challenge the authority of the juvenile magistrate judge, the probable cause determination, nor the subject matter jurisdiction of the criminal court.
- (3) The record was sufficient to show that the juvenile defendant received a full and fair hearing in compliance with the law regarding transfers, prior to being transferred to criminal court.
- (4) Because the due process violation cannot be said to have had a material impact on the outcome of the case, the defendant was not entitled to any relief.

**PRACTICE POINT:** This is a good case to emphasize the simplicity of using a juvenile magistrate judge to do a transfer hearing, and the importance of procedurally following the statutes if the juvenile judge is in fact appointing

a substitute judge, pursuant to which the statutory provisions should be followed.

State v. Gray (Tenn. Cr. App. 11/30/22)

### **PRE-TRIAL IDENTIFICATION PROCEDURES**

**PHOTOGRAPHIC LINEUP: EVEN THOUGH WITNESS INITIALLY TOLD OFFICERS THAT HE COULD NOT IDENTIFY THE SUSPECT IN THE LINEUP, AND THE OFFICERS CONTINUED TO TELL HIM TO “DO THE RIGHT THING,” THE WITNESS’S ULTIMATE IDENTIFICATION OF THE DEFENDANT WAS FOUND TO BE ADMISSIBLE AS THE CCA FOUND THAT THE LINEUP PROCEDURE WAS NOT UNDULY SUGGESTIVE OR COERCIVE IN NATURE SINCE THE OFFICERS KNEW THE WITNESS WAS IN A DIFFICULT POSITION KNOWING BOTH THE DEFENDANT AND THE VICTIM**

**FACTS:** In a case involving first degree premeditated murder, the defendant contended that the trial court had erred in denying his motion to suppress Mr. Denson’s identification of the defendant as the shooter. The defendant argued that the identification procedure was “marred by unduly suggestive or coercive techniques.”

The proof at the suppression hearing reflected that the witness, Mr. Denson, said he was in the kitchen when he heard shots and that he did not know who shot the victim. The officers among other things told Mr. Denson that they did not think he was telling the truth and the officers continued to have conversations with the witness. Denson continuously stated that he did not know the shooter’s name but officers continued to

tell Denson that “the truth will set you free,” and that he needed to “do the right thing.”

At some point, Denson stated that he was diabetic and he needed something to eat, following which he was offered candy, a Sprite and some crackers, part of which he did consume.

After the passage of time, Denson was told not to feel pressure to pick out someone but to do the right thing. The officers knew that the victim was a good friend of Mr. Denson and that Denson’s sister was pregnant with the defendant’s child. One of the investigators told Denson that the victim was a friend and had done more for Denson than the defendant ever had. Finally, when Denson was asked, “Who shot your friend?,” Denson circled a person on the photographic lineup, which was the defendant.

In a written order denying the motion to suppress the trial court found that under the totality of the circumstances, Denson was not coerced into identifying the defendant and that the lineup was actually not relevant to Denson’s identification of the defendant because Denson already knew the defendant.

**HELD:** The Court of Criminal Appeals held that the record did not support a conclusion that the trial court had erred in determining that the identification was not obtained through unduly suggestive means. The court found that Denson had testified at the trial that he had been untruthful with the police initially because he was in a difficult position with his sister being in a relationship with the defendant and with the defendant’s having just killed Denson’s best friend. The court noted that Denson testified that he did not think the officers wanted him to lie or that he was uncertain of his identification but that eventually Denson “realized he had to do the right thing” by being forthcoming about the defendant’s identity as the shooter.

The court in reaching its determination stated that whether evidence of an identification from a photographic lineup is admissible, the trial court must determine whether the identification procedure was unduly

suggestive pursuant to the case of Neil v. Biggers (1972). The court noted that the relevant factors include:

1. The opportunity of the witness to view the criminal at the time of the crime, the degree of attention of the witness, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

2. Determining whether evidence of an identification from a photographic lineup is admissible, the trial court must determine whether the identification procedure was unduly suggestive.

3. To be admissible as evidence, an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification.

4. If the identification procedure was unduly suggestive, the second question is whether the identification was reliable despite the undue suggestion.

Viewing the totality of the facts, the court found that there were no unduly suggestive procedures invoked by the officers and that there was no substantial likelihood of misidentification, particularly due to the fact that the witness knew both the defendant and the victim.

State v. Clark (Tenn. Cr. App. 9/28/22)

## **RESTITUTION**

**“VICTIM ELIGIBLE FOR RESTITUTION”: ORDER BY TRIAL COURT DURING SENTENCING THAT REQUIRED THE DEFENDANT TO PAY FIFTY-TWO HUNDRED DOLLARS IN RESTITUTION TO THE TBI FOR THE COSTS OF CONTROLLED DRUG**

## **PURCHASES WAS FOUND TO BE INAPPROPRIATE DUE TO THE FACT THAT THE TBI WAS NOT A “VICTIM” WITHIN THE MEANING OF THE RESTITUTION STATUTE**

**FACTS:** The defendant maintained that the trial court erred in ordering him to pay restitution to the TBI to compensate the TBI for some of the expenses of its investigation. The defendant maintained that the TBI was not a “victim eligible for restitution” under the statute.

**HELD:** The Court of Criminal Appeals held that the TBI was not a “victim” within the meaning of the restitution statute and the Court of Criminal Appeals vacated the trial court’s order of restitution.

The Court of Criminal Appeals noted the following principles in regard to payment of restitution:

1. Restitution may be ordered as a component of sentencing pursuant to TCA 40-35-104(c)(2) and 40-35-304.
2. The purpose of ordering restitution is to compensate the victim and to punish and rehabilitate the defendant.
3. In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform. (The CCA did point out in a footnote to its opinion that a new version of the statute went into effect after the sentencing hearing providing that courts “may,” rather than “shall,” consider financial resources and future ability of the defendant to pay.) Therefore, the amount of restitution the defendant is ordered to pay must be based upon the victim’s pecuniary loss and the financial condition and obligations of the defendant; and the amount ordered to be paid does not have to equal or mirror the victim’s precise pecuniary loss.
4. An order of restitution which obviously cannot be fulfilled serves no purpose for the defendant or the victim.

The Court of Criminal Appeals first noted that the trial court had only given “cursory consideration to the defendant’s ability to pay,” and had essentially surmised that the defendant could pay the amount (\$5,200.00) because the defendant had been very successful as a drug dealer. The CCA noted that the trial court did not really consider any proof of income, and the trial court failed to take into consideration that the defendant was about to be in fourteen-year sentence of incarceration and that the defendant had been deemed indigent and been appointed legal counsel.

Secondly, and most importantly for the opinion, the court concluded that the TBI was not a victim within the meaning of the restitution statute and therefore the entire order of restitution was vacated.

For example, the Supreme Court noted that in prior opinions the Supreme Court had found that an assault victim’s medical insurance carrier did not fall within the narrow definition of “victim,” which the statute defined as “the individual or the individuals against whom the offense was actually committed.” The court noted that the insurance liability was contractual and an insurance company is not a victim within the statute.

In a subsequent case, the court found that an insurance carrier can actually be a “victim” in certain cases such as where the defendant plead guilty to presenting a false insurance claim and to arson, the court finding that the residential insurance company was the actual victim of that crime and that in accepting risk pursuant to the insurance contract, the insurance company did not accept the risk of fraud by its own insured.

The court also pointed to cases in which a cemetery and a church had been deemed victims for the purposes of restitution being granted to them and where the appellate courts of Tennessee had found that the true victim of the crime was the individual who was killed by the defendant’s reckless endangerment with a motor vehicle and that the two institutions granted restitution, the cemetery and the church, were not victims for the purposes of ordering restitution by the defendant.

Based on the same type principle, the court concluded that the TBI was not a victim within the meaning of the restitution statute, as the TBI was not referenced in the indictments, was not the direct object of the

defendant's crimes, nor was the TBI the entity against whom the offenses were actually committed. Also, the TBI did not suffer any unexpected harm, therefore the TBI was not entitled to be reimbursed for the expenses of its investigatory activities.

**PRACTICE POINT:** This is a good case to serve as a reminder for General Sessions judges in awarding restitution that courts are not to reach out and reimburse institutions like law enforcement branches or insurance companies, unless they are in fact the actual victims of the crimes.

State v. Graves (Tenn. Cr. App. 2/14/23)

## **SEARCH AND SEIZURE**

**CITIZEN INFORMANTS: INFORMATION PROVIDED TO THE INVESTIGATOR WHICH WAS THE BASIS OF THE AFFIDAVIT FOR A SEARCH WARRANT WAS PROVIDED BY A JUVENILE WHO HAD REPORTED TO A SCHOOL COUNSELOR THAT SHE WAS THE VICTIM OF A SEXUAL ASSAULT, SAID VICTIM QUALIFYING AS A CITIZEN INFORMANT WITH A PRESUMPTION OF RELIABILITY**

**FACTS:** In a case in which the defendant was convicted of unlawful possession of a firearm after being convicted of a felony involving violence and of unlawful possession of a handgun by a convicted felon, the defendant challenged the trial court's denial of his motion to suppress the firearms and ammunition found in his residence during the execution of the search warrant. The defendant specifically argued that the trial court improperly accepted the information contained in the search warrant as

reliable without conducting surveillance or other verification that the defendant resided at the address.

The challenged affidavit (which was signed by Investigator Starks on 1/9/19) stated that on 1/8/19 the Gallatin Police Department had received a DCS referral regarding a sexual assault (rape) whereupon the victim was a sixteen-year-old juvenile. The juvenile reported to a school counselor that she was raped by her “Uncle Steve” on Sunday, January 6, 2019, at his house which was located at 1092 Campbell Avenue in Gallatin, Tennessee.

The victim also provided information that the defendant had showed her a large amount of money and also had showed her three guns that he had in the closet. She described the guns to the investigator including “one was a black, small handgun and two guns which were long guns of which one was black and had a scope on it.”

**HELD:** The Court of Criminal Appeals held that the information provided in the affidavit was presumed to be reliable as the child who provided the information was clearly a citizen informant as she provided her statement to Investigator Starks. The Court of Criminal Appeals noted that she had reported that the defendant sexually assaulted her in his home and threatened her using several firearms that were stored in the bedroom closet. The court therefore found that the information provided was presumed to be reliable and the trial court did not err in denying the defendant’s motion to suppress.

In supporting this determination, the Court of Criminal Appeals pointed out the following:

1. Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.
2. Under both the Tennessee and United States Constitutions, no search warrant may be issued except upon probable cause which has been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act.



3. Under the totality-of-the-circumstances test, the issuing magistrate is required to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

4. Citizen informants have a presumption of reliability, so long as the affidavit identifies the source of information as a citizen informant.

5. Citizen informants are either victims of the crime or have otherwise observed portions of the crime.

The investigator had also noted in the search warrant affidavit that the investigation had revealed that the defendant had a criminal record which included statutory rape and aggravated assault in Davidson County.

The totality of the evidence therefore showed that the defendant was a convicted felon, and the evidence properly supported probable cause that the defendant was a convicted felon in possession of illegal firearms.

**PRACTICE POINT:** It is interesting to note that in this case the victim had reported a crime of a sexual nature involving her uncle at a specific address, and the information that she provided further lead to officers realizing that he was a convicted felon and that the information indicated that he was in possession of illegal firearms. These convictions involved only the charges related to the firearms and not the sexual misconduct which was the basis for the report to the school personnel.

State v. Anderson (Tenn. Cr. App. 3/24/23)

**PLAIN VIEW DOCTRINE: SEARCH WARRANT WHICH WAS  
AUTHORIZED FOR SEEKING EVIDENCE OF NARCOTICS  
VIOLATIONS ON THE DEFENDANT'S CELL PHONE AND**

**WHICH LEAD TO DISCOVERY OF NUMEROUS  
PORNOGRAPHIC IMAGES DID NOT VIOLATE THE  
DEFENDANT’S RIGHTS UNDER THE FOURTH AMENDMENT  
AS THE PORNOGRAPHIC IMAGES WERE FOUND PURSUANT  
TO THE “PLAIN VIEW” DOCTRINE**

**FACTS:** The defendant was convicted of three counts of sexual exploitation of a minor involving more than one hundred images and one count of sexual exploitation of a minor with more than fifty images. The case arose from a search of the defendant’s cell phone, pursuant to a search warrant, in an unrelated investigation concerning the sale of narcotics. During the search of the cell phone, law enforcement officers found pornographic images of children on the cell phone. Subsequent to the discovery of the pornographic images, law enforcement sought the defendant’s permission to access a locked image gallery on his cell phone, following which the defendant granted access to additional images on the phone by entering his passcode of his own volition.

**HELD:** The Court of Criminal Appeals held that the images extracted from the cell phone were obtained either (a) pursuant to a valid search warrant or (b) pursuant to the defendant’s voluntary consent to search. The court found that the evidence extracted was thus legally obtained and there was no basis to suppress the evidence.

The Court of Criminal Appeals noted the following principles in search and seizure issues:

1. The Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution provides for the rights of people to be secure in their persons, houses, papers, and personal effects, against unreasonable searches and seizures.
2. A search warrant shall be issued only on the basis of an affidavit, sworn before a neutral and detached magistrate, which establishes probable cause for its issuance.

3. To establish probable cause, the affidavit must demonstrate a nexus among the criminal activity, the place to be searched, and the items to be seized.

4. In determining whether the nexus has been sufficiently established, courts should consider whether the criminal activity under investigation was an isolated event or a protracted pattern of conduct, the nature of the property sought, the normal inferences as to where a criminal would hide the evidence, and the perpetrator's opportunity to dispose of incriminating evidence.

5. Unlike an affidavit in support of an arrest warrant, an affidavit seeking issuance of a search warrant need not implicate a particular person in the crime under investigation.

Noting all of the above principles, the CCA noted that the trial court had stated that the search of the cell phone was valid because the search was performed pursuant to a valid warrant for seeking narcotics information. The remaining images were obtained by consent of the defendant after Investigator Massey asked for the passcode to the locked gallery on the phone.

The Court of Criminal Appeals noted that its review of the record confirmed the conclusions of the trial court. Specifically, the investigator sought a warrant for the cell phone and testified that he viewed the images as he looked for evidence of drug use or paraphernalia, which was authorized by the search warrant. The search warrant had specifically authorized officers to search for images and videographic files related to the narcotics violations and this language was not overly broad. During this investigation, the investigator saw, during his search, images of naked young girls in sexual positions, prompting him to seek permission to continue his search of the phone's images. The defendant granted him access to additional images on the phone by entering his passcode of his own volition.

The Court of Criminal Appeals therefore concluded that the images extracted from the cell phone were either obtained (a) pursuant to a valid search or (b) pursuant to the defendant's voluntary consent to search.

State v. Greenman (Tenn. Cr. App. 12/27/22)

**TRAFFIC STOP: THE PROLONGED STOP OF THE DEFENDANT'S VEHICLE PARTIALLY CAUSED BY THE REQUEST FOR A K-9, VIOLATED THE FOURTH AMENDMENT, AS THE OFFICER DID NOT POSSESS THE REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY NECESSARY TO EXTEND THE SCOPE AND DURATION OF THE STOP**

**FACTS:** The defendant maintained that the trial court erred when it denied his motion to suppress based upon the fact the state failed to establish that its warrantless detention of the defendant was not unreasonably prolonged. The defendant was a passenger in the car that was stopped for a traffic violation due to the fact that the driver had crossed over into the officer's lane of traffic requiring the officer to apply brakes and swerve to avoid a collision. Once pulled over, the driver was asked to step out of the vehicle, at which time the officer explained the reason for the traffic stop, and the officer intended to write a traffic citation. The officer also requested consent to search the car which the driver denied. The officer began preparing the traffic citation and simultaneously requested a canine unit.

The initial traffic stop occurred at 6:58 p.m. and the request for the canine unit occurred at 7:08 p.m., ten minutes after the initial traffic stop. The officer testified at one point that it took him 7-8 minutes to issue a traffic citation. The canine unit arrived at 7:15 p.m.

When the canine unit arrived seventeen minutes into the traffic stop, Investigator Shoate stopped working on the traffic citation to explain to the canine unit officer “what he had.” (The Court of Criminal Appeals noted that “we consider this moment to be significant.”) Shoate then stopped writing the traffic citation for the driver and “detoured from the mission of the traffic stop.” Seventeen minutes into the stop, the defendant was asked to exit the car for the sole purpose of deploying the canine.

The trial court credited the testimony of Investigator Shoate and determined that “this was not a prolonged detention” because “the officer obviously has to prepare the citation, has to run whatever records check, driver’s license check, things of that nature and, you know, seven minutes is really not a very prolonged, unreasonable detention in order to issue the traffic citation.”

**HELD:** The Court of Criminal Appeals held that based on the totality of the circumstances, “we hold that Investigator Shoate did not possess the reasonable, articulable suspicion of criminal activity necessary to extend the scope and duration of the stop. Consequently, Investigator Shoate’s prolonged detention of the defendant violated the Fourth Amendment, and all evidence seized as a result of the stop must be suppressed. We therefore reverse the judgment of the trial court’s denial of the defendant’s motion to suppress the evidence, vacate the judgments, and dismiss the case.”

In this important case, the Court of Criminal Appeals noted the following principles in a search and seizure case:

1. The Fourth Amendment of the U.S. Constitution and article I, section 7 of the Tennessee Constitution protect against unreasonable searches and seizures.
2. A police officer’s stop of a vehicle and the detention of its occupants constitutes a seizure within the meaning of both constitutions.
3. Individuals do not lose their constitutional protections against unreasonable searches and seizures by getting into an automobile. (The CCA noted that the propriety of the initial stop in this case is not at issue as

the defendant conceded that Investigator Shoate's initial stop of the car was legally justified based on a traffic citation.)

4. Under Tennessee cite and release statute (TCA 55-10-207), when an officer observes certain misdemeanors such as an improper lane change the officer shall issue a citation in lieu of arresting the defendant. Violating the "cite and release" statute infringes upon a defendant's right against unreasonable searches and seizures.

5. An officer may not extend a traffic stop to conduct a dog sniff unless there is reasonable suspicion of criminal activity beyond the traffic violation. (see Rodriguez v. United States) (2015).

6. The tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission", which is to address the traffic violation that warranted the stop and attend to related safety concerns.

7. A traffic stop can become unlawful if it is prolonged by a dog sniff beyond the time reasonably required to complete the mission of issuing a ticket, and as such, the lawful seizure ends when tasks tied to the traffic infraction are completed or reasonably should have been completed. Otherwise, one court has noted, "a crafty officer, knowing this rule, may simply delay writing a ticket for the initial traffic violation until after she has satisfied herself that all of her hunches were unfounded."

8. A detention that is reasonable at the outset can become unreasonable and constitutionally invalid if the time, manner or scope of the investigation exceeds the proper parameters.

9. Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop, such as request for driver's license and vehicle registration documents, computer checks, and issuance of citations, all of which are consistent with the lawful scope of any traffic stop.

10. A dog sniff, however, is a measure aimed at detecting evidence of a general criminal wrongdoing and not considered one of the ordinary inquiries incident to the mission of a traffic stop. Therefore, a dog sniff may

violate the Fourth Amendment if it extends the traffic stop beyond the time necessary to conduct the ordinary inquiries incident to such a stop.

11. Once the officer detours from the mission of the traffic stop, the officer has for all intents and purposes initiated a new seizure with a new purpose, one which requires its own reasonableness under the Fourth Amendment. “This new seizure cannot piggy-back on the reasonableness of the original seizure.” (Our CCA quoting the case of State v. Linze (Idaho, 2016)).

12. To meet the reasonable suspicion requirement, an officer must have a particularized and objective basis for suspecting the persons detained of breaking the law.

13. An officer making a traffic stop may order passengers to get out of the car pending completion of a stop based on the inherent safety concerns of a traffic stop.

14. In other words, an exit order to the occupants of a vehicle during a lawful traffic stop would only be reasonable if the exit order were based on the inherent safety concerns associated with the mission of the traffic stop. If the exit order was for some reason other than officer’s safety associated with the mission of the traffic stop, then the officer would need independent reasonable suspicion to justify the new seizure.

The Court of Criminal Appeals noted that in applying all of the above stated principles to the present case, even accepting the credibility determination of the judge in regard to Investigator Shoate, the CCA found that the record did not support the determination of the trial court in denying the defendant’s motion to suppress.

The CCA noted that viewing the evidence in the light most favorable to the state, the traffic stop began at 6:58 p.m., request for canine came at 7:08 p.m. and the canine unit arrived at 7:15 p.m. Very significantly, the court noted that when the canine unit arrived seventeen minutes into the traffic stop, “Investigator Shoate stopped working on the traffic citation to explain to the canine unit officer ‘what he had,’ even though he agreed that he had nothing more than an improper lane change. We consider this moment to be significant.” The CCA then noted that “at least seventeen

minutes into the stop the defendant was asked to exit the car for the sole purpose of deploying the canine. There is no question that a dog sniff is a measure aimed at detecting evidence of a general criminal wrongdoing and not considered part of the 'mission' of the traffic stop." This was a detour from the mission of the traffic stop and began a measure aimed at detecting evidence of general criminal wrongdoing, which represented a new seizure and required independent reasonable suspicion to justify the seizure.

The emphasis by the Court of Criminal Appeals is on the fact that the traffic stop investigation was not determined by the officer to require the defendant passenger to exit the vehicle, but when the canine arrived only then did safety measures require having the defendant passenger exit the vehicle. This was a clear deviation from the contours of the initial stop and there was no articulation of any suspicion at that point that the driver or the defendant possessed drugs or was otherwise engaged in criminal activity.

The Court of Criminal Appeals concluded that "because the state failed to establish that the detention was reasonable and not prolonged beyond the time and scope necessary to effectuate a traffic stop for an improper lane change, the trial court erred in denying the defendant's motion to suppress." The judgment of the trial court was reversed and the case dismissed.

**PRACTICE POINT:** This is an excellent analysis of all of these principles by Judge Camille R. McMullen of the Court of Criminal Appeals.

State v. Graves (Tenn. Cr. App. 4/27/23)



## SENTENCING

**CONSECUTIVE SENTENCING: THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE DEFENDANT QUALIFIED UNDER TENNESSEE SENTENCING STATUTES AS AN OFFENDER WHOSE RECORD OF CRIMINAL ACTIVITY WAS EXTENSIVE BECAUSE EVEN THOUGH THE DEFENDANT HAD NO PRIOR RECORD, THE RECORD IN THE PRESENT CASE WAS CLEAR THAT THE DEFENDANT POSSESSED A LARGE AMOUNT OF CHILD PORNOGRAPHY AND THAT HE NOT ONLY POSSESSED MULTIPLE IMAGES OR VIDEOS WITH INTENT TO DISTRIBUTE OR EXCHANGE, THE DEFENDANT HAD SHARED OR TRADED CHILD PORNOGRAPHY WITH OTHERS**

**FACTS:** The defendant plead guilty to twenty-four counts of aggravated sexual exploitation of a minor that took place during the years 2016 and 2017, stemming from the discovery that he had uploaded one-hundred and seventy-four images or videos comprising child pornography or child erotica to his electronic file sharing account.

Although Mr. Perry had no prior criminal convictions, the trial court imposed partial consecutive sentencing after finding that he qualified as an offender whose record of criminal activity was “extensive.”

The Court of Criminal Appeals affirmed the trial court’s decision in regard to consecutive sentencing, and the case was appealed to the Tennessee Supreme Court.

**HELD:** The Tennessee Supreme Court determined that the trial court adequately articulated the reasons for ordering consecutive sentencing on the record and that the trial court did not err in imposing partial consecutive sentencing.

The Supreme Court made the following specific and important decisions in regard to consecutive sentencing in the State of Tennessee:

1. The Supreme Court noted that in recent years, the court had examined criminal sentencing procedure in Tennessee in the wake of landmark decisions from the United States Supreme Court and corresponding legislative changes enacted by the Tennessee General Assembly.

2. The Tennessee State Sentencing Act provides that as a prerequisite to imposing consecutive sentences under TCA 40-35-115, the trial court must find by a preponderance of the evidence that the defendant qualifies for consecutive sentencing under the law and bearing in mind the purposes and principles of sentencing.

3. The Supreme Court stated that the question presented by the defendant in this case focuses on the initial determination of whether the defendant was an offender “whose record of criminal activity was extensive.”

4. In determining an appropriate sentence the sentencing act provides that the trial court shall consider:

(a) the evidence, if any, received at the trial in the sentencing hearing;

(b) the presentence report;

(c) the principles of sentencing and arguments as to sentencing alternatives;

(d) the nature and characteristics of the criminal conduct involved;

(e) evidence and information offered by the parties on the mitigating and enhancement factors;

(f) any statistical information provided by the administrative office of the courts;

(g) any statement the defendant wishes to make on the defendant’s own behalf about sentencing; and

(h) the result of the validated risk and needs assessment

5. The Supreme Court noted that TCA 40-35-115(b)(2) authorizes consecutive sentencing for an offender “whose record of criminal activity is extensive.” The court noted that this is not self-defining, and the sentencing act does not provide a precise meaning. The court reviewed dictionaries in regard to the definition of “extensive”, from all of which the court gleaned from the dictionaries a “common thread” from which the court concluded that an extensive record of criminal activity for purposes of the statute is that which is “considerable or large in amount, time, space, or scope.” The Supreme Court then noted that courts should look to “those facts from which they can determine that the defendant’s record of criminal activity is considerable or large in amount, time, space, or scope.”

The Supreme Court noted that the current case “presents an opportunity for this court to offer guidance on relevant considerations that ordinarily will inform the determination of whether an offender’s record of criminal activity is extensive.”

The court noted that to that end courts should look to certain non-exclusive considerations in evaluating whether the proof establishes that the defendant is an offender whose record of criminal activity is extensive;

(i) The amount of criminal activity, often the number of convictions, both currently before the trial court for sentencing and prior convictions or activity;

(ii) The time span over which the criminal activity occurred;

(iii) The frequency of criminal activity within that time span;

(iv) The geographic span over which the criminal activity occurred;

(v) Multiplicity of victims of the criminal activity; and

(vi) Any other fact about the defendant or circumstance surrounding the criminal activity or convictions, present or prior, that informs the determination of whether an offender’s record of criminal activity was considerable or large in amount, time, space or scope.

Reviewing the current case under all of those standards, the Supreme Court concluded that the trial court properly looked to the

amount of child pornography that the defendant possessed in determining whether his record of criminal activity was extensive. The Supreme Court noted that it agreed with the trial court that possession of one-hundred and seventy-four images or videos of child pornography, regardless of the resulting number of convictions, reflects criminal activities that were considerable in amount or scope. The Supreme Court also stated that it agreed with the trial court that actually having shared or traded child pornography reflects criminal activity on the part of the defendant more considerable in scope than simply having possessed child pornography, even with the intent to distribute or exchange.

The court did note that the trial court's failure to address the actual time frame and scope of the criminal activity was a shortcoming of the trial court, but the Supreme Court found that this deficiency did not negate the presumption of reasonableness of the sentencing decision. The court did note that even though the trial court did not engage in an analysis of the time span or frequency of the defendant's criminal activity, the record was clear that the defendant's criminal activity took place during the years 2016 and 2017 and that the defendant had uploaded files to his Dropbox account on multiple occasions. The court noted that "the record belies any notion that the defendant's criminal activity was comprised of a single occasion."

**PRACTICE POINT:** This is a significant case in looking at consecutive sentencing in the State of Tennessee even for General Sessions Judges who look to consecutive sentencing in regard to misdemeanor cases. These principles are instructive for us as judges to look at the nature of the factors in determining whether consecutive or concurrent sentencing is appropriate.

State v. Perry (Tenn. Supreme Court (12/9/22))

**CONSIDERING A FOREIGN CONVICTION DURING SENTENCING:  
IN DETERMINING WHETHER A FOREIGN CONVICTION MAY  
BE INCLUDED WHEN A TENNESSEE COURT IS CONSIDERING**

**A DEFENDANT’S CLASSIFICATION RANGE FOR SENTENCING PURPOSES, THE TRIAL COURT MUST DETERMINE WHETHER THE FOREIGN CONVICTION WAS A “COGNIZABLE” OFFENSE UNDER TENNESSEE LAW AND WHETHER THE ELEMENTS OF THE FOREIGN FELONY AT THE TIME OF THE CONVICTION WERE ANALOGOUS TO A FELONY OFFENSE UNDER TENNESSEE LAW**

**FACTS:** In a case in which the defendant was convicted of one count of forgery pursuant to his plea of guilt, the trial court sentenced the defendant as a Range III career offender based upon consideration of prior Michigan convictions. The defendant maintained that the trial court erred in sentencing him as a Range III, career offender based on his out-of-state convictions.

**HELD:** The Court of Criminal Appeals held that the defendant had a right to be sentenced within the law applicable to him, his circumstances, and his record and found that the trial court lacked the authority and jurisdiction to sentence the defendant outside the appropriate range without evidence supporting the finding. The court held that the state’s failure to properly establish the defendant as a Range III offender, and the trial court’s failure to require the state to do so, resulted in the defendant possibly receiving a sentence longer than he qualified for. The court therefore found that the defendant’s sentence must be reversed and the case remanded for a new sentencing hearing.

Significantly, the trial court was found by the Court of Criminal Appeals to have erred in finding the defendant’s Michigan convictions were the equivalent of Tennessee felonies for the purposes of increasing the defendant’s range. The court noted that there was no proof entered into the record of the specific elements of the offenses for which the defendant was convicted in Michigan. The court noted that instead the trial court relied solely on the names of the offenses and the terms of the defendant’s sentences.

The court also found that the trial court's limited attempt at comparing the Michigan offenses' elements with comparable Tennessee offenses clearly showed that the trial court had not properly conducted the analysis as required. The court noted that the following considerations were absolute under Tennessee law:

1. In determining whether a foreign conviction may be included in a defendant's range classification analysis, the trial court must first determine whether the foreign conviction was a "cognizable" offense under Tennessee law.
2. Secondly, the trial court must determine whether the foreign conviction was a "named felony" in Tennessee. To meet the requirements for a "named felony," a foreign felony conviction must have the same name as an offense that is currently a felony in Tennessee.
3. If the foreign felony is not a "named felony" in Tennessee, the trial court is required to analyze the elements of the foreign felony at the time of the defendant's conviction to determine whether it "was analogous to a felony offense under Tennessee's law as it existed at the time it was committed."
4. The determinative factor for whether a foreign conviction constitutes a felony offense "is the elements of the convicted offense," not the facts or the elements of the originally charged offense. In meeting this burden, the Court of Criminal Appeals stated that the state "cannot rely on the offense's name or the length of sentence imposed but is instead required to show that the offense, as committed by the defendant, would have constituted a felony in Tennessee."
5. "Unless the elements of the out-of-state conviction are identical to a Tennessee felony, the state must present facts to indicate that the defendant's criminal conduct would have satisfied the elements of a Tennessee felony."

The court found that the court's analysis in the present case "falls short" in these requirements.

State v Gordon (Tenn. Cr. App.3/7/23)

**FAILURE TO MAKE FINDINGS ON THE RECORD: THE COURT OF CRIMINAL APPEALS IN A CASE INVOLVING A COURT OF RECORD FOUND THAT DUE TO THE TRIAL COURT'S COMPLETE LACK OF FINDINGS IN THE CASE A NEW SENTENCING HEARING MUST BE CONDUCTED TO DETERMINE THE DEFENDANT'S SUITABILITY OR LACK THEREOF FOR PROBATION**

**FACTS:** The defendant plead guilty to aggravated statutory rape and the trial court imposed a sentence of eight year's incarceration in the Tennessee Department of Corrections. The defendant appealed the case to the Court of Criminal Appeals with the sole issue being the trial court's denial of alternative sentencing, as the defendant argued that the trial court's ruling did not reflect consideration of the purposes and intent or principles that apply in implementing the statutory requirements of the sentencing guidelines.

At the sentencing hearing, the defendant testified on his own behalf and apologized to the victim and her family for putting them through "so much trouble." The defendant asked the trial court to place him on probation and stated that he would abide by all the rules. He acknowledged that he was on diversion for statutory rape at the time he committed the new crime but testified that he had not received sex offender treatment following his prior conviction.

At the conclusion of the first hearing, the trial court took the matter of probation under advisement and stated that if the defendant had a letter

from the mom of the twelve-year-old victim saying she wanted the defendant to have probation then he would consider the issue of probation.

On 7/1/22, a second hearing was held during which the victim's mother testified. The victim's mother stated that her family had attended therapy and had received threats at both her home and through text messages. The mother also stated that she had never told the prosecutor's office it was ok for the defendant to receive probation but she advised that she would respect the trial court's sentencing decision.

The trial court denied probation and noted that the court did not need to have another hearing for any further information. The trial court did not make any other findings in regard to statutory requirements.

**HELD:** The Court of Criminal Appeals held that: "Given the complete lack of findings of fact in this case, we conclude that a new sentencing hearing is in order to determine the defendant's suitability or lack thereof for probation."

The Court of Criminal Appeals noted that the trial court failed to make any findings with regard to its denial of alternative sentencing. After the victim's mother had testified that she did not want the defendant to receive probation, the trial court noted, "I've got these folks telling me they want you to go to jail. What do you think I'm going to do? You've done it --- done it before. Application for probation is denied."

The Court of Criminal Appeals noted that the trial court did not indicate whether it examined the statutory considerations for imposing confinement nor did it place in the record its reasons for imposing the sentence. The Court of Criminal Appeals noted that although the trial court is afforded wide discretion in sentencing decisions, the trial court "retains an affirmative duty to state on the record, either orally or in writing, its findings of fact and reasons for imposing a specific sentence to facilitate appellate review." The court noted that "while the trial court correctly noted that the defendant committed the instant offense while on diversion for the exact same offense, he failed to make a finding that



measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.”

The case was therefore remanded to the trial court for further proceedings consistent with the opinion.

**PRACTICE POINT:** This case is put in the outline just to emphasize that even though General Sessions Judges are not reviewed by an appellate court directly but appeals go to the Circuit Court for a de novo hearing, it is still important for General Sessions Courts to consider statutory factors and factors outlined in appellate decisions that establish our sentencing decisions are based on lawful considerations and appropriate considerations including history of the defendant, factors set out by statute and in case law, and for us to know that we have considered the facts of the case, the history of the defendant, information provided through prosecutors and defense counsel, statements by victims, treatment factors that may influence a decision, significant or egregious factors in the case, and other information that can show that we have made a considered decision about the case. These are important for defendants and their families, victims and their families, and others who may be affected by the decision. All sentencing procedures (for courts of record and non-courts of record) are essentially for the purpose of having some consistency in decision making and for the purpose of people understanding the nature of the sentencing and the factors the court is considering in the decision. It adds credibility for General Sessions Courts to clearly state the basis of findings and factors in sentencing.

State v. Campbell (Tenn. Cr. App. 4/17/23)

## **TAMPERING WITH EVIDENCE**

**TAMPERING WITH EVIDENCE: CONVICTION REVERSED DUE TO THE FACT THAT STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BY PLACING THE BAG OF**

## HEROIN IN HIS PANTS THE DEFENDANT INTENDED TO IMPAIR ITS AVAILABILITY AS EVIDENCE IN THE POLICE INVESTIGATION OR AT TRIAL

**FACTS:** A Madison County jury convicted the defendant of tampering with evidence along with other crimes. The defendant contended that the evidence presented at trial was insufficient to support his conviction for tampering with evidence.

The tampering with evidence charge was based on “the defendant’s placement of a bag of heroin in his pants during a traffic stop which continued during his transport to the Madison County Jail.” Before placing the defendant in the patrol car, the officer conducted a pat-down search of the defendant but did not locate anything. Prior to exiting the patrol car at the jail, the officer shined a flashlight on the backseat of the patrol car and the defendant’s hands to ensure they were empty. The officer testified the defendant dropped the bag of heroin in the empty hallway at the Madison County Jail as they were walking to the booking area. The officer was able to retrieve the bag which was later identified as 2.01 grams of heroin.

The facts showed that the bag of heroin was not altered or destroyed. The defendant was in the presence of police officers the entire time he had the bag of heroin in his pants, and it was discovered by the officers within minutes of the defendant’s dropping the bag of heroin in the hallway.

**HELD:** The Court of Criminal Appeals concluded that the defendant’s conduct did not impair the heroin’s evidentiary value, its availability for testing, or its use at trial. The court found that under the facts of the case, the evidence presented was insufficient to support the defendant’s conviction for tampering with evidence, and the conviction was reversed and vacated.

The Court of Criminal Appeals pointed out the key principles of a tampering with evidence case as follows:

1. When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”
2. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact.
3. A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves all conflicts in favor of the theory of the state.
4. The rationale for these rules pertaining to tampering with evidence was stated by the Tennessee Supreme Court in State v. Grace (Tenn. 1973) as follows:

“This well-settled rule rests on a sound foundation. The trial Judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere, and the totality of the evidence cannot be reproduced with a written record in this Court.”

5. TCA 39-16-503(a)(1) sets forth the definition for tampering with evidence:
  - a. It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress to:
    - (1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.

6. The statute requires the state to prove “timing, action, and intent” beyond a reasonable doubt.

The “timing” element requires that the act be done only after the defendant forms a belief that an investigation or proceeding is pending or in progress. The “action” element requires alteration, destruction, or concealment.

To “conceal” a thing means “to prevent disclosure or recognition of a thing or to place a thing out of sight.”

For “intent” to be established, the proof must show that through his actions the defendant intended to hinder the investigation or official proceeding by impairing the record’s, document’s or thing’s verity, legibility, or availability as evidence.

7. For examples, cases in which convictions for tampering have been upheld include a situation when a defendant swallows the drugs, flushes the drugs down a toilet, tosses the drugs out of a moving vehicle over a significant drive when the drugs are never found.

8. Factual situations in which convictions have not been upheld include a situation when a defendant hid drugs in his socks or his pocket, tossed the drugs onto the roof of a garage while being pursued, dropped the drugs off a roof in view of the police, or threw the drug evidence over a wooden privacy fence while officers were in pursuit, or hiding the drugs in one’s mouth without successfully swallowing the drugs which are ultimately found. In these types of situations, the Tennessee Supreme Court has declined to convict because the elements of evidence tampering had not been met due to the fact that the evidence could still be used and was not permanently lost or destroyed.

The Court of Criminal Appeals noted that in the present case the state would have been required to prove beyond a reasonable doubt that by placing the bag of heroin in his pants, the defendant intended to impair its availability as evidence. The court noted that the facts showed that the defendant’s actions only resulted in the discovery of the drugs being “delayed minimally, if at all.” The court noted that the defendant’s

conduct did not impair the heroin's evidentiary value, its availability for testing, or its use at trial.

State v. Graves (Tenn. Cr. App. 2/9/23)

### **TRAFFIC CITATION**

**TRAFFIC CITATION: DEFENDANT'S PAYMENT OF HIS TRAFFIC CITATION ON 7/24/19 AND ALLOWING TEN DAYS TO LAPSE BEFORE HE FILED A MOTION TO WITHDRAW HIS GUILTY PLEA ON 8/26/19 RESULTED IN HIS JUDGMENT OF CONVICTION BECOMING FINAL AND HIS MOTION FAILED TO STATE A COGNIZABLE CLAIM FOR ANY FORM OF POST-CONVICTION RELIEF**

**FACTS:** Defendant was a truck driver with a California commercial driver's license and was issued a traffic citation on 5/8/19 by a Tennessee State Trooper for failure to exercise due care in a traffic accident in violation of TCA 55-8-136. The defendant's court date was set for Wilson County General Sessions Court on 7/11/19. The citation was signed by the defendant and by the trooper.

The citation contained the following language: "YOU MAY PAY BY MAIL. IF YOU WISH TO PLEAD GUILTY TO THE OFFENSE CHARGED AGAINST YOU, YOU MUST SIGN THE WAIVER PRINTED BELOW AND MAIL THIS COPY OF THE CITATION AND THE PRESCRIBED AMOUNT SET BY THE COURT."

The defendant did not seek a continuance and the facts were undisputed that on 7/24/19, the defendant paid the citation online in lieu of appearing in General Sessions Court. The citation indicates that the citation was disposed of by the Wilson County General Sessions Court, but the disposition/judgment information does not reflect the date the case

was settled, is not signed by the General Sessions Judge, and none of the boxes for guilty, not guilty, dismissed, or other, are checked.

On 8/26/19, the defendant filed a "Motion to Hear or Rehear the Traffic Case, Set Aside Payment of Traffic Citation for Mistake And/Or to Set Aside The Retired Status and Judgment of Traffic Citation." The defendant argued that the payment was not a guilty plea nor an acknowledgement of guilt and also noted that when he paid the citation, he did not know that the conviction would seriously affect his commercial driving privileges and his ability to work and that paying the citation was a mistake of fact.

The General Sessions Court denied the motion on 11/14/19, and on 11/20/19, the defendant appealed the General Sessions Court's denial of his motion to the trial court.

On 6/4/20, the trial court held a hearing, for which there is no transcript, but a statement of the evidence reflected that the trial court granted the defendant's motion to set aside the judgment of the General Sessions Court and set the case for trial on 9/3/20, and a docket sheet states "9/3/20 @ 9:00 for trial."

On 9/3/20, the court reviewed the status of the case and the trial court ultimately denied the defendant's motion to hear or rehear the traffic case or to set the judgment aside. The defendant filed an appeal to the Court of Criminal Appeals.

**HELD:** The Court of Criminal Appeals held that the trial court properly dismissed the defendant's appeal from the Sessions Court. The Court of Criminal Appeals held that the defendant's motion in Circuit Court failed to state a cognizable claim for any form of post-conviction relief.

Succinctly, the Court of Criminal Appeals stated that in this case the following had occurred:

1. The defendant paid his traffic citation on 7/24/19.
2. The defendant did not file his motion to withdraw his guilty plea until 8/26/19, well after any judgment of conviction had become final.

3. Therefore, any challenge to defendant's conviction for failing to exercise due care in a traffic accident was "necessarily limited to post-conviction remedies."

4. The Court of Criminal Appeals found that in the present case, the defendant's motion failed to state a cognizable claim for any form of post-conviction relief.

5. The CCA determined that the trial court properly dismissed the defendant's appeal from the General Sessions Court and he was not entitled to relief.

The court noted that Tennessee Rule of Civil Procedure 32(f) provides that a trial court may grant a motion to withdraw a guilty plea for any fair and just reason before the sentence has been imposed. The court noted that after the sentence has been imposed but before a judgment becomes final, the court may set aside the judgment of conviction and permit the defendant to withdraw the plea to correct manifest injustice. The court then found that since ten days had passed from the time of the payment of the fine that the General Sessions Court had properly dismissed the case since it was past the ten days granted to the defendant to appeal.

6. The trial court properly dismissed the defendant's appeal from the General Sessions Court because it failed to state any cognizable claim for any form of post-conviction relief since the motion was filed after General Sessions Court lost jurisdiction.

**PRACTICE POINT:** The procedural aspects of this case got somewhat messy, but the key point is that any motion to set aside the judgment needs to be filed during the ten-day period when General Sessions Court still has jurisdiction. Since the defendant did not do so, the General Sessions Court was compelled to find that the motion was untimely. Following that, the Circuit Court had no basis to set aside the judgment or grant any post-conviction relief since no cognizable basis for relief had been set out.

State v. Kolimlim (Tenn. Cr. App. 11/7/22)

## **VIOLATION OF PROBATION**

### **FACTORS FOR TRIAL COURT AND PROBATION VIOLATION CASES: IT IS PROPER FOR A TRIAL COURT TO CONSIDER THE DEFENDANT'S BEHAVIOR WHILE ON PROBATION IN DETERMINING THE PROPER CONSEQUENCE FOR A PROBATION VIOLATION**

**FACTS:** The defendant was placed on probation for aggravated assault on 10/28/20, and the conditions of the defendant's probation sentence required that he (1) not violate any laws; and (2) refrain from any contact with the victim.

The defendant asserted on appeal that the trial court abused its discretion when it revoked his probation sentence because the trial court based the revocation and consequences for the revocation on matters not included in the probation violation warrant.

**HELD:** The Court of Criminal Appeals concluded that the trial court correctly found by a preponderance of the evidence that the defendant violated the conditions of his probation sentence and properly determined within the court's discretion that the consequence of the violation would be to require the defendant to serve his sentence. The court noted that the CCA disagreed with the defendant's characterization of the trial court's revocation of his probation sentence as being based solely on the defendant's physical assault of the victim while she was paralyzed.

The probation violation warrant alleged that the defendant violated the terms of his probation by using illegal drugs and by having contact with the victim.

The CCA noted that the trial court, in considering the appropriate consequence, properly considered the defendant's conduct during his probation sentence before revoking the defendant's sentence. The court



noted that the conduct of the defendant after being placed on probation included the following:

1. The defendant admitted violating the terms of his sentence by using drugs, which was also based upon multiple failed drug screens.

2. The victim testified that she observed the defendant using drugs and that he asked her to buy “clean urine” to submit for his drug testing. The court noted that while this was not specifically alleged in the warrant, “this evidence presented during the consequence phase provided the trial court with information relevant to the violation and to the proper consequence to be imposed.

3. The probation violation alleged the defendant had contact with the victim in violation of terms of his probation, and the defendant admitted to this violation. The victim also testified about multiple incidences of contact after the probation sentence was in effect, including phone conversations in jail and in-person contact. The CCA noted that while the in-person contact was not alleged in the warrant, this evidence was relevant to the trial court’s determination of the appropriate consequence for the violation. The CCA concluded by saying that in the court’s view, it was proper for the trial court to consider the defendant’s behavior while on probation.

The CCA said that it agreed with the defendant that the trial court should not consider violations not alleged in the warrant when considering whether a violation occurred, but noted that in the present case the defendant admitted to violations of probation, accepting the allegations that he engaged in illegal drug use at least three times and that he had contact with the victim at least once. The court noted that if nothing else, the defendant’s guilt as to the violations was already established by his own admission.

Importantly, the court noted that after determining that the defendant had violated his probation, the court considered additional evidence relevant to the violations to determine “whether the defendant should return to probation, serve a period of the sentence in jail, or serve the entirety of the sentence in jail.” The court noted that the trial court

considered the “scope and breadth of the violations to conclude that because the defendant repeatedly violated both Tennessee law and the terms of his probation sentence, he was not a good candidate for reinstatement to the probation sentence.”

**PRACTICE POINT:** This case recognizes that the allegations in a probation warrant about the nature of the violation must be proven in order to establish a violation of probation, but once the violation has been established, the court can consider other facts that are established by testimony in court, by which the court can determine the proper consequence of the violation, as this is a factor in how the defendant will conduct himself/herself in the future.

State v. Sarkissian (Tenn. Cr. App. 12/2/22)

**NO-CONTACT ORDER WITH THE VICTIM: VIOLATION OF NO-CONTACT ORDER FOUND TO BE KEY FACTOR IN VIOLATION OF PROBATION AS DEFENDANT CONTINUED TO VIOLATE THE ORDER DAILY, EVEN WHILE HE WAS STILL IN CUSTODY, AND THE VIOLATION INCLUDED HIS ELICITING THE HELP OF HIS OWN MOTHER TO VIOLATE THE NO-CONTACT ORDER**

**FACTS:** The defendant plead guilty to the offenses of aggravated assault and kidnapping and was sentenced to serve four years with a suspended sentence served on supervised probation and including a no contact order with Christa Burchell, the victim of his crimes.

The defendant was subsequently charged with violation of probation for testing positive for the use of controlled substances, committing the new offense of driving under the influence, and in violating the trial court’s no-contact order.

The defendant maintained that the trial judge abused his discretion in ordering confinement for the balance of the sentence rather than a period of split-confinement, claiming that he was amenable for residential substance abuse treatment and that service of the entire sentence was not necessary.

**HELD:** The trial court properly exercised its discretion in deciding the consequence of the defendant's violation was to revoke his suspended sentence in its entirety to be served. The court noted that a trial court's "consequence determination analysis" is not merely focused on the probationer's rehabilitative needs alone, but "must necessarily also consider whether those needs, including substance-use treatment, can be effectively addressed in the community rather than in custody.

Toward this end, the court noted that the trial court considered "how quickly" the new violations occurred after the defendant's original plea. The Court of Criminal Appeals noted that the CCA has emphasized that this factor is appropriate for consideration "because, all things being equal, new violations that have occurred quickly after sentencing on a previous probation violation may show that the defendant is not voluntarily cooperating with rehabilitative measures."

The court noted that the trial court had also emphasized that the defendant had continued violating the order of no-contact with the victim, even while the defendant was being held in custody pending the probation violation hearing. The court noted that the defendant had "even elicited the help of a third party, his mother, to violate the no-contact order." The court noted that the trial court's consideration of this factor was certainly appropriate because an early violation of this nature shows that the defendant did not take the trial court's order seriously. The court further noted that the defendant's use of his mother as a screen to obscure the violations of the no-contact order, as well as his telling the victim to "be sneaky" revealed a purposeful and willful intent to violate the court's orders.

The court further noted the provision of Tennessee Code Annotated 40-28-302(1) emphasized the possibility of revocation of probation "for

failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large and cannot be appropriately managed in the community.”

**PRACTICE POINT:** It is a significant factor in violation of probation proceedings to consider the dangers and risks to specific victims of crime as well as the public as a whole and is a factor in a judge’s determination about whether or not such risk can be appropriately managed while the defendant remains in the community.

State v. Banning (Tenn. Cr. App. 10/18/22)

**VIOLATION OF PROBATION: “THE CONSEQUENCE DETERMINATION” IN A CASE OF VIOLATION OF PROBATION ESSENTIALLY EXAMINES “WHETHER THE BENEFICIAL GOALS OF PROBATION ARE BEING REALIZED” IN WHETHER THE DEFENDANT REMAINS AN APPROPRIATE CANDIDATE FOR PROBATION**

**FACTS:** On 8/11/14 the defendant plead guilty to the offense of theft of property as a Class D felony, following which the Blount County Circuit Court sentenced her to a term of four years, suspending the sentence and placing the defendant on probation.

The defendant violated her probation on 8/24/15 and again on 6/2/18. For the first violation, the court ordered the defendant to serve two-hundred and ten days before being returned to supervised probation, and for the second violation, the trial court ordered her to serve eighty days before returning to supervised probation.

On 8/6/18 the trial court issued a third VOP warrant alleging the defendant had failed to report to her probation officer, and the defendant

continued to remain out of contact with her probation officer until she was arrested more than three years later on 11/29/21.

The Blount County Circuit Court held a revocation hearing on 1/24/22, at which time the defendant stipulated to violating her probation by failing to report to her probation officer since 7/3/18. At the hearing Deputy Pekala testified that while on routine patrol on 11/29/21, he pulled over a vehicle in which the defendant was a passenger, at which time the defendant gave a false name and insisted that she could not remember her complete social security number. The defendant testified at the hearing and testified that she had passed her initial drug screens, but later when her probation officer announced he would be “violating” her probation after he believed she had “masked” a drug screen, she stopped reporting to her probation officer because she believed that she didn’t have any other date to report to.

**HELD:** The Court of Criminal Appeals held that the trial court properly exercised its discretion in ordering the defendant to serve her original sentence as a consequence of her probation violations. Specifically, the court looked at the specific factor of “seriousness of the violations,” and noted that the defendant had committed new criminal conduct which included three separate criminal offenses of which one was a felony. The Court of Criminal Appeals noted that the court had long recognized that where a probationer continues to commit new crimes, the beneficial aspects of probation are not being served. The court noted that the seriousness of the violation only increases when the probationer continues to commit new felony offenses while on probation for a felony.

In regard to failure to report, the court noted that the period of more than three years without reporting was a significant violation, “because supervision may be important to aid a probationer’s rehabilitation and to protect public safety, a probationer’s failure to voluntarily comply with supervision may reflect poorly on the probationer’s suitability for further probationary efforts.” The court also noted that the “intentionality of an absconson” is relevant to whether the probationer is going to engage in rehabilitation efforts. The court therefore stated that “a sustained period

of absconsion can show the probationer has a complete disregard for the rehabilitative process and the orders of the court.

The court also noted in regard to “prior violations,” the defendant had twice violated conditions of her probation before committing the instant violations. The court noted that the CCA had also recognized that prior violations may show that the defendant has poor potential for rehabilitation and is unwilling to engage in rehabilitative efforts.

The Court of Criminal Appeals concluded that the trial court had properly exercised its discretion in ordering the defendant to serve her original sentence as a consequence of her probation violations. The CCA noted that the trial court had properly considered the key factors of seriousness of the violations consisting of new criminal conduct, a felony offense, and her lengthy absconsion from supervision. The court also noted that the court had properly considered the defendant’s prior history on probation and her two prior violations of probation.

**PRACTICE POINT:** This case includes a good summary about how to proceed with a violation of probation case, which is to say very clearly the basis of the finding of violation of probation and a clear analysis of the factors which are appropriate for consideration.

State v. Everett (Tenn. Cr. App. 11/3/22)

**NOTE:** In the case of State v. Johnson (Tenn. Cr. App. 11/16/22), the Court of Criminal Appeals also concluded that the trial court had sufficiently stated its reasoning in fully revoking the defendant’s sentence.

The Court of Criminal Appeals in State v. Johnson noted that the defendant had entered a guilty plea to violation of probation and stipulated to the facts supporting the conviction.

For his second probation violation for absconding, the defendant had explained that he understood the policy concerning reporting late to the probation office and the need to report the next day. The defendant

acknowledged that on this occasion he had relapsed and used drugs again following which, the defendant had acknowledged that he was given “a break” and allowed to check in to a rehabilitation facility. Unfortunately, the defendant had checked himself out two weeks later in direct violation of the instructions from his probation officer. The defendant then chose not to report to his probation officer and chose to spend time with his family because he knew that he would have to answer for his conduct at some point and he waited for police to arrest him at his home.

The Court of Criminal Appeals held that the trial court found that this second violation for absconding indicated his inability or unwillingness to comply with release in the community.

Based on these factors, the Court of Criminal Appeals stated the court was unable to agree with the defendant that his interest and the interest of the public were not properly considered by the trial court, and the CCA found that the trial court had not abused its discretion in revoking defendant’s probation and requiring him to serve the entire sentence in custody.

## ETHICS

### BRANDISHING A FIREARM IN OPEN COURT

#### **DISPLAY OF FIREARM: JUDGE VIOLATED HIS OWN LOCAL RULE IN REMOVING A FIREARM FROM A PLACE OF CONCEALMENT ON HIS PERSON DURING A CIVIL CASE AND PLACING IT ON THE BENCH IN OPEN VIEW FOR THE REMAINDER OF THE PROCEEDING**

**FACTS:** During a civil case that occurred on March 12, 2022, the judge removed a firearm from a place of concealment on his person and put it on the bench in open view for the remainder of the proceeding. At one point, the judge picked up the gun and displayed it for all to see, the act being captured on court security video. Stories about the incident went viral in the national news subsequent to the incident.

The facts showed that on April 4, 2013, the judge himself, as Chief Judge of the 2<sup>nd</sup> Judicial Circuit, entered an order allowing all Circuit Court Judges, Family Court Judges, Supreme Court Justices and Senior Status Judges to “possess a firearm in and about the premises constituting courthouses and/or magistrate courts throughout the 2<sup>nd</sup> Judicial Circuit.” The order directed that all such judges “shall take reasonable and necessary measures to ensure that any firearm he or she may possess on the aforesaid premises is concealed such that the same is not displayed.”

**HELD:** The Judicial Investigation Commission of West Virginia held that it was “incredulous for a judge to violate his own administrative order but that is what the judge did when he pulled out a gun and he showed it in the courtroom. It is no wonder to this Commission that his conduct resulted in nationwide publicity. He not only humiliated himself but he also



caused great embarrassment to the court system as a whole and is admonished for his actions.”

The Commission found the judge guilty of violations of the following:

1.1 – Compliance with the Law

1.2 – Confidence in the Judiciary

1.3 – Avoiding Abuse of the Prestige of Judicial Office.

2.8 – Decorum, Demeanor and Communication with Litigants, Jurors, and other Professionals.

In addition to the public admonishment of the judge, the judge had agreed to resign and never seek judicial office again.

In the matter of David Hummel, Jr., (Complaint No. 37-2022, Judicial Investigation Commission of West Virginia 12/2/22).

### **COMMENTS REGARDING THE NEED FOR AN INTERPRETER BY THE TRIAL JUDGE**

**INTERPRETER PROVIDED FOR DEFENDANT “OUT OF AN ABUNDANCE OF CAUTION”: COMMENT BY TRIAL JUDGE THAT AN INTERPRETER WAS APPOINTED FOR THE DEFENDANT “OUT OF AN ABUNDANCE OF CAUTION” DID NOT INDICATE ANY BIAS BY THE JUDGE FOR OR AGAINST EITHER PARTY AND DID NOT IMPROPERLY SUGGEST THAT THE JUDGE DID NOT BELIEVE THAT THE DEFENDANT ACTUALLY NEEDED AN INTERPRETER**

**FACTS:** In a case involving a charge of driving under the influence, sixth offense, the defendant contended that the trial court had erred in telling prospective jurors that an interpreter was being provided to the defendant at trial “out of an abundance of caution.”

At that time, the trial court had noted that when English is a second language, “the need for an interpreter does increase at a trial where you cannot pace yourself to try and slowly and methodically understand each other.” The court also stated that he had remembered the defendant’s testimony at an earlier hearing and that even though everyone had got through the hearing, “it was not a piece of cake.” The defendant claimed that the court’s comment “effectively expressed its personal opinion that the defendant could speak and understand English well enough that an interpreter was not necessary” and “effectively endorsed the officer’s subsequent testimony that the officer was able to communicate with the defendant in English and that the defendant, in response to questioning, stated that he had been driving the vehicle.”

The defendant further maintained that a key issue in the case was whether the defendant understood Officer Cox’s question about whether he had been driving, and that the trial court’s remark constituted a judicial comment on the evidence in violation of Article VI, section 9 of the Tennessee Constitution as well as the Fifth and Fourteenth Amendments to the United States Constitution.

In pretrial proceedings the defendant had requested an interpreter even though an interpreter had not been used in previous proceedings because defense counsel maintained that the previous hearings had been “very challenging for the court reporter” and “very challenging for both of us.”

The state maintained that the trial court had made the comments to ensure that prospective jurors would not harbor a bias toward either party based on the presence of the interpreter and were a proper exercise of the trial court’s discretion when conducting voir dire and did not constitute an improper comment on the evidence.

The state had argued that there was no need to continue the trial for the defense to have an interpreter because an interpreter had not been used in prior hearings and there had never been an allegation that the defendant did not speak English.

**HELD:** The Court of Criminal Appeals stated, “After considering these comments in the overall context of the case, we conclude the defendant has failed to show that the trial court abused its discretion in making these comments.”

The court emphasized that when the trial court made the statement “out of abundance of caution” the comment was made to explain to prospective jurors why there was an interpreter present. The court noted “that the bulk of the court’s remaining comments were made to ensure that the prospective jurors were not biased toward either party based on the presence of the interpreter and to identify any potential jurors who might not be able to view the proof objectively because of the interpreter.”

The court also made it clear to the jurors that the defendant’s ability to understand English could become an issue in the case, the Court of Criminal Appeals noting that these comments were neutral and impartial and were a proper exercise of the trial court’s discretion during voir dire.

The court further noted at one point during the hearing that he was not suggesting that the defendant had a command of the English language by any “stretch of the imagination.” The court noted that it is critical to have interpreters to make sure of a full understanding of what is going on by the defendant and the court emphasized that he was “not trying to give any misleading information on the ability or the extent of the defendant’s ability to understand English because that may become an issue in the case.”

The Court of Criminal Appeals noted the following principles in regard to use of interpreters in a court of law:

1. In Tennessee, a judge is constitutionally prohibited from commenting on the credibility of witnesses or the evidence in a case.

2. A trial judge must be very careful not to give the jury any impression of his or her feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury.

3. The court must consider the trial court's comments in the "overall context" of the case when determining whether the comments were prejudicial.

**PRACTICE POINT:** There have been cases in Tennessee and across the nation in which comments have been made by the judge about whether or not the defendant actually needs an interpreter; about the trial court's conclusion that the defendant is playing games and does not actually need an interpreter; derogatory remarks by a trial judge in regard to defendants acting like they need an interpreter when they actually do not; and similar types of comments that have become the subject of ethical complaints and/or as in the current case, an issue as to whether or not the court had made an improper comment impacting a jury or impacting the perception of whether the judge had any bias in the case.

It is important for all judges, including General Sessions judges, to properly understand and respect the needs of parties to cases, including criminal defendants, needing the use of an interpreter in order to properly keep up with a case, have a full understanding of what is going on and what is being said, have a person such as an interpreter who can ask the court to slow down or repeat a matter in which it may have been difficult for the interpreter or the party to understand what has been said, and other related issues.

It is important for a judge to have patience and understanding in regard to these issues to emphasize the desire to be fair and receptive to the needs of litigants involved in the court process. Whether or not someone has a basic understanding of certain aspects of the English language certainly does not mean that person is capable of understanding the context of legal procedures and legal expressions as a case moves promptly through the court's docket.

Providing an interpreter is the best course of action to show that the court is fair and neutral and interested in helping the litigants, and avoiding issues on appeal where there is the appearance that an interpreter was needed but not provided, and numerous other issues regarding issues pertaining to interpreters.

State v. Lueth (Tenn. Cr. 2/10/23)

### **IMPARTIALITY OF A TRIAL JUDGE**

**IMPARTIALITY OF A TRIAL JUDGE: THE PURPOSE OF ARTICLE VI, SECTION ELEVEN OF THE TENNESSEE CONSTITUTION IS TO “INSURE EVERY LITIGANT THE COLD NEUTRALITY OF AN IMPARTIAL COURT”**

**FACTS:** On 1/26/19, the defendant and his girlfriend took their eleven-week-old daughter (the victim) to the Crocket Hospital emergency room in Lawrenceburg. The defendant told nurses that he had fallen while holding the victim. The victim’s injuries were so severe that the child was transferred to Vanderbilt’s Children’s Hospital and the hospital staff contacted law enforcement and the Department of Children’s Services. The defendant was arrested on a charge of aggravated child abuse, and later the Lawrence County grand jury indicted the defendant with charges of attempted first degree premeditated murder and aggravated child abuse.

Subsequent to the date when the child was taken to the hospital, the defendant voluntarily gave a statement to detectives that in addition to slipping and falling with the victim he had slammed the victim against his chest a couple of times to make her quit crying and then had thrown her on the couch. He also admitted that he may have hit her head on the couch.

At the start of the defendant’s trial, the defendant pled guilty to the charge of aggravated child abuse, following which the trial for attempted

first degree premeditated murder took place, and the defendant was convicted.

Prior to trial, the defendant had filed a motion for Judge Hargrove to recuse herself from the trial contending that Judge Hargrove had been involved in the victim's adoption and that photographs of the adopting family posing with Judge Hargrove, including one picture of Judge Hargrove holding the victim, were posted on Facebook by the victim's adoptive mother, creating an appearance of impropriety that necessitated Judge Hargrove's recusal.

In the order denying the motion to recuse, Judge Hargrove explained as follows:

1. The defendant had "simply executed a surrender of his parental rights," and the case did not involve a termination of his parental rights. The surrender took approximately fifteen minutes and nothing was discussed about any criminal charges that might be pending against a surrendering parent. The counsel for the parent was present during the surrender.
2. Judge Hargrove explained that she had been responsible for all termination of parental rights cases for two years and that after parents surrendered their parental rights, the same trial court usually presided over the adoptions that followed.
3. Judge Hargrove explained that adoption proceedings were very brief, lasting approximately 5-10 minutes, and that it was often the case that adoptive families requested photographs with the judge and that this case was no different.
4. Judge Hargrove noted that she did not request to hold the victim but that a family member requested that she pose with the victim and family members for a quick picture. The judge noted that "in no way did I bond with the victim over those few seconds." She noted that pictures were posted by someone on Facebook but she simply followed the same routine in every adoption, and she had not thought to request that pictures not be placed on social media.

5. Judge Hargrove had stated in denying the recusal that “she had no personal bias against defendant and maintained that she could be fair and impartial.”

**HELD:** The Court of Criminal Appeals held that “a person of ordinary prudence in the judge’s position, knowing all the facts known to the judge, would not find a reasonable basis for questioning its impartiality.” The court therefore found that the defendant had not shown that the trial court erred when it denied his motion for recusal.

The Court of Criminal Appeals noted the following principles in regard to a case in which the impartiality of the judge was questioned:

1. Article VI, Section 11 of the Tennessee Constitution provides “that no judge of the supreme or inferior courts shall preside on the trial of any cause in the event of which she may be interested.”

2. The Tennessee Supreme Court has explained that portion of the constitution is to “insure every litigant the cold neutrality of an impartial court.” The provision is intended to “guard against the pre-judgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a pre-judged conclusion because of interest, partiality, or favor.”

3. “Preservation of the public’s confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial.”

4. Tennessee’s Rules of Judicial Conduct require judges to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.”

5. A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned. One such circumstance described by the code is when “the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.”

6. The test for recusal requires a judge to disqualify herself in any proceeding in which “a person of ordinary prudence in a judge’s position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.”

Looking at all of these principles, the Court of Criminal Appeals concluded that Judge Hargrove’s actions during the victim’s adoption were completely in line with what typically occurs during adoption proceedings. The court noted that “a reasonable person would understand that a trial judge assigned to a judicial district is responsible for a wide variety of proceedings that may involve overlapping litigants and that the same trial judge might even preside over several criminal cases involving the same defendant.”

The court noted that “the simple fact that Judge Hargrove presided over other cases – one involving the surrender of defendant’s parental rights and another involving the adoption of the victim – is insufficient to support recusal.”

Therefore, the Court of Criminal Appeals concluded that the defendant had presented no proof that Judge Hargrove’s involvement in the victim’s adoption made his trial unfair. In regard to the pictures being placed on Facebook with the victim and Judge Hargrove, the court noted there was no proof that Judge Hargrove was Facebook “friends” with the victim’s adoptive mother or that Judge Hargrove had visited, “liked,” or otherwise interacted with the Facebook post regarding the adoption.

**PRACTICE POINT:** It is important for a judge to consider all of the judge’s actions in regard to other court proceedings when considering a motion for recusal. This is a good case to refer to if issues arise. Judges should consider honestly whether a person in a defendant’s position might feel uncomfortable or very uncomfortable due to previous interactions that the court has had with the defendant or other people involved in a case. The simple fact is that it is not essential to remain on a case if it appears to be a borderline case in regard to the need for recusal.

State v. Fisher (Tenn. Cr. App. 2/15/23)



## **JUDICIAL DEMEANOR TOWARD YOUNG CHILDREN**

### **IN CAMERA INTERVIEWS WITH MINOR CHILDREN: THE JUDGE'S CONDUCT IN CALLING TWO YOUNG GIRLS, AGES 7 AND 6, "LIARS" AND ACCUSING THEM OF CONSPIRING WITH THEIR MOTHER, FOUND TO BE OUTRAGEOUS STATEMENTS AND IMPROPER CONDUCT FOR A JUDGE IN A DEPENDENT AND NEGLECT CASE**

**FACTS:** In a dependent and neglect case in Juvenile Court, two minor daughters, ages seven and six, were allegedly sexually abused by their natural father. At a two-day adjudicatory hearing, the judge heard testimony from several witnesses, including three witnesses who testified the daughters were consistent in their reports of abuse; the court heard video-recordings of the children's interviews with the children's advocacy center; and the judge held in camera interviews with both girls with only the guardian ad litem, the judge, and members of the judge's staff being present.

Both of the children were reluctant witnesses and were easily distracted during their interviews. The elder child indicated that she did not want to discuss the allegations and at one or more times both children hid under a table in the judge's chambers. During the interview, the judge repeatedly accused the oldest daughter, age seven, of lying which led her to break into tears. The judge also concluded that the younger daughter, age six, had implicated the mother in a "sinister" plot to falsify allegations against the father, the judge using the word "plan" when questioning the little girl.

The judge ultimately issued an order holding that the children were not abused or neglected and dismissed the petition. When the case was

sent back to him for more specific pleadings, the judge held that there was no clear and convincing evidence of any abuse or neglect by the father and the judge reinstated the parenting time previously ordered by the family court.

In a later appellate opinion, the State Supreme Court found that the judge had violated West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings and established case precedent on leading witnesses and the questioning of children. The appellate court therefore vacated the lower court's order dismissing the abuse and neglect petition and remanded the matter back for a different judge to consider the case.

**HELD:** The Judicial Investigation Commission of West Virginia held that the judge violated Rules of Judicial Conduct and established case law with respect to the use of leading questions in the proceedings. The board held that the judge "knew or should have known better." The court noted that the judge was a longtime lawyer and former assistant prosecutor and a "seasoned veteran of the court."

The board held that the judge "had absolutely no business calling a child of tender years a liar or suggesting to an impressionable six-year-old that she had engaged in some 'sinister' plan regarding her father."

The board noted that "when dealing with young children, judges should remember at all times that they are not wooden toys that can be repaired with ease. They are living beings with thoughts and feelings who are coming into a huge unknown, called 'court,' to talk to what a child may perceive as a scary individual, called 'Judge,' and must be treated with charity, understanding and patience. Respondent failed to do so and is admonished for his conduct."

In the matter of David Hummel, Jr., (Complaint No. 37-2022, Judicial Investigation Commission of West Virginia 12/2/22).

**JUDICIAL PARKING SPOT, JUDICIAL RESTROOM AND OTHER HILLS TO DIE ON**

**“YOU MAKE THE CALL:” WHICH IS MORE IMPORTANT? YOUR JUDGESHIP OR YOUR PARKING SPOT**

**FACTS:** On 4/30/21, Carter, a former member of Arkansas General Assembly, went to have dinner with his wife and to meet their twenty-year-old son in downtown Bentonville. The son was a college student at a nearby university and at approximately 7:00 p.m. he arrived and parked in a government parking lot. There were well marked signs that stated, “Benton County employee parking lot only, 7:00 a.m. – 5:00 p.m.” There was another sign located on the wall of the building above four parking spots which stated they were reserved for Judge Karren and others and which stated, “reserved parking 24/7 violators towed.” After dinner, the son left with his mother and walked toward his vehicle in the parking lot and when they arrived Judge Karren and a bailiff were standing near both vehicles. The incident that followed resulted in a 27-second video in which Judge Karren throws his cane to the ground while moving towards the son in an aggressive manner. The incident attracted widespread public attention through online social media and traditional media coverage. The video was accompanied by posts which said, “I walked out and saw a very angry man with a gun on his hip and a cane berating my son and my wife because my son parked in ‘his’ parking spot.” The actions of the judge were described as “rabid” and “angry”.

**HELD:** The Arkansas Judicial Discipline and Disability Commission issued a public censure against Judge Karren recognizing among other violations that the judge failed to promote public confidence in the judiciary, and that he violated the prohibition against judges from participating in “extra judicial activities that would appear to a reasonable person to undermine the judge’s integrity, independence, or impartiality.

The Commission stated as follows:

“Judges have a duty to conduct themselves with dignity in their personal lives as well as their official actions on the bench. It is also clear that duty is not just a general principle, but an enforceable standard of conduct. It is not burdensome to expect the judiciary to follow broadly accepted norms of social conduct. This is where you failed. This case was not about a technical aspect of the unique position of being a judge. It was about common courtesy and conduct when in a minor confrontation.

Judges routinely order people to conduct themselves with self-control, show restraint, and avoid confrontation. It is incumbent upon judges to also adhere to the same behavioral standards in their life encounters. This misconduct not only displayed a lack of dignity, courtesy and patience required of judges --- it affected the way the public views a judge dealing with everyday issues --- the same kind that often bring the public to court. Judges should not be isolated from the public. They live in the same communities as the attorneys, staff, parties, and witnesses that appear on their dockets. It is not too much to ask that our judiciary interact with the public with the same patience, self-control, and kindness that should be the social norm throughout our state.”

Commission Case No. 21-188, Judicial Discipline & Disability Commission (1/21/22).

**TRIVIAL INCIDENT LEADS TO LOSS OF JUDGESHIP: AFTER THE JUDGE’S LAW CLERK HAD A MINOR DISAGREEMENT WITH A STORE EMPLOYEE ABOUT THE LAW CLERK MISBEHAVING IN THE STORE, THE REACTION OF THE JUDGE (WHICH LED TO A TWENTY-FIVE DAY JAIL SENTENCE FOR THE STORE CLERK) RESULTS IN THE JUDGE LOSING HIS JUDGESHIP**

**FACTS:** An incident at a convenient store resulted in the convenience store clerk claiming that the judge’s law clerk was misbehaving in the convenience store. Judge Toothman investigated the identity of the salesperson, and ultimately caused a probation violation case to be pursued against the female clerk and having her sent to jail because her actions had displeased him. The sales person ultimately was ordered to be in prison for twenty-five days on a “dubious probation violation charge” in the aftermath of a disagreement with the law clerk at the convenience store.

**HELD:** The Commonwealth of Pennsylvania Court of Judicial Discipline found that Judge Toothman’s misconduct was “motivated by personal anger at two people who offended him,” and the commission also found “his dictatorial actions are reprehensible.” The court stated that “misuse of the powers of the judiciary to satisfy one’s personal animosities is among the worst offenses a judge can commit.”

The court looked at ten key factors in these types of cases which are as follows:

1. Whether the misconduct is an isolated instance or evidenced a pattern of conduct. The court noted that in this case there were two incidents of bullying on the part of the judge that fit the category of a “personal grudge or fit of pique.”
2. The nature, extent, and frequency of occurrence of the acts of misconduct. The court found that the judge’s misconduct was very serious and had a detrimental effect on those he targeted.
3. Whether the conduct occurred in or out of the courtroom. The Disciplinary Commission found that the conduct occurred both in and out of the courtroom in this case.
4. Whether the misconduct occurred in the judge’s official capacity. The court found that the misconduct was specifically pursuant to the judge’s capacity as a judge.

5. Whether the judge acknowledged or recognized that the acts occurred. The court noted that Judge Toothman had acknowledged his improper conduct.
6. Whether the judge has evidenced an effort to change or modify his conduct. The commission noted that Judge Toothman had voiced contrition over his misconduct, resulting in his resignation from the bench.
7. The length of service on the bench. Judge Toothman had served as a judge for eleven years.
8. Whether there had been prior complaints about the judge. No prior complaints had been brought against the judge.
9. The effect of misconduct upon the integrity of and respect for the judiciary. The court found that the judge brought considerable disrepute upon the judiciary by his improper conduct, specifically bullying others for personal reasons which greatly erodes respect for the judiciary.
10. The extent to which the judge exploited his or her position to satisfy personal desires. The commission found that Judge Toothman engaged in his acts of misconduct to satisfy his personal anger.

The court therefore noted that Judge Toothman was removed from the bench and barred from further judicial service, and he was required to send a written apology to those he victimized by his conduct.

In Re: Judge Farley Toothman, Commonwealth of Pennsylvania Court of Judicial Discipline No. 1 JD 20 (3/17/22)

**NOTE:** Another excellent statement was made in regard to the responsibility of judges in maintaining the integrity of the court which was set out In the matter of the Honorable Phillip T. Gaujot, Complaint No. 130-2021 Judicial Investigation Commission of West Virginia (4/25/22), in which the commission stated as follows, in quoting the preamble to the Code of Judicial Conduct, which provides as follows:

“The role of the judiciary is essential to the American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law ... Good judgment and adherence to high moral and personal standards are also important.”

The Judicial Investigation Committee of West Virginia goes on to state the following important language:

“A judge must have a thick skin. Not everyone will agree with the decisions that judges must make in cases on a daily basis. There will always be at least one party who will disagree with the decision and they are free to openly criticize the judge if they so choose. However, judges are constrained by the rules from replying to criticisms and shall not do so when they involve a matter that is pending or impending in any court.

“Judicial temperament is an absolute requirement. Not only does a judge set the tone of his/her courtroom but he/she in large part owes his/her reputation to acts of courtesy, civility and consideration. Judges must also realize that how people view the judge is how they view the court system as a whole. In order to gain respect, a judge must give respect even in difficult circumstances.

“Judges are often perceived as the most powerful person in his/her county. In other words, the balance of power is never equal where a judge is involved and it is usually heavily tipped in his/her favor. Therefore, a judge must at all times take into consideration how he/she is viewed by his/her opponent before commenting. A simple negative comment by a judge may be viewed by his/her opponent as a threat. Therefore, judges should choose their words wisely.”

## **RACISM AND THE LAW**

### **“RACIST AND RACIALLY INSENSITIVE DEMEANOR”: COURT OF JUDICIARY OF ALABAMA FINDS THAT RACIST CONDUCT AND SEXUALLY INAPPROPRIATE CONDUCT ON THE PART OF JUDGE ON MULTIPLE OCCASIONS REQUIRED REMOVAL OF JUDGE FROM OFFICE**

**FACTS:** In a contested hearing before the Board of Judicial Conduct, testimony established that on multiple occasions, Judge Jinks referred to African- Americans as “they,” “them,” or “those people,” along with multiple occasions in which the judge had stated or “mouthed” racial epithets or expressions in the presence of staff or others. The judge often used racial stereotypes in conversations with staff or employees. The judge, according to the testimony, referred to “Black Lives Matter” protestors by using curse words or derogatory expressions and stated on one occasion that “you SOBs” will “need something to burn down after Trump gets re-elected for a second term.” The judge in his defense stated that this statement had been made during a “private and personal conversation,” but admitted that it should not have “been overheard in the workplace.”

Testimony also revealed that Judge Jinks had engaged in sexually inappropriate conduct by showing “a subordinate a sexually explicit video in the workplace,” among several other inappropriate actions or statements made by the judge. The proof also established that the judge engaged in inappropriate displays of anger and use of profanity toward clerks and other people with whom he worked.

**HELD:** The Supreme Court of Alabama held that the conclusions reached by the Court of Judiciary were supported by clear and convincing evidence that the judge violated certain Canons, including:



Canon 1: A judge should uphold the integrity and independence of the judiciary; Canon 2: A judge should avoid impropriety and the appearance of impropriety in all of his activities; Canon 3: A judge should perform the duties of his office impartially and diligently; Canon 5: A judge should regulate his extra judicial activities to minimize the risk of conflict with his judicial duties.

These Canons were violated by the judge’s display of racist conduct, finding that the behavior rose above “mere racial insensitivity.” The Supreme Court also found that the judge engaged in sexually inappropriate behavior.

The sanction of removal from office was found to be supported by clear and convincing evidence.

Judge John Randall Jinks v. Alabama Judicial Inquiry Commission  
(Supreme Court of Alabama, 12/21/22)

## **THE CHALLENGE OF COMBATTING SYSTEMIC RACISM:** **ONGOING DEVELOPMENTS IN RACISM AND THE LAW**

1. The Metro Nashville Community Oversight Board released findings and recommendations in its draft report to the community on July 24, 2023.

The key findings included the following:

- 1) Black and Hispanic subjects, both adults and youth, are more likely to be recipients of use of force (including displays of firearms).
- 2) White and male officers are more likely to use force.
- 3) Black people are more likely to have force used against them.

4) Use of force is concentrated in non-white and high-poverty areas of Nashville.

5) Youth who had force used against them by school resource officers were ninety-six percent black and fifty-eight percent female in 2023.

2. On the national front, the United States Department of Justice Civil Rights Division and the United States Attorney's Office (District of Minnesota Civil Division) released its findings in a report dated June 16, 2023, following the completion of a significant study in the aftermath of the murder of George Floyd in Minneapolis, Minnesota.

The findings included the following:

- 1) The Minneapolis Police Department uses excessive force in violation of the Fourth Amendment, including unreasonable deadly force.
- 2) The MPD uses tasers in an unreasonable and unsafe manner.
- 3) The MPD uses unreasonable take downs, strikes, and other bodily force against compliant or restrained individuals.
- 4) The MPD utilizes unnecessary, unreasonable, and harmful force techniques against youth.
- 5) The MPD fails to render medical aid to people in custody and disregards their safety.
- 6) The MPD fails to intervene during unreasonable uses of force by other officers.
- 7) The MPD has an inadequate force review system.

Additional findings and conclusions of the 2023 study:

- 1) MPD unlawfully discriminates against Black and Native American people when enforcing the law, including unlawfully discriminating against Black and Native American people during stops.
- 2) In the aftermath of George Floyd's murder, many officers stopped reporting information on the race of victims of police abuse.
- 3) MPD has failed to sufficiently address known racial disparities and allegations of bias, which has damaged community trust.
- 4) MPD violates people's First Amendment rights, including (a) violating the First Amendment rights of protestors; (b) retaliating against journalists and unlawfully restricting access of journalists during protest; (c) unlawfully retaliating against people during stops and calls for service; (d) unlawfully retaliating against people who observe and record their activities; (e) and inadequately protecting First Amendment rights.

The Department of Justice concluded that as the result of its investigation, the DOJ has reasonable cause to believe that MPD and the City of Minneapolis engaged in a pattern and practice of conduct that deprives people of their rights under the Constitution and Federal law. The report noted that the MPD used unreasonable force and discriminated against individuals based on race and disability. The report also concluded that MPD "lacks the systemic safe guards that can prevent or address those abuses, such as effective accountability, rigorous training, robust supervision, and appropriate officer support."

3. A new report was released by the Death Penalty Information Center (DPIC), entitled "Doomed To Repeat: The Legacy of Race in Tennessee's Contemporary Death Penalty." The new report placed Tennessee's death penalty in its historical context of lynchings and mass racial violence against Black Tennesseans.

The release of the DPIC report noted as follows: “Tennessee’s history informs today’s practices. Tennessee was the site of more than five-hundred lynchings, according to Tennesseans for Historical Justice and a nationwide study of death sentences between 1989 and 2017 found a significant statistical relationship between a state’s history of lynching and the number of death sentences given to Black defendants.”

The report further states that the DPIC study “documents that Tennessee prosecutors are more likely to seek the death penalty, and juries are more likely to impose it, when the victim is white. Of all death sentences imposed in the state since 1972, seventy-four percent involved white victims. The race-of-victim effect can also be seen in other aspects of the criminal legal system; for example, between 2013 and 2021, twenty-nine percent of homicides of black victims in the state went unsolved, compared to eleven percent of homicides of white victims.”

Robin Maher, DPIC’s Executive Director, stated: “Nothing can change the fact that racial violence and discrimination are part of Tennessee’s history. But studying the past can help us understand why racial disparities continue today, especially in our death penalty system, and inform future decisions.”

4. As reported nationally, on August 14, 2023, six former Mississippi law enforcement officers pleaded guilty to charges against them “stemming from the torture and abuse this year of two black men, one of whom was shot in the mouth.”

Former deputies Christian Dedmon, Hunter Elward, Brett McAlpin, Jeffrey Middleton and Daniel Opdyke and ex-police officer Joshua Hartfield were each charged with conspiracy to commit obstruction of justice.

The former officers pleaded guilty to federal charges in the case in which prosecutors said the former officers kicked down the door of a home in Braxton, Mississippi, where the Black men were living and assaulted them for two hours. The officers did not have a warrant and barged into the home of the victims. The officers referred to themselves as “the goon”

squad” because of their willingness to use excessive force and not to report it, which was the claim of the Federal charging instrument. The victims filed a federal lawsuit against the officers alleging that the officers “illegally entered their home and handcuffed, kicked, waterboarded and tased them and attempted to sexually assault them over nearly two hours, at which time one of the deputies put a gun in the mouth of Michael Jenkins and shot him.” The allegations included that the deputies repeatedly used racial slurs in the course of their violent acts, were oppressive and hateful against the victims, and the defendants were motivated on the basis of race and the color of the skin of the persons they assaulted.

5. Headline: “Aryan Nation gang member charged with threatening Hamilton County judge, federal courthouse from jail phone.” (8/7/23)

In Chattanooga, Tennessee, a man identified by authorities as a member of the Aryan Nation white supremacist gang made several threats to a Hamilton County judge including three telephone calls which were made as follows:

“a) At 3:44 p.m. the defendant made a call to a woman associated with Affordabail Bonding Company in which the defendant “threatened to bomb an unknown person’s house and threatened to bomb the public defender’s office.”

b) At 3:47 p.m., the defendant made a twenty-seven-second phone call to Platinum Bail Bonding, in which he threatened to blow up that company’s building and at which time the caller identified himself as a “terrorist.”

c) At 3:52 p.m. the defendant made a phone call to Affordabail Bonding once again at which time he threatened to bomb Hamilton County Criminal Court judge’s courtroom, stating that he was “going to bomb Gary Starnes’ courtroom” and then laughs and states he is going to bomb the Federal building.”

## Conclusion

In conclusion, the manifestations of the horrendous and lingering effects of racism in the United States of America continue to raise their ugly heads in the criminal and civil justice systems in America. One of the key ethics issues which continues to haunt our legal systems is demonstrated in these reports and headlines which are a tiny sampling of what is in the press and media every single day. As judges, we should never cease in our efforts to combat racism and to seek equity and justice for all.

*“....the minimum that this nation should require from its courts and government at all levels is that they carefully question and scrutinize any governmental measures that harm minorities, that they reject implausible or phony justifications, and that they refrain from covering up racism.*

David Kairys, With Liberty and Justice for Some (1993)

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