

TENNESSEE GENERAL SESSIONS JUDGES
CONFERENCE

FEBRUARY 2023

Criminal Law Update
Murfreesboro, Tennessee

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CRIMINAL LAW UPDATE

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ANIMAL CRUELTY

DEFINITION OF LIVESTOCK: “CHARLEY THE EMU” IS NOT “LIVESTOCK” UNDER THE PLAIN LANGUAGE OF THE STATUTE AND THE TRIAL COURT ERRED IN FINDING THAT “CHARLEY THE EMU’S” STATUS CHANGED TO LIVESTOCK WHEN HE WAS GIVEN TO THE MCGAVOCK HIGH SCHOOL AGRICULTURAL DEPARTMENT

FACTS: The defendant was charged with two counts of animal cruelty which the trial court dismissed upon finding that “Charley the emu” met the statutory definition of livestock under TCA 39-14-201 and that an animal control officer was not a statutorily qualified livestock examiner under the statute.

The trial court had entered a written order granting the defendant’s motion to dismiss finding that the emu status had changed to livestock when it was donated to the McGavock Agricultural Department, and, therefore, the officer who made the charge against the defendant did not meet the qualifications to examine the livestock. At the hearing, the testimony of witnesses, including an animal doctor, had noted the unsanitary and improper conditions for maintaining the emu.

HELD: “Charley the emu” is not livestock. The Court of Criminal Appeals noted that there was no proof in the record that the emu was being raised “primarily for use as food or fiber for human utilization or consumption,” and that the statutory definition of livestock was not ambiguous, and that under the plain language of the livestock examination statute, “Charley” was not livestock. The court noted that applying the plain language of the definition of livestock, that Charley the emu was not livestock, the rabbits who were mistreated were clearly not livestock, and, accordingly, the trial court had erred in the dismissal of the two counts of animal cruelty under the statute.

PRACTICE POINT: “Charley the emu” is not livestock and does not want to be treated as such.

State v. Lumpkins (Tenn. Cr. App. 9/21/22)

CONFESSION

EQUIVOCAL OR UNEQUIVOCAL REQUEST FOR AN ATTORNEY?: THE COURT OF CRIMINAL APPEALS HELD THAT THE DEFENDANT’S REQUEST OF THE LAW ENFORCEMENT OFFICER AT THE INTERROGATION ---- “HOW LONG WOULD IT TAKE TO HAVE A LAWYER HERE?” ---- WAS AT BEST AN “EQUIVOCAL EXPRESSION OF HIS DESIRE FOR THE PRESENCE OF COUNSEL”

FACTS: In a case in which the defendant was indicted for second-degree murder, the defendant maintained that he invoked his right to counsel prior to speaking with Sergeant Byrd and therefore the trial court erred in denying his motion to suppress. The state responded that the defendant’s statement did not unequivocally invoke his right to counsel and that the trial court had properly denied defendant’s motion to suppress.

The parties stipulated to playing a 3-minute segment of an approximately 5-hour long recorded interrogation video in the motion to suppress hearing. In the video, defendant asked of the officer, “How long would it take to have a lawyer get here?” Sergeant Byrd replied, “I don’t know how long. Um, I can’t tell you that. Um, but when we get through the advice of rights form, when we get to that point, then we can look into it. It’s up to you.” Sergeant Byrd testified that he did not believe the defendant’s question was an invocation of his right to counsel.

The sergeant admitted on cross-examination that the defendant may have been “a little sleep deprived,” but “he was alert enough to follow instructions.” Defense counsel asked Sergeant Byrd why he did not ask follow-up questions to the defendant about his attorney inquiry. Sergeant Byrd responded, “He’s a thirty-seven-year-old man. If he wants an attorney and he is obviously alert, oriented, he knows --- ... he never came back to it.”

The defendant testified that he had a “casual conversation” with Sergeant Byrd and that he had read the advice of rights form but claimed he did not understand he was giving up all of his rights when he was signing the form. Defendant claimed that he said, “When can we start the process to get me an attorney?” After seeing the video, the defendant admitted that he said, “How long would it take to have a lawyer here?”

The trial court issued an order denying defendant’s motion to suppress and found that the defendant unequivocally waived his rights when he initialed next to each right and signed the advice of rights form. The trial court determined that defendant did not unequivocally invoke his right to counsel.

HELD: The Court of Criminal Appeals held that they agreed with the trial court’s factual determinations and stated that the defendant’s initial question was at best “an equivocal expression of his desire for the presence of counsel.”

The court stated the following key principles in a case of this nature:

1. Both the state and federal constitutions guarantee an accused the right to the assistance of counsel and the right against self-incrimination.
2. Statements made during the course of a custodial police interrogation are inadmissible at trial unless the state establishes the defendant was advised of his right to remain silent and his right to counsel and that the defendant then waived those rights.
3. A defendant’s right to counsel and to remain silent may be waived as long as the waiver is made voluntarily, knowingly, and intelligently.
4. However, during an investigation, if the defendant clearly and unequivocally invokes either his right to silence or his right to counsel, the interrogation must immediately cease.
5. If an accused makes an unequivocal request for an attorney, all interrogation must cease unless the accused himself initiates further communication, exchanges, or conversations with the police.
6. Invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.
7. If a suspect makes a reference to an attorney that is ambiguous or equivocal and that a reasonable officer in light of the circumstances would have understood only the suspect might be invoking the right to counsel, questioning need not cease, nor must an officer clarify the suspect’s intention regarding invocation of the right to counsel.

8. Whether an individual's request for counsel is equivocal or unequivocal is a mixed question of law and fact that is ultimately subject to de novo review.

The Court of Criminal Appeals primarily focused on the defendant's question, "How long would it take to have a lawyer here?" and determined that at best it was an equivocal expression of desire for the presence of counsel and, therefore, the trial court properly denied the motion to suppress.

PRACTICE POINT: This is one of those puzzling issues when it comes to constitutional rights. The United States Supreme Court could ultimately have chosen in these types of cases to impose a standard whereby once the defendant mentions or discusses his right to an attorney that a duty is imposed upon the officer to clearly state the defendant's right to counsel and to seek clarification as to what the defendant is choosing to do. Instead, the United States Supreme Court elected to choose a path that does not impose a greater duty on law enforcement to seek clarification of rights, even in such cases as the present case when the officer does indicate that there could be an issue of sleep deprivation with the defendant.

By making this type of choice, it can be certainly argued that the justice system has elected through its courts to minimize the rights and/or to minimize the obligations on the part of officers to clarify what a defendant has chosen to do. This also has made it much easier for officers to basically ignore such questions and ignore such opportunities for discussions and to proceed to not get clarification and also resulting in courts upholding the admission of statements even after a defendant has brought up his right to counsel by asking a question about the same.

Based upon the actions of officers through the years and questionable practices used by officers in some circumstances, it is certainly debatable as to whether this has been the best choice in regard to protecting what courts have always purported to believe are very important constitutional rights.

State v. Banks (Tenn. Cr. App. 7/22/22)

RIGHT TO REMAIN SILENT: TRIAL COURT ERRED IN ALLOWING THE STATE TO CONTINUE QUESTIONING AN OFFICER, WITNESS FOR THE STATE, ABOUT THE DEFENDANT'S CHOOSING NOT TO GIVE A STATEMENT AND INVOKING HIS RIGHT TO REMAIN SILENT

FACTS: In a case in which the defendant was charged with two counts of aggravated sexual battery, the defendant contended that the trial court committed reversible error by allowing Sergeant Stanfill to testify that he tried to interview the defendant but that the defendant invoked his right not to speak with the officer.

Sergeant Stanfill's testimony was to the effect that the defendant was transported to the police department where the officers attempted to interview him. The state asked Sergeant Stanfill if the defendant cooperated in that interview and Sergeant Stanfill answered, "No, he chose not to." Defense counsel objected based upon the fact that the defendant chose not to speak because he was invoking his right to counsel and therefore the state should not be allowed to continue asking Stanfill about the defendant's interview.

In a conversation at the bench, the state insisted that it was ok to inquire about whether or not the defendant had cooperated and have the officer respond that the defendant asserted his right to counsel. The state insisted that it was relevant to show the fact that the defendant did not cooperate. The trial judge ruled that he was going to allow the state to pursue with the questions, "whether or not he was given his Miranda rights and was a statement given."

After the bench conference the state continued questioning Sergeant Stanfill which included the following questions and responses:

Q Investigator Stanfill, I believe where you were when we stopped here, I apologize, you transported the defendant from the hospital to CID I believe?

A That's correct, our headquarters.

.....

Q And did you properly Mirandize him?

A Yes. We advised – We have a written copy of one's Miranda rights and read that.

.....

Q Well just tell us what those rights are.

A Basically, you have the right to remain silent if you choose to, and you have a right to an attorney if you choose to have one person present before any questions are asked, and you're not obligated to answer any questions, some of the questions. It's totally up to the defendant what they would like to talk about, if they choose to talk at all.

- Q And these are based on rights given to all of us in the Constitution, correct?
- A That's right. It's just based on constitutional rights of every American.
- Q And when you attempted to speak with the Defendant, did he invoke his rights?
- A He did. We advised him of rights, and he chose to remain silent and have representation.
- Q So he gave no statement, correct?
- A That is correct.

After those questions and answers, the defense counsel moved for a mistrial, and, after mistrial was denied, the defendant accepted the trial court's offer to give a curative instruction, which was given as follows:

“Now, the Defendant is presumed innocent, and the burden is on the State to prove his guilt beyond a reasonable doubt. He is not required to give any statement to law enforcement, and his election not to do so cannot be considered for any purpose against the Defendant, nor can any inference be drawn from such fact.”

HELD: The Court of Criminal Appeals held and concluded that the trial court had erred in allowing the state to continue questioning Sergeant Stanfill about the defendant's choosing not to give a statement and the defendant's invoking his right to remain silent. The court noted that this was over the defendant's strenuous objection.

The Court of Criminal Appeals noted that the Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution generally provides a privilege against self-incrimination to individuals accused of criminal activity, which includes the right to remain silent.

The CCA noted the following principles in such a case:

1. Case law establishes that a defendant may not be punished at trial for exercising his constitutional right to remain silent.
2. Therefore the prosecution generally may not comment about a defendant's post-arrest, post-Miranda silence.
3. Likewise, a law enforcement officer should not comment about a defendant's post-Miranda silence.
4. Nevertheless, an improper comment regarding the invocation of the right to remain silent may be considered a harmless error that does not require the grant of a mistrial.

The CCA ultimately concluded that even though the state elicited improperly the testimony from the officer about the defendant's post-arrest silence, the issue is not mentioned during closing arguments and the trial court made the instruction to the jury that it cannot consider the defendant's decision not to give a statement against him or to draw any inference from the defendant's decision. The CCA also noted that the evidence against the defendant was strong, and the victim testified specifically about being sexually penetrated by the defendant and that she reported the incident to her aunt shortly after the incident. The defendant also gave three different versions of the events which the court found to be damaging to the defendant. Therefore, the error in admitting the information about the defendant's post-arrest silence was deemed to be harmless beyond a reasonable doubt.

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

**WHETHER A DEFENDANT IS IN CUSTODY FOR
MIRANDA PURPOSES: THE TEST FOR MIRANDA
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
A FORMAL ARREST**

FACTS: In a case involving DUI and drug charges, the defendant filed a motion to suppress the evidence obtained during a traffic stop, which included a pistol and needles (found during the search of his vehicle) and the statements that the defendant had made to the trooper in the case.

At his motion to suppress hearing, the defendant admitted to driving a stolen vehicle and being stopped by Trooper Langley, but he denied being under the influence and rested his suppression motion upon the fact that he was not Mirandized during the traffic stop.

During the trial, Trooper Langley testified that he saw the defendant cross the fog line, saw that the vehicle matched a BOLO for a stolen vehicle, and ultimately made a traffic stop of the defendant. The trooper noted that the defendant could barely hold his eyes open, and after removing the

defendant from the stolen vehicle, the trooper performed a pat down search and located a Ruger .380 pistol on the defendant's person. After the finding the pistol, the trooper placed the defendant in the assisting officer's patrol vehicle, searched the stolen vehicle and found three needles.

The trooper asked the defendant about his drug use after finding the needles, and the defendant admitted to using heroin. The defendant stated that the last time he had used heroin was "as he was passing Trooper Langley."

HELD: The Court of Criminal Appeals held that based upon the facts of the case the defendant was not in custody for the purposes of Miranda and therefore there was no requirement that Miranda be read to the defendant at that time when the trooper obtained a statement from the defendant. The court noted that after finding a pistol on the impaired defendant, Trooper Langley placed the defendant in the patrol car for safety purposes. The court noted that during the search of the stolen vehicle, the trooper found needles and asked the defendant about his drug use, "presumably to insure both his safety and the safety of the public." The Court of Criminal Appeals noted that courts have repeatedly held "that an officer may handcuff a suspect or place them in a police car for safety purposes, and that an officer may ask questions that are necessary to ensure the officer's safety or that of the public without violating the Miranda rights of a person in custody." The court noted a prior federal case in which the Sixth Circuit had noted that "merely placing a suspect in the back of a police car does not constitute custody for the purposes of Miranda."

The Court of Criminal Appeals held that the record indicated the defendant was not in custody for purposes of Miranda, and the defendant had provided no proof to show otherwise.

PRACTICE POINT: This case would appear to be a somewhat closer case than indicated in the opinion since the test for determining whether an individual is in custody for Miranda purposes is "whether, under the totality of the circumstances, a reasonable person in a suspect's position would consider himself or herself deprived of movement to a degree associated with a formal arrest." One might think that being removed from a stolen vehicle and being placed into a police car might indicate to a reasonable person in a suspect's position that he was being deprived of movement to a degree associated with a formal arrest.

And, does one “presume” that an officer’s question about the defendant’s drug use is to ensure the safety of the defendant or the officer or the public as a whole without specific proof that was the purpose?

State v. Crowson (Tenn. Cr. App. 5/27/22)

CONSTITUTIONAL RIGHT TO TESTIFY AND BE HEARD

ABILITY TO UNDERSTAND AND COMMUNICATE IN ENGLISH: PROCEEDING WITH THE TRIAL WHEN THE DEFENDANT DID NOT HAVE THE NECESSARY MEANS TO COMMUNICATE VIOLATED HIS CONSTITUTIONAL RIGHT TO TESTIFY AND TO BE HEARD AND CAUSED AN INJUSTICE TO THE DEFENDANT

FACTS: The defendant filed a motion pursuant to TRCP 28 and Tennessee Supreme Court Rule 42 seeking to have the trial court approve and/or appoint a Russian interpreter for his trial on 6/11/21. The defendant claimed that his primary language was Turkish but that he did speak and understand the Russian language. The trial court noted that the defendant had mentioned a problem with understanding English but that the Administrative Office of the Courts had difficulty in finding (and the defendant had not been able to procure) a Russian interpreter.

The defendant argued that the trial court had noticed the defendant had difficulty in understanding English but maintained that the court made “no attempt to determine if defendant had limited ability to speak and understand English.” The Court of Criminal Appeals noted that the record on appeal does not include any written or oral order addressing the defendant’s motion to appoint an interpreter.

HELD: The Court of Criminal Appeals held that the court’s “proceeding with the trial when defendant did not have the necessary means to communicate” violated his constitutional right to testify and to be heard, was unreasonably prejudicial to the defendant’s case, undermined the fairness of the proceeding, and caused an injustice to defendant. The court reversed the conviction and remanded it for a new trial.

The Court of Criminal Appeals relied upon the following principles which were set out in the opinion:

1. The right to testify is a fundamental constitutional right guaranteed both by Article I, section 9 of the Tennessee Constitution and by the 5th and 14th Amendments to the United States Constitution. The Tennessee Constitution provides that the accused has the right to be heard by himself and his counsel.
2. The court has a duty to determine whether a participant in a legal proceeding has a limited ability to understand and communicate in English.
3. If the court determines that a participant has such limited ability, the court should appoint an interpreter pursuant to this rule.
4. A summary of the efforts made to obtain a certified or registered interpreter should be made in open court.
5. Although the appointment of an interpreter is a matter of judicial discretion, the failure to appoint an interpreter may undermine the fairness of the proceeding, and violate the defendant's constitutional right to be heard.
6. The recognition of the need for an interpreter may arise from a request by a party or counsel, the court's own voir dire of a party or witness, or disclosures made to the court by parties, counsel, court employees or other persons familiar with the ability of the person to understand and communicate in English.
7. The interpreter has a duty to: (1) ensure the proceedings in English reflect precisely what was said by the LEP (Limited English Proficiency) person, and (2) to place the LEP person on an equal footing with those who understand and speak English.

The Court of Criminal Appeals noted that the record did not show that the defendant waived the services of an interpreter or even whether the trial court had addressed whether or not the defendant was an LEP person.

The Court of Criminal Appeals noted that it was apparent from listening to the recording that the defendant's limited ability to speak or understand English led to his testimony being characterized as indiscernible. The court noted that the transcript included the word "indiscernible" forty-nine times "in the approximately sixteen pages of transcript containing the defendant's testimony."

The Court of Criminal Appeals noted that the trial court was responsible for determining whether the defendant had a limited ability to understand and communicate in English, it was clear the defendant did struggle to speak in discernible English as the trial progressed and the trial court had simply failed to properly address the issue.

The court also made it clear that the duty to determine whether a participant in a legal proceeding has a limited ability to understand and

communicate in English, a requirement provided in Tennessee Supreme Court Rule 42, “applies to all courts in Tennessee.”

State v. Serghei (Tenn. Cr. App. 9/15/22)

DOUBLE JEOPARDY

JUVENILE PETITION: THE DISMISSAL OF THE INITIAL DELINQUENCY PETITION, WHICH WAS DISCOVERED TO BE UNVERIFIED, DID NOT PREVENT THE STATE FROM FILING A SECOND PETITION WHICH WAS “VERIFIED” AS JEOPARDY NEVER ATTACHED FOR THE FIRST JUVENILE PETITION SINCE IT WAS UNVERIFIED

FACTS: On 2/10/20, the fifteen-year-old defendant was charged with committing child rape and aggravated sexual battery, which was initiated by the filing of a delinquency petition against the defendant in juvenile court. Beginning in April 2020, the defendant participated in treatment for sexually reactive and sexually abusive males at Cedar Grove Treatment Program. The defendant attended the treatment program for approximately nine months.

In March 2021, defendant filed a motion to dismiss based upon the failure of the court to have an adjudicatory hearing pursuant to the Tennessee Rules of Juvenile Practice, which requires a hearing within thirty days of a juvenile being removed from his or her home or ninety days for any case. In May 2021, the juvenile court held an adjudicatory hearing, and counsel for the defendant brought the unverified petition to the court’s attention after the first witness was sworn. The juvenile court entered an order dismissing the charges and the case based upon the unverified petition. The juvenile court stated in its order that jeopardy attached because the first witness had taken the stand.

Subsequently, instead of filing an appeal, the state filed a second verified petition. The defendant then filed a motion to dismiss, claiming that the state should have filed a timely appeal within ten days of the dismissal in juvenile court. The state argued that a defective charging instrument (the initial petition) did not place defendant in jeopardy and therefore that the state had the right to file the second petition.

The juvenile court entered an order which found as follows:

1. The state could have filed an appeal of the dismissal of the initial petition but had not done so;
2. The filing of the second petition violated principles of double jeopardy based on the court's previous ruling;
3. The state's argument against double jeopardy was not compelling because the cases cited were not juvenile delinquency cases; and
4. The defendant's attendance of an extensive rehabilitation program and the recommendations of his forensic evaluation negated any need for rehabilitation, which was a requirement to file a delinquency petition. Based upon these factors, the court dismissed the state's second petition.

The state timely filed an appeal to the circuit court. The circuit court dismissed the appeal stating that because the state had not timely appealed the dismissal of the original petition and because once a witness was sworn in in a juvenile court case jeopardy attached even on a petition that was not sworn.

The state then timely appealed to the Court of Appeals.

HELD: The Court of Appeals concluded that the constitutional prohibition against double jeopardy did not preclude the state from filing a second delinquency petition against the defendant because the defendant was not placed in jeopardy as a result of the initial unverified petition. The decision of the Circuit Court was therefore reversed and remanded to the Circuit Court.

The Court of Appeals noted the following key principles of double jeopardy:

1. Just like adults, children are entitled to the protections afforded by the Constitution.
2. The protections afforded to children also includes the protection against double jeopardy, which extends to delinquency proceedings in juvenile court just the same as in adult court.
3. A violation of double jeopardy arises only when an individual is twice placed in jeopardy for the same offense. Stated differently, a defendant must be put in jeopardy at least once, for only if that point has once been reached does any subsequent prosecution of the defendant bring the guarantee against double jeopardy even potentially into play.
4. The Tennessee Supreme Court has explained when jeopardy attaches in both jury and non-jury proceedings as follows: "Customarily, in jury proceedings, jeopardy attaches when the jury is sworn, and in non-jury proceedings, jeopardy attaches when the first witness testifies."

5. Therefore, given that this case involved a non-jury proceeding, “jeopardy attaches and potentially triggers” the protection against double jeopardy, when the first witness is sworn to testify.
6. Yet, the Tennessee Supreme Court has held that a defendant is not put in jeopardy when a court acts without jurisdiction. Quoting previous case law, the Court of Appeals stated: “One is not put in jeopardy when the court which tries him, or attempts to try him, has no jurisdiction of the person or subject matter.”
7. The rationale is based on the well-established principle that a court acting without jurisdiction is acting without authority of law and its decrees are absolutely void.
8. A void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment.
9. “When a judgment is void, it binds nobody; it bars nobody; it is a nullity, and no judgment at all; and justifies no act done under it.”
10. When a judgment is void because the court acts without jurisdiction, it may be attacked at any time.

Based upon those principles, the Court of Appeals concluded that the constitutional prohibition against double jeopardy did not preclude the state from filing a second delinquency petition because the defendant in the case had never been placed in jeopardy as a result of the initial unverified petition.

State v. Isaiah M. (Tenn. Civil App. 9/23/22)

DRIVING ON A SUSPENDED LICENSE

DRIVING ON SUSPENDED LICENSE: WITHOUT SOME SHOWING THAT THE “NCIC” RECORDS REVIEWED BY THE OFFICER WERE IN FACT AN ACCURATE REFLECTION OF THE STATUS OF THE DEFENDANT’S DRIVER’S LICENSE, THE OFFICER’S TESTIMONY ABOUT THE NCIC RECORDS COULD NOT, STANDING ALONE, SUPPORT THE DEFENDANT’S CONVICTION

FACTS: The defendant argued that Officer Varner’s testimony that his check of the “NCIC” showed defendant’s driver’s license had been suspended in April of 2017 was insufficient to support his conviction of driving on a suspended license.

HELD: The Court of Criminal Appeals agreed with the defendant and stated that to support a conviction for driving on a suspended license, “the state must establish beyond a reasonable doubt that the defendant’s license was suspended at the time he was driving. The court noted that could easily be done by submitting a certified copy of the defendant’s driving record. The court found there was no showing whatsoever that the NCIC records were an accurate reflection of the status of the defendant’s driver’s license, and, therefore, the officer’s testimony about the NCIC records could not, standing alone, support the defendant’s conviction.

The court noted that the statute, TCA 55-50-504, states that “a person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained ... at a time when the person’s privilege to do so is suspended ... commits a Class B misdemeanor.”

The court found that the state had failed to establish its burden of proof and therefore reversed the conviction for driving on a suspended license and dismissed the charge of driving on suspended license.

State v. Beets, (Tenn. Cr. App. 8/23/22)

EVIDENCE

**ADMISSION AT TRIAL OF PRELIMINARY HEARING
TRANSCRIPT BASED UPON UNAVAILABILITY OF
WITNESS: THE RECORD AS A WHOLE
DEMONSTRATED ADEQUATE GOOD FAITH
EFFORTS ON THE PART OF THE STATE TO TRY
TO LOCATE THE WITNESS AND THAT THE
DEFENDANT HAD A PRIOR OPPORTUNITY AND
SIMILAR MOTIVE TO CROSS-EXAMINE THE
WITNESS AT THE PRELIMINARY HEARING**

FACTS: In a case involving second degree murder and aggravated assault, the defendant was convicted of the charges following a bench trial. The

defendant challenged the trial court's decision to admit the preliminary hearing testimony of a witness.

Approximately three weeks prior to trial, the prosecutor informed the trial court that the state was not certain it could locate Ms. Haslam, who had been served with a subpoena in jail in February for a trial which was to take place in August of the same year.

On the first day of trial, the prosecutor informed the court that Ms. Haslam had been served with the subpoena, that there were warrants for her arrest out of Rutherford County and Cannon County, that the state had verified that she was not currently in custody, and that the state's investigator and victim/witness coordinator had attempted to contact her by phone multiple times without success. The prosecutor informed the court that she personally had attempted, together with the victim/witness coordinator, to call Ms. Haslam and that she had left messages identifying herself and asking Ms. Haslam to call her back but had received no response.

The defense co-counsel stated to the court that she had attempted to contact Ms. Haslam, who had an aggravated robbery charge and a drug charge in Rutherford County. Counsel had spoken with Ms. Haslam's Rutherford County defense attorney the week prior, and the attorney had expected Ms. Haslam to appear for her court date on that day. Ms. Haslam had missed her court appearance. Counsel had also contacted two separate bonding companies and was advised that Ms. Haslam had failed to appear on a violation of probation charge in Cannon County.

The state's investigator, Mr. Turner, testified that prior to serving her with the subpoena in February 2019, he had gone to addresses in Alexandria, Smyrna, Murfreesboro, and Woodbury, Tennessee, locations which were based on information that she was staying with family members and on information from prior arrests. Turner did testify that after serving the subpoena in February 2019, the only effort he made to contact her was to call her grandmother on the morning of the second day of trial.

Detective Baltimore testified that when she did not appear on the first day of trial, he attempted to locate her by following up on information from her bonding companies and that he made several calls including to the grandmother and having the Sheriff's Department of DeKalb County to visit another address where it was thought the witness may be.

The trial court found that Ms. Haslam had been served with the subpoena, that the contacts listed on her bonds could not find her, and that Ms. Haslam had failed to appear in Rutherford County the previous week. The trial court noted that although the state's efforts to locate her "could

have started sooner,” a number of authorities were looking for her without success and further efforts by the prosecution would have been unsuccessful.

The defense objected arguing that the testimony would be a due process violation because the defense did not have discovery at the time Ms. Haslam was cross-examined at the preliminary hearing and therefore the defense was unable to properly impeach her. The trial court concluded that the defendant had an adequate opportunity to cross-examine Ms. Haslam noting that she was in the motel room on the day of the incident for only seventeen seconds.

HELD: The Court of Criminal Appeals concluded that the state showed that it made a good faith effort to contact Ms. Haslam and took reasonable steps in doing so. The CCA found that the trial court did not err in determining that the state was unable to procure the witness by process under Tennessee Rule of Evidence 804(a)(5) and that the trial court had appropriately concluded that the state had made adequate good faith efforts to secure the witness in order to satisfy the defendant’s right to confrontation.

The CCA made the following key points in regard to this type of case and in the findings about this case:

1. Generally, prior testimony is hearsay, or is a statement, other than one made by the declarant while testifying, offered for the truth of the matter asserted. Hearsay is generally not admissible but under Tennessee Rule of Evidence 804, former testimony of an unavailable witness may be admissible under some circumstances. The court noted that a witness is “unavailable” when the witness is “absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance by process.”

2. The CCA stated that: “Intertwined with the rules on the admissibility of hearsay is the constitutional right to confront witnesses.” Prior testimony is inadmissible under the Confrontation Clause unless the witness appears at trial or the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. A trial court’s determination regarding whether a witness is unavailable is reviewed for abuse of discretion. Whether the admission of hearsay statements violated a defendant’s confrontation rights is a question of law subject to de novo review.

3. To preserve a defendant’s right to confrontation the state must make a good faith effort to secure the presence of the witness. The CCA noted in this case that “Tennessee courts have considered evidence that a

witness was evading contact with the state and evaluated whether the record contained evidence of reasonable efforts to contact the witness.”

4. In the present case, the CCA found that the state’s efforts exceeded those found inadequate in other cases based upon the totality of the proof summarized in the statement of facts in this outline. The court noted specifically that Ms. Haslam was served with a subpoena six months prior to trial and knew when the trial would take place; the state attempted to contact her prior to trial by telephone at a number previously used to locate her; the state had contacted the witness’ grandmother in an effort to locate her; the witness had outstanding warrants in two counties and the week before trial she had also failed to appear for hearing on her charge for aggravated robbery in Rutherford County; the state continued to make efforts even after the trial had started by contacting the bonding company and seeking other information from other sources.

The Court of Criminal Appeals noted that while it agreed with the trial court that the state’s efforts to locate Ms. Haslam immediately prior to trial could have begun sooner, “the trial court also essentially found Ms. Haslam was evading contact and that further efforts to locate her would have been futile.” The court quoted a previous case, noting that “the great improbability that such efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness requires their execution.”

The Court of Criminal Appeals also noted that the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising.

The CCA therefore concluded that the state showed that it made good faith efforts to contact Ms. Haslam and took reasonable steps in doing so.

The Court of Criminal Appeals also noted that in regard to the discovery issues raised by the defendant, the witness had been cross-examined at the preliminary hearing regarding the use of drugs in the hotel, her motivation for leaving in the middle of the night with her children, her entry into the hotel lobby, and the fact that she did not see the shooting. The court concluded that the issues were sufficiently similar to give the defendant a similar motive for cross-examination at the preliminary hearing.

The court also noted that Ms. Haslam’s statements to law enforcement and her failure to identify the defendant in a photographic line-up were introduced through the detectives, and security footage and telephone records established that the defendant was not shooting at Ms. Haslam from the balcony and that she did not call 9-1-1 herself. From this, the Court of Criminal Appeals found the trial court had properly admitted the testimony

because of the opportunity to cross-examine the witness at the preliminary hearing and by being able to bring out other evidence through other witnesses.

State v. Jackson (Tenn. Cr. App. 6/3/22)

ADMISSION OF AFFIDAVIT OF INDIGENCY: CROSS-EXAMINATION REGARDING AFFIDAVIT OF INDIGENCY AND CHILD SUPPORT OBLIGATION WAS HELD TO BE RELEVANT TO REBUT THE DEFENDANT’S PRIOR TESTIMONY THAT HE WAS FINANCIALLY SOLVENT AND THEREFORE HAD NO MOTIVATION TO COMMIT A ROBBERY

FACTS: In a case in which the defendant was convicted of three counts of second-degree murder and two counts of aggravated assault, the defendant challenged the trial court’s decision to admit evidence regarding the defendant’s child support obligations and the affidavit he completed regarding child support. The defendant argued that he was not given proper notice under the Tennessee Rule of Evidence 608(b)(3).

At trial, the defendant introduced evidence tending to negate a financial motive for the crime by testifying that he was employed and that his brother (the football player) would give him money as he needed it. On cross-examination he testified he was employed “off and on” at a hotel in 2018. The prosecutor questioned the defendant about a judgment for back child support that was first assessed against him in 2016 prior to the homicide, and the defendant stated that he asked his brother for part of the money but not the entire judgment because he did not feel he owed any money because he had custody of the child “most of the time.” The prosecutor also asked the defendant if he had lied on his 2018 uniform affidavit of indigency, and the defendant denied having been untruthful. The prosecutor then asked the defendant to identify the affidavit, and defense counsel objected based on relevance. The trial court ruled that the affidavit was relevant to the defendant’s credibility, following which the defendant agreed he listed zero income or assets at the time he filled out the affidavit in December 2018 and that this was a lie.

HELD: The Court of Criminal Appeals held that the cross-examination regarding the defendant’s 2016 child support obligation and his

untruthfulness on the indigency affidavit were relevant to his credibility and to rebut the defendant's prior testimony that he was financially solvent and therefore had no motivation to commit a robbery. The CCA found that the trial court had not abused its discretion in so finding.

In regard to the issue of lack of notice pursuant to TRE 608(b)(3), the court ruled that the defendant had waived this issue by failing to object at the trial on the basis of that issue.

In regard to Tennessee Rule of Evidence 608 the court noted that under the Rule, if probative of truthfulness or untruthfulness, the witness can be cross-examined concerning the witness's character, truthfulness, or untruthfulness under the following conditions:

1. The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;
2. The conduct must have occurred no more than ten years before commencement of the action or prosecution but evidence of a specific instance in conduct may be admissible if the proponent gives to the adverse parties sufficient advance notice of intent to use such evidence to provide the adverse party with an opportunity to contest the use of such evidence; and
3. "If the witness to be impeached is the accused in a criminal prosecution, the state must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues.

In this case the court agreed with the state that the defendant had waived the issue of proper notice under TRE Rule 608, as the defendant objected only to relevance at trial, and the motion for a new trial asserted only generally that there was error in admission of the evidence.

PRACTICE POINT: The notice provision under Rule 608(b)(3) is very important for defendants as such evidence can be devastating to a defendant. The defendant should have had the benefit of the notice but here the court found that the failure to object to the state's failure to comply with the rule was fatal to the defendant's being able to raise the issue.

State v. Jackson (Tenn. Cr. App. 6/3/22)

CHAIN OF CUSTODY: EVEN THOUGH THE PERSON WHO BAGGED THE HANDGUN DID NOT TESTIFY, THE COURT OF CRIMINAL APPEALS FOUND

**THAT THE CHAIN OF CUSTODY WAS
SUFFICIENTLY ESTABLISHED FOR THE
ADMISSION OF THE EVIDENCE BASED UPON
TESTIMONY OF OFFICERS THAT THEY SAW THE
HANDGUN ON THE COFFEE TABLE AND
DEFENDANT TOLD ONE OF THE OFFICERS THAT
HE USED THE GUN**

FACTS: In a case in which the defendant was accused of attempted first-degree murder among other charges, the defendant claimed that the trial court erred in admitting the .45 caliber handgun because the state failed to establish the chain of custody for the gun. The state maintained that the prosecution had proven an unbroken chain of custody.

HELD: The trial court did not err in finding that the state had established the chain of custody for the handgun.

The court noted that the following principles applied in a case in regard to chain of custody:

1. Tennessee Rule of Evidence 901(a) provides that the requirement of authentication or identification is a condition precedent to admissibility and 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.
2. The Tennessee Supreme Court has previously recognized it is well established that as a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody.
3. The purpose of the chain of custody requirement is to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence.
4. Even though each link in the chain of custody should be sufficiently established, Rule 901 does not require that the identity of tangible evidence be proven beyond all possibility of doubt; nor is the state required to establish facts which exclude every possibility of tampering.
5. When the facts and circumstances that surround tangible evidence reasonably established the identity and integrity of the evidence, the trial court should admit the item into evidence.
6. The state's failure to call up as a witness each person who handled an item does not necessarily preclude the admission of evidence.

7. Absent sufficient proof of the chain of custody, however, the evidence should not be admitted unless both identity and integrity can be demonstrated by other appropriate means.
8. The Court of Criminal Appeals reviews challenges to the chain of custody of evidence under the abuse of discretion standard.

The Court of Criminal Appeals in reviewing the testimony at this trial noted that Deputy Holt testified that he saw the .45 caliber handgun on the coffee table and the defendant told him he used that gun to shoot the victim. Deputy Holt testified that he and other officers secured the scene and cleared the weapons in the house. Agent Woodby testified that the .45 caliber handgun was already in an evidence bag when she arrived and that an officer directed her to the weapon. Woodby took the handgun from the home, and Agent Hodge determined it was the weapon that was used to shoot the victim. While the person who bagged the handgun did not testify, the Court of Criminal Appeals found that the chain of custody was sufficiently established for admission of the evidence.

The court also noted that the admission of the weapon had nothing to do with the defendant's claim of self-defense. The defendant testified that he shot the victim with the handgun, and he did not assert any additional prejudice resulting from the admission of the gun.

PRACTICE POINT: The Court of Criminal Appeals not only discussed the principles of the rule of chain of custody, but it also pointed out factors which make the issue less important such as the defendant's admission of shooting the victim but claiming self-defense, rather than actually contesting the chain of custody.

State v. Dunn, (Tenn. Cr. App. 7/5/22)

FORENSIC INTERVIEW OF A SEVEN-YEAR-OLD CHILD: TRIAL COURT PROPERLY FOUND THAT THE FORENSIC VIDEO HAD "PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS" EVEN THOUGH THE VICTIM INITIALLY SAID SHE DID NOT KNOW THE DIFFERENCE BETWEEN A TRUTH AND A LIE BUT THAT SHE COULD SAY WHAT WAS "REAL" AND "NOT REAL"

FACTS: In a case in which the defendant was convicted of two counts of rape of a child, the defendant maintained that the trial court failed to make adequate factual findings regarding the required statutory factors that the video had particularized guarantees of trustworthiness.

Prior to trial, the court reviewed the video interview, and Ms. Womack testified regarding her training and education and other statutory factors relevant to the admission of the video, and all parties admitted to her qualifications. During her testimony, Ms. Womack agreed that the victim initially said in the interview that she did not know the difference between the truth and a lie, but she did testify that the victim was able to distinguish between what was real and what was not real and the victim was told that she could only say what was real during the interview. There were some inconsistencies in what the victim stated but Ms. Womack said that the testimony was typical for a seven-year-old. Ms. Womack agreed that it is a sign of reliability if a child sometimes answers that she does not know or corrects the questioner, and that the victim did not do either. Ms. Womack had stated that it was “best practice” to elicit a narrative from a child but Ms. Womack agreed that the interview was mainly “yes” or “no” questions.

The trial court found that the state had satisfied the procedural requirements and found that the video was a typical seven-year-old child talking to an adult about an adult type issue. The trial court at one point said that weighing what the victim was saying “goes back and forth” but the trial court ultimately concluded that the jury was capable of evaluating the strength and weaknesses of the statement. The trial court concluded that the interview process was well done and ruled that the video was admissible subject to the victim’s authentication and availability for cross-examination (which were ultimately supplied).

HELD: The Court of Criminal Appeals found that the trial court considered each statutory factor and that the court found that the video possessed particularized guarantees of trustworthiness. The CCA noted, however, that the trial court did not make specific findings but only generally found the evidence was trustworthy. The CCA stated that, “Because the trial court’s findings were conclusory statements indicating that the court found the victim’s behavior in the interview, “typical,” “normal,” and “classic,” we review de novo the sole contested issue of whether the interview held particularized guarantees of trustworthiness.”

2. The Court of Criminal Appeals concluded after its analysis that the statutory factors support the trial court’s determination that the interview bore particularized guarantees of trustworthiness. The court noted that while

some of the victim's statements lacked clarity, "there was nothing to suggest that the interview as a whole was not trustworthy, and the trial court properly concluded that the jury, in its determination of credibility, could take into account any lack of clarity in the victim's individual statements." The Court of Criminal Appeals, therefore, found no error in the admission of the forensic interview.

The Court of Criminal Appeals noted the following principles in regard to this type of case:

1. Under statute, a video recording in which a child under thirteen is interviewed by a forensic interviewer regarding child abuse is admissible as substantive evidence in a trial on sexual abuse if the requirements of the statute are met. TCA 24-7-123(a).
2. The statute requires the state to make various showings regarding the qualifications of the interviewer and the nature of the recording, and requires the child to authenticate the video and to be available for cross-examination.
3. The court noted that the statute provides guidance on the requirement of finding particularized guarantees of trustworthiness, which under the statute are as follows:

- (2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pretrial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:
 - (A) The mental and physical age and maturity of the child;
 - (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
 - (C) The timing of the child's statement;
 - (D) The nature and duration of the alleged abuse;
 - (E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
 - (F) Whether the statement is spontaneous or directly responsive to questions;
 - (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;

- (H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;
- (I) The relationship of the child to the offender;
- (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
- (K) Any other factor deemed appropriate by the court.

The trial court after reviewing the video found that Ms. Womack's training and education allowed for the admission of the video. The court noted that while Ms. Womack testified that it was best practice to elicit a narrative from the child, she agreed that the interview was mainly yes or no questions. She did not recall the victim saying anything untrue except there were a couple of occasions where she had to correct herself.

The Court of Criminal Appeals specifically found that the admission of the interview was supported by the mental and physical age and maturity of the victim and noted that while the victim did not directly answer that she could tell the difference between a truth and a lie, it was clarified that she would testify only in regard to events that were real as opposed to not real. The court noted that the victim clearly told Ms. Womack that the defendant put his "bad spot" in her mouth in her mother's bedroom and in her bedroom and that the trial court had found that the victim's maturity was typical for her age, and the CCA found that the record supported that finding. The CCA concluded that the video supported the conclusion that the victim possessed sufficient maturity and mental acumen to recount the instances of sexual abuse to Ms. Womack and to limit her statements to what she believed to be true.

The Court of Criminal Appeals also found that the manner of the interview was reliable and did not suggest to the victim that Ms. Womack was looking for any particular content in the victim's statements. None of the yes or no questions inherently suggested that Ms. Womack was looking for either an affirmative or a negative answer to the question.

After a review of all the statutory factors which are detailed in the opinion, the CCA concluded that the statutory factors support the trial court's determination that the interview bore particularized guarantees of trustworthiness and that therefore there was no error in the admission of the forensic interview.

PRACTICE POINT: This is a very good opinion to review in regard to these type of issues. The CCA goes through numerous factors in its

analysis as to the pros and cons of determining whether or not the forensic video was trustworthy pursuant to statute.

State v. Lovin (Tenn. Cr. App. 8/3/22)

**FORFEITURE BY WRONGDOING HEARSAY
EXCEPTION: TRIAL COURT FAILED TO
DETERMINE WHETHER THE PREPONDERANCE
OF THE EVIDENCE ESTABLISHED THAT THE
DEFENDANT WAS INVOLVED IN OR
RESPONSIBLE FOR “PROCURING THE
UNAVAILABILITY OF THE DECLARANT” AND
THE EVIDENCE SHOULD HAVE BEEN EXCLUDED
AS HEARSAY**

FACTS: In a case involving charges of murder against the defendant, the defendant contended that the trial court erred in admitting into evidence the text messages sent from the deceased victim to her mother on the day of the murder.

The defendant had filed a motion in limine to exclude any and all statements alleged to have been made via electronic messaging from the victim to her mother on or about 8/10/17 to the effect that someone was knocking on the victim’s door and the victim thought it was the man who “cuts the yard”. Detective Gish testified that he was provided the victim’s mother’s cell phone and received her consent to perform an examination of the contents. Included among the messages recovered by the detective was a message sent by the victim to her mother at 4:15 p.m. on 8/10/17 with the message, “Mom, someone is knocking on the door.” Four minutes later, the victim wrote her mother again stating, “I think it was the man who cuts the yard.”

The trial court denied the defendant’s motion in limine, finding the victim’s text messages qualified under the forfeiture by wrongdoing exception to the rule against hearsay.

HELD: The Court of Criminal Appeals held that the victim’s text messages to her mother were out of court statements offered to prove that the defendant was at the victim’s trailer during the time of her murder. The CCA found that the text messages were hearsay and should have been excluded.

The court noted the following principles in regard to the forfeiture by wrongdoing hearsay exception:

1. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tennessee Rule of Evidence 801(c)
2. One such exception allows for the admission of a statement made “against a party that is engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness.”
3. Before a hearsay statement is entered under this exception, the trial court must conduct a jury-out hearing and determine that “a preponderance of the evidence” establishes: (i) that the defendant was involved in or responsible for procuring the unavailability of the declarant; and (ii) that the defendant’s actions were intended, at least in part, to procure the absence of the declarant.

The Court of Criminal Appeals held that the trial court failed to follow the procedures set forth by the Tennessee Supreme Court in State v. Ivy (Tenn. 2006), noting that even though a jury-out hearing was held, the trial court failed to determine whether a preponderance of the evidence established that the defendant was involved in or responsible for procuring the unavailability of the declarant. The court noted that the state presented no evidence that the defendant’s actions were designed to prevent the victim from testifying against him. The CCA concluded that the text messages were hearsay and should have been excluded.

The court did find that the evidence against the defendant was extremely strong and that the error in admitting the proof was harmless error.

The court noted that the victim had been found strangled and sexually assaulted and the defendant’s DNA was located on the victim’s buttocks, face, and arm. The defendant’s DNA was also found on the inside of the master bathroom window frame, where detectives discovered pry marks. The court found that the defendant would have been a person of interest to the officers even without the identification provided in the wrongfully admitted text messages and the proof clearly established that the admission of the text messages was harmless.

State v. Coons (Tenn. Cr. App. 6/3/22)

**GROOMING A VICTIM OF A SEX CRIME BY
NORMALIZING SEXUAL BEHAVIOR BETWEEN
THE VICTIM AND DEFENDANT: THE COURT OF
CRIMINAL APPEALS FINDS THAT EVIDENCE OF
DEFENDANT’S BEHAVIOR TOWARD THE VICTIM
INVOLVING SEXUAL OR BAD ACTS OR SEXUAL
CONDUCT WAS ADMISSIBLE TO ESTABLISH
THAT THE DEFENDANT WAS GROOMING THE
VICTIM TO GAIN FAVOR OR ACCESS TO THE
VICTIM OR TO NORMALIZE THE CONDUCT
BETWEEN THE DEFENDANT AND THE VICTIM**

FACTS: In a case in which the defendant was convicted by a jury of rape of a child and incest, the defendant maintained that certain testimony was inappropriately admitted by the trial court relating to “uncharged sexual acts” which should have been excluded pursuant to the rules of evidence, including (1) testimony from witnesses that the defendant unhooked or snapped the minor child’s bra; (2) testimony from witnesses that the defendant began getting into bed with the victim; (3) testimony from the child that the defendant held her hand and placed his hand on her thigh while in the truck together; (4) testimony from witnesses including the victim that the defendant attempted to watch the victim change her clothes; and (5) testimony from the victim that at times when in bed with her, the defendant would put his hands on the sides of her body or try to put his hand down her pants or up her shirt.

HELD: The Court of Criminal Appeals held that most of the alleged evidentiary issues did not rise to the level of uncharged sex crimes, but that “in any event, the state offered the testimony about defendant’s behavior toward the victim as proof that the defendant groomed the minor child by normalizing the exact behavior that ultimately prefaced the rape.” The Court of Criminal Appeals noted that such evidence of a defendant’s “grooming of a victim” is admissible, including evidence of “bad acts committed during or in preparation for the charged offense.” The court explained that the “concept of grooming” is one that has been recognized by Tennessee courts as well as other jurisdictions and is properly admitted through evidence of a defendant’s bad acts to gain favor or access to a victim.

**LIMITATION OF CROSS-EXAMINATION OF THE
VICTIM: TRIAL COURT DID NOT ERR IN
EXCLUDING CROSS-EXAMINATION OF THE
VICTIM BY THE DEFENDANT ON PENDING THEFT
CHARGES**

FACTS: In a case in which the defendant was charged with attempted first-degree murder along with other charges, the defendant maintained that the trial court had erred by denying the opportunity to the defendant to cross-examine the victim regarding her pending criminal charges of theft. The defendant argued that the state used the testimony of the victim as the “driving force” of the state’s case and therefore the cross-examination of the victim should not have been limited. The state responded by saying that in the present case the state was not relying solely on the victim’s testimony but also was using extensive testimony from law enforcement as well as physical evidence from the scene.

Specifically in the present case, the victim’s prior criminal conduct that defendant sought to introduce involved theft, which is a crime of dishonesty, and which would typically be admissible under the Tennessee Rules of Evidence to impeach the victim. Tennessee Rule of Evidence 608(b) provides that specific instances of conduct may be used to impeach a witness during cross-examination if the conduct is probative of the witness’s character for truthfulness or untruthfulness. The trial court must, upon request, hold a hearing outside the jury’s presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry.

In this case, the trial court held a jury-out hearing, and the victim asserted her Fifth Amendment privilege against self-incrimination regarding her pending theft charges. After the jury-out hearing, the trial court excluded cross-examination on those pending charges.

HELD: The Court of Criminal Appeals held that there was no error in the trial court’s decision. The court held that the victim’s right not to incriminate herself on pending criminal charges was “paramount” to the defendant’s right to present evidence of the victim’s crime of dishonesty. The court noted that in the case of State v. Dicks (Tenn. 1981) the Tennessee Supreme Court ruled that “if it appears that a witness attempts to claim the Fifth Amendment privilege against self-incrimination as to essentially all

questions, the court may in its discretion, refuse to allow him to take the stand.” The CCA also noted that Tennessee appellate courts have held that a trial court can limit the examination of a testifying witness if the answers to certain questions will result in the witness asserting the Fifth Amendment privilege against self-incrimination.

The court also considered the following principles in its ruling:

1. A defendant’s constitutional right to confront the witnesses includes the right to conduct meaningful cross-examination.
2. The denial of a defendant’s right to effective cross-examination is “constitutional error of the first magnitude” and may violate the defendant’s right to a fair trial.
3. The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the sound discretion of the trial court.
4. A defendant’s right to confront witnesses does not preclude a trial court from imposing limits upon the cross-examination of witnesses, taking into account such factors as “harassment, prejudice, issue confusion, witness safety, or merely repetitive, or marginally relevant interrogation.”
5. A trial court has authority to exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel.
6. Absent a clear abuse of discretion that results in manifest prejudice to the defendant, the appellate courts will not interfere with the trial court’s exercise of its discretion on matters pertaining to the examination of witnesses.
7. TRE 608(b) provides that specific instances of conduct may be used to impeach a witness during cross-examination if the conduct is probative of the witness’s character for truthfulness or untruthfulness.
8. TRE 608(b) requires that before a witness may be cross-examined on specific instances of conduct the trial court must, upon request, hold a hearing outside the jury’s presence and determine probative value and that a reasonable factual basis exists for the inquiry.
9. Ordinarily, the victim’s prior criminal conduct involving theft, a crime of dishonesty, would typically be admissible under the Tennessee Rules of Evidence.

Considering all of the facts in the case and the principles including those mentioned above, the Court of Criminal Appeals found that the victim’s right not to incriminate herself on pending charges was paramount to the defendant’s right to present evidence of the victim’s crime of dishonesty and therefore the trial court did not commit error in limiting the defendant’s cross-examination on that issue.

The court also noted that the evidence against the defendant's claim of self-defense was strong and relied on far more than just the victim's word. The court noted that the state had presented evidence from multiple law enforcement officers and TBI agents showing that the victim did not have a weapon when the defendant shot her. The victim's injuries were consistent with her holding her arms in front of her body defensively. Two audio recordings immediately after the shooting captured the victim's conduct and her repeatedly denying that she tried to shoot the defendant or that she had a weapon in her hand. The victim had testified that the defendant told her, "Die, bitch. That'll teach you to run your mouth." The CCA therefore concluded that even if defendant had been permitted to question the victim regarding her pending charges, her assertion of her Fifth Amendment privilege in the presence of the jury would not have changed the outcome of the trial.

State v. Dunn (Tenn. Cr. App. 7/5/22)

“OPENING THE DOOR”: IN A CASE INVOLVING A ROAD RAGE INCIDENT, THE COURT OF CRIMINAL APPEALS FOUND THAT THE TRIAL COURT DID NOT ERR BY ALLOWING THE STATE TO CROSS-EXAMINE THE DEFENDANT REGARDING HIS TERMINATION FROM THE CLEVELAND POLICE DEPARTMENT, BASED ON AN INCIDENT WHEN HE BRANDISHED A FIREARM DURING A ROAD RAGE INCIDENT, THE CCA FINDING THAT THE DEFENDANT HAD “OPENED THE DOOR” TO THE EVIDENCE

FACTS: The defendant was convicted of simple assault and aggravated assault against two victims, Stacey and Jimmy Langford, based upon a “road rage” incident. The testimony established at trial that Ms. Langford pulled out of a parking lot and soon heard a horn and looked and saw the defendant in the rearview mirror. The defendant followed her and continued honking his horn and yelled at her “to pull the f*** over.” She called her husband who told her to drive to his workplace four miles away. The defendant continued to follow her to the husband's workplace on his motorcycle and upon arriving pointed at Ms. Langford and referred to her as “that f*****”

c***.” The defendant returned to his motorcycle and pulled a gun from the saddlebag, put a round in the chamber, and then at one point the defendant ripped his shirt off in a very aggressive manner while continuing to verbally assault the victims. Officers arrived at the scene and found the defendant shirtless with a handgun tucked in his pants ultimately charging the defendant with criminal offenses.

Testimony at trial included the victims testifying that they were very fearful about being shot as the defendant brandished the gun and advised that he was going to kill Mr. Langford.

The defendant testified that he had “always” been responsible and safe in handling firearms and testified about his previous employment history with the Chattanooga Police Department where he had testified that he had served as a 9-1-1 dispatcher working on such matters as missing children, runaways, and things of that nature and stating that he had always been a responsible and safe gun owner.

During cross-examination, the state questioned the defendant about why he was terminated from his dispatch position with the Cleveland Police Department over the objections of defense counsel. The defendant ultimately admitted that he had been terminated from the CPD for “insubordination” and while he denied lying in his hearing with the CPD he acknowledged that there was an administrative finding regarding his termination with the CPD.

The defendant maintained that the trial court erred by allowing the state to cross-examine him regarding his termination from the CPD, as the defendant claimed that the state had elicited inadmissible evidence regarding an alleged prior act which was hearsay and inadmissible pursuant to the Rules of Evidence.

The state argued that the defendant tied his credibility to his work history and responsible gun ownership and therefore had opened the door for the state to question him about the circumstances of his dismissal from the police department what included an allegation of irresponsible gun ownership.

HELD: The Court of Criminal Appeals concluded that the evidence was admissible due to the fact that the defendant had opened the door to the evidence by his testimony during direct examination.

The court noted the following principles in regard to cross-examination and to the doctrine of “opening the door:”

1) In Tennessee, a witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

- 2) The propriety, scope, manner and control of the cross-examination of witnesses, however, rest within the discretion of the trial court.
- 3) To attack the credibility of a witness, a party may question the witness concerning any matter that has been fairly raised by the evidence.
- 4) A party may not introduce a subject that is inadmissible to attack the credibility of a witness.
- 5) However, even if the evidence is inadmissible, a party may “open the door” to admission of the evidence.
- 6) A party opens the door to evidence when that party introduces evidence or takes some action that makes admissible evidence that would have previously been inadmissible.
- 7) The most common manner by which a party opens the door to inadmissible evidence is by raising the subject of that evidence at trial. When a party raises the subject at trial, the party expands the realm of evidence and the opposing party may be permitted to present evidence on that subject. (The CCA noted that “the opening the door doctrine is really a rule of expanded relevancy.”)
- 8) Opening the door is a doctrine intended to serve fairness and truth-seeking. Accordingly, the remedy sought after a party has opened the door should be both relevant and proportional.
- 9) The otherwise inadmissible evidence sought to be introduced by the opposing party should be limited to that necessary to correct a misleading advantage created by the evidence that opened the door. The trial court is in the best position to gauge the prejudicial impact of particular testimony.
- 10) Rulings regarding the relevancy of evidence are within the trial court’s discretion and will not be reversed on appeal absent an abuse of that discretion.

In summary, the court noted that the record made clear that during direct examination, the defendant testified that he currently serves the community and discussed his service to the Cleveland Police Department. The defendant also stated that he had always been a responsible and safe gun owner. The CCA noted that “as such, during cross-examination, the state sought to elicit testimony from the defendant as to why he left the CPD.” When the defense objected to certain questions, the trial court overruled the objections. The CCA noted that upon review of the record, the CCA concluded that the trial court did not err in allowing the state to question the defendant about why he was terminated from the CPD because it related to the defendant’s credibility. The state was merely seeking to attack the defendant’s credibility during cross-examination by inquiring about the circumstances surrounding the defendant’s termination from the CPD for

lying during administrative proceeding. The CCA noted that the record indicated the trial court properly determined the state could question the defendant about his credibility as it related to his termination from the CPD and his gun use as it had been fairly raised during direct examination.

In conclusion, the evidence regarding the defendant's termination from the CPD and the prior road rage incident during which the defendant brandished a gun was relevant to the state's ability to challenge the defendant's credibility during cross-examination.

PRACTICE POINT: This is an excellent case to review in regard to the doctrine of "opening the door," as this is a common occurrence during criminal trials and hearings.

State v. Erwin (Tenn. Cr. App. 8/15/22)

REBUTTAL WITNESS: TRIAL COURT DID NOT ERR BY ALLOWING THE STATE'S REBUTTAL WITNESS TO TESTIFY ABOUT THE DEFENDANT'S SELLING AND EXCHANGING DRUGS WITH THE WITNESS BECAUSE THE COURT FOUND THAT THE EVIDENCE WAS RELEVANT EVEN IF THE STATE DID NOT PRESENT THE EVIDENCE DURING ITS CASE-IN-CHIEF

FACTS: In a case in which the defendant was charged with felony and misdemeanor drug offenses, the defendant contended that the trial court erred by allowing the state's rebuttal witness, Ms. Wooley, to testify about the defendant's selling and exchanging drugs with her. The defendant contended that these matters were not presented during the state's case-in-chief and that therefore the defendant was unable to make a fully informed decision about his testifying because Ms. Wooley did not testify during the state's case-in-chief. The defendant asserted that allowing Ms. Wooley to testify as a rebuttal witness violated his rights under the Momon v. State (Tenn. 1999) case.

HELD: The Court of Criminal Appeals held that the trial court did not err in allowing the evidence, finding that the defendant's credibility was a material issue, and Ms. Wooley's testimony was relevant because it directly contradicted the defendant's claims that he had never sold drugs. The Court of Criminal Appeals agreed with the trial court which had ruled that the

defendant's testimony that he never sold drugs "opened the door" to the state's calling Ms. Wooley to contradict that testimony. The court also noted that the trial court had ruled that the probative value of Ms. Wooley's testimony was not substantially outweighed by the danger of unfair prejudice.

The court noted that evidence which is relevant is 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. Questions regarding the admissibility and relevance of evidence generally lie within the discretion of the trial court. A trial court abuses its discretion when it applies an incorrect legal standard or reaches a conclusion that is illogical or unreasonable and causes an injustice to the party complaining. The court found that the trial court had appropriately allowed the proof into evidence based upon the defendant opening the door by his own testimony and the trial court's appropriately finding that the witness's testimony was not substantially outweighed by the danger of unfair prejudice.

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

RELEVANCE OF BLACK GARBAGE BAG TO CHARGE AGAINST DEFENDANT: A SUFFICIENT NEXUS WAS FOUND TO EXIST BETWEEN THE DEFENDANT AND THE GARBAGE BAG AS THE GARBAGE BAG (CONTAINING REMNANTS OF A METH LAB) WAS FOUND APPROXIMATELY FIFTY YARDS FROM THE BACK DOOR OF THE DEFENDANT'S TRAILER

FACTS: In a case in which the defendant was convicted of initiating the manufacturer of meth and promoting the manufacture of meth, the defendant asserted that the trial court had erred in admitting the black garbage bag and its contents which were found in the ditch across the street from the defendant's Avondale trailer, the defendant arguing that the probative value was substantially outweighed by the danger of unfair prejudice.

HELD: The Court of Criminal Appeals held that there was sufficient evidence to connect the defendant to the garbage bag and therefore the state

had established a nexus between the defendant and the garbage bag, and that the contents of the garbage bag were relevant to the issues at trial.

The Court of Criminal Appeals noted the following principles in regard to the admission of evidence of this nature:

1. The admission of evidence is left to the sound discretion of the trial judge, and relevancy is always a judicial question to be determined according to the issue which is to be tried.
2. An appellate court reviews a trial court's admission of evidence under an abuse of discretion standard.
3. Initially, questions of admissibility of evidence are governed by Tennessee Rules of Evidence 401 and 403, which rules require that the trial court first determine whether the proffered evidence is relevant. Under Rule 401, evidence is deemed relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. In other words, evidence is relevant if it helps the trier of fact resolve an issue of fact.
4. After a court finds that the evidence is relevant, then the court will weigh the probative value of that evidence against the risk that the evidence will unfairly prejudice the trial. If the court in its discretionary authority finds that the probative value is substantially outweighed by its prejudicial effect, the evidence may be excluded.
5. Excluding relevant evidence is an extraordinary remedy that should be used sparingly and parties seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion.

In the present case, the Court of Criminal Appeals found that the trial court properly denied the defendant's request to exclude the contents since the evidence was relevant to the charges and the probative value was not substantially outweighed by the danger of unfair prejudice. The court noted that the remnants of a meth lab and the 47.21 grams of meth in the black garbage bag were relevant to whether the defendant was involved in the manufacture of meth. The court found that the proximity to the defendant's trailer of the garbage bag, and the fact that the trailer contained remnants of meth use, were sufficient to establish the nexus between the defendant and the garbage bag and its contents.

State v. Rogers (Tenn. Cr. App. 7/14/22)

FERGUSON ISSUE

DUTY TO PRESERVE: DUE TO FACT THAT THE DASHCAM VIDEO WAS CORRUPTED AND UNAVAILABLE AT TRIAL DUE TO REASONS BEYOND THE STATE’S CONTROL, THE DEFENSE FAILED TO SHOW THAT THE STATE HAD FAILED IN ITS DUTY TO PRESERVE THE VIDEO OR THAT THERE WAS ANY NEGLIGENCE ON THE PART OF THE STATE

FACTS: In this case in which the defendant was charged with DUI, possession of drugs and possession of a weapon, the defense filed a Ferguson motion claiming that the charges should be dismissed since “all of the relevant dashboard video – critical evidence to the case – has been deleted.” The defendant maintained that the video was deleted either with extreme negligence or with outright intent and that there was no other evidence of DUI apart from the incident that occurred on the video.

Trooper Langley testified that he saw the defendant drive past him driving 70 mph and that the defendant crossed the fog line and the trooper began following the defendant in order to watch his driving behavior. The dashboard camera was activated, following which Trooper Langley noted that the license’s tag driven by the defendant matched a stolen vehicle described in an active BOLO. The defendant ultimately exited the interstate and pulled into a gas station, at which time Trooper Langley initiated a traffic stop.

Trooper Langley testified that the dashcam video captured the pursuit of the defendant and the traffic stop and that the video capturing the traffic stop was successfully pulled from the server, while the portion of the video which captured the pursuit was not successfully pulled from the server.

Kevin Kennett, the Administrative Sergeant for THP explained the process by which the video footage was saved. Kennett testified that the two video files which captured the pursuit were corrupted, which had happened before and was not out of the ordinary. The trooper testified that he did not personally take any steps to resolve the corruption issue but that the THP had recently changed from the old server system to a new Cloud system. The trial court denied the Ferguson motion.

HELD: The Court of Criminal Appeals concluded that based upon the facts of the case, the state did in fact have a duty to preserve the dashcam video, and the CCA also held that the state had taken the necessary steps to do so. The court noted that, “Unfortunately, due to reasons beyond the state’s control, portions of the dashcam video are corrupted and unavailable at trial.”

The Court of Criminal Appeals held that the defendant had failed to show that the state failed in its duty to preserve the video or to demonstrate negligence on behalf of the state or to adequately explain the significance of the lost dashcam video in light of Trooper Langley’s testimony.

The court noted that the three factors involved in a Ferguson case are as follows:

1. The degree of negligence involved;
2. The significance of the destroyed evidence; and
3. The sufficiency of the other evidence used at trial to support the conviction.

The CCA held that it was clear that the state had the duty to preserve the video footage and that the record indicated that the state had in fact done so. Therefore, the CCA found that the court did not have to consider what consequences would be appropriate for the loss of the portion of the dashcam video, and the trial court had not erred in denying the Ferguson motion.

PRACTICE POINT: It is not rare for a General Sessions Court to be confronted with a factual situation which includes that a police department may regularly or continuously have problems with its video system, the preservation of the footage of a video, and the corruption of the video.

Other cases have pointed out that there can be factors in a Ferguson case regarding the willfulness of the state in failing to correct a poor system or the negligence in failing to preserve evidence and other similar factors which can become an issue in a Ferguson case. This case places a premium on the defense presenting some proof to truly substantiate a Ferguson issue. There can also be issues in many cases of the defendant having difficulty to afford to have expert proof establishing the nature of the state’s willful or negligent conduct in failing to preserve a video. Repetitive failures by the police department of a governmental entity in preserving video or audio recordings could be proof of a governmental entity content not to correct failures which continuously lead to destroyed or unavailable proof. Courts are not helpless in considering what the proper consequences or remedies should be when

there are constant Ferguson problems with an individual police department or entity.

State v. Crowson (Tenn. Cr. App. 5/27/22)

METH LAB COMPONENTS: STATE HAD NO DUTY TO PRESERVE EVIDENCE AT METH LAB SCENE DUE TO THE FACT THAT THE ITEMS AT THE SCENE WERE INHERENTLY DANGEROUS AND WERE FOUND TO BE CONTAMINATED, PLUS THE STATE HAD PHOTOGRAPHS OF SCENE

FACTS: The defendant was convicted of initiating the manufacture of methamphetamine, three counts of simple possession of a controlled substance and other drug related charges. The defendant contended that the trial court erred by denying her pretrial motion to dismiss the case on the basis of the state's failure to preserve evidence. The defendant argued that because the defendant disclaimed ownership of the items, some of the items were non-hazardous and fingerprints taken from the meth lab components could have proven to be wholly exculpatory and that therefore the state had a duty to preserve them.

The trial court had found that as a result of the search, the police discovered a scene "replete" with items involved in methamphetamine manufacture and that the police had made a decision not to collect and/or save them.

The trial court had relied on the previous decision of the Court of Criminal Appeals in Scott Benjamin Carroll, Jr. vs. State (2015) in which the CCA held that photographs of the meth components could be introduced due to the nature of the hazardous contents of the meth lab as the photographs were a suitable alternative to establish the nature of the scene of the crime. The Carroll case held that "when evidence is just too dangerous to preserve the state has no duty to preserve it."

The trial court found that in the present case where the meth lab was defunct or spent as opposed to being an active lab that "common sense" dictated that the remaining substances were corrosive, caustic, or otherwise hazardous. In the court's written order denying the motion to dismiss, the trial court found specifically that the state had no duty to preserve hazardous items and that because all of the items on sight were potentially

contaminated and photographic evidence existed as a substitute, no Ferguson violation occurred.

The Court of Criminal Appeals also emphasized the fact that, in the present case, the meth lab and associated components “permeated a small living area,” rather than being spread about in a large area.

In regard to the Ferguson issue the court pointed out several key principles:

1. Trial courts must first determine whether the state has a duty to preserve the evidence by determining whether the evidence possesses exculpatory value and whether or not the defendant would be unable to obtain comparable evidence by other reasonably available means.

2. If the trial court concludes that the state lost or destroyed evidence that it had a duty to preserve, the trial court must then consider three factors to determine the appropriate remedy for the state’s failure:

- (1) The degree of negligence involved;

- (2) The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substantive evidence that remains available; and

- (3) The sufficiency of the other evidence used at the trial to support the conviction.

3. If the trial court concludes that a trial will be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant’s right to a fair trial including the possibility of dismissing the charges.

The Court of Criminal Appeals pointed out that detectives testified that the meth lab was in “a very volatile state” and that meth labs never become safe as far as the chemical process is concerned and also noting that lithium was highly combustible and that ammonium nitrate and camp fuel were dangerous. Detective Wear testified that the items were extremely hazardous including that one bottle was “a bomb.” Detective Wear testified that all the seized items were destroyed that night after the methamphetamine task force officer responded to the scene although paraphernalia like corner cut baggies, smoking pipes, digital scales and razor blades were retained as evidence. The detective did identify the crime scene photographs of the meth labs including broad views of the scene, closer angles of the meth lab, and the coffee table with various items of the meth lab.

The Court of Criminal Appeals concluded that the entire record including photographs, supported the court’s finding that the state had no

duty to preserve the potentially contaminated evidence and therefore that the Ferguson issue had no merit.

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

OBSTRUCTING OR PREVENTING SERVICE OF PROCESS

OBSTRUCTING OR PREVENTING SERVICE OF PROCESS: A DEFENDANT CANNOT INTENTIONALLY PREVENT OR OBSTRUCT SERVICE OF “ANY LEGAL WRIT OR PROCESS” IF HE DOES NOT KNOW THAT THE OFFICER IS ATTEMPTING TO SERVE ANY LEGAL WRIT OR PROCESS

FACTS: The defendant and his wife were charged with one count of simple assault and one count of obstructing or preventing service of process due to events that took place at their home on 6/19/19. On that date, Jackson Police Officers Kelly Mason and Curtis Cozart went to the Bakers’ home to serve a criminal summons on Mrs. Baker. Officer Cozart activated his body camera to record the entire encounter. The video, which was shown as an exhibit to the officer’s testimony, reflected the defendant and Mrs. Baker sitting in their open garage as the officers approached. As he walked toward the garage, Officer Mason held up a sheet of paper and said, “I hate to be the bearer of bad news, but the neighbor is prosecuting.” Neither officer stated that they had come to the residence to serve Mrs. Baker with a criminal summons.

At that point, the defendant told Mrs. Baker to go inside the house, adding, “Nobody is leaving this property.” The defendant then walked to the door leading from garage into the house and stood in the doorframe. One of the officers stated, “You’re not going to jail.” Mrs. Baker proceeded into the house and told the officers to leave, and then she and the defendant attempted to shut the door. The officers did not leave but instead moved swiftly towards the door and just before the door swung shut, Officer Mason braced the left side of the door with his left forearm and Officer Cozart on the right side. After a short struggle, the officers forced their way into the residence, where Mrs. Baker again told them to leave. Instead, the officers arrested the defendant and Mrs. Baker, and one of the officers

mentioned the criminal summons for the first time and stated that they had only come to obtain Mrs. Baker's signature.

The officers noticed a swollen area on Officer Mason's arm for which he ultimately sought medical treatment. The defendant and his wife were ultimately charged with assault due to the incident with the door and with obstructing or preventing the service of process. Part of the proof reflected that the officers did not have a warrant for Mrs. Baker's arrest and that they only had a criminal summons. The proof was also clear that neither officer mentioned that they were there to serve a criminal summons until after they forced their way into the residence and placed both the defendant and Mrs. Baker under arrest. Mrs. Baker did not refuse to sign the summons, and the video of the officer reflected that the defendant did not tell Mrs. Baker not to sign anything.

Among other issues, the defendant contended that the officers violated his Fourth Amendment rights by entering the home without a warrant and that the officer's entry could not be supported by exigent circumstances because the officers created any exigency by their own conduct.

HELD: (1) The court found that the defendant had technically waived his Fourth Amendment allegation, but the court still found that the alleged Fourth Amendment violation did not warrant dismissal of the charges. The court noted that the officers certainly had the right to go to the Baker residence to serve the criminal summons on Mrs. Baker, recognizing that the law clearly provides that a police officer may approach a home and knock, precisely because that is no more than any private citizen might do. The court noted the officers also had the right to enter the Bakers' garage given that the garage was open and that both Bakers were sitting in the garage facing the street, noting also that the doorbell was located on the interior doorframe. All the officers had the right to enter the garage based on those circumstances, and the defendant was free to end the interaction by asking the officers to leave. The court noted that there was no danger of the destruction of evidence in the case, and the crime that was the subject of the criminal summons, which was criminal trespass, fits the very definition of a "minor offense." The court noted that "consequently, the officers had no justification for the warrantless entry into the Bakers' home."

The court then found that any Fourth Amendment violation would involve the exclusion of any illegally obtained evidence and there was no illegally obtained evidence that the state was seeking to introduce. Therefore, the remedy of excluding illegally obtained evidence was unnecessary as there was no evidence that the state was attempting to introduce. The court found that the remedy for any Fourth Amendment

violation does not extend to barring the prosecution altogether of a charge. The Court of Criminal Appeals concluded that “the Fourth Amendment does not shield the defendant from prosecution for criminal actions he took in the exercise of his constitutional rights.” Consequently, even in the absence of waiver, the Fourth Amendment violation did not bar the defendant’s convictions.

(2) In regard to the merits of the case, the Court of Criminal Appeals stated, “In our view, a defendant cannot intentionally prevent or obstruct service of any legal writ or process if he does not know the officers are attempting to serve any legal writ or process.” The court noted that holding up a folded piece of paper and saying that a neighbor had elected to press charges is not the same thing as communicating that they were there to serve a criminal summons, or any other legal document for that matter. The court noted that the officers did not ask Mrs. Baker to sign the summons and consequently she neither signed the summons nor refused to sign it. The court noted that neither officer provided any other information even in response to Mrs. Baker’s question, “For what?”. The court said that the officers did not mention the fact that they had a criminal summons or indicate they were only there to get a signature. Therefore, the conviction for preventing or obstructing service of process must be reversed and the charged dismissed, stated the CCA.

(3) In regard to the assault, the court noted that the video recording from the body camera did not show that the defendant forcefully closed Officer Mason’s arm between the door and the frame. The court noted that the recording showed that the defendant, Mrs. Baker, began the process of closing the door, which opens to the inside of the house, as Officer Mason was rushing to the door. The officers then used their arms and bodies to brace it and to prevent the door from closing. While the court did find that the type of injury could satisfy the statutes definition of “bodily injury” the evidence did not establish that the defendant acted at least recklessly, much less intentionally or knowingly, in attempting to close the door.

The CCA noted that the review of the video does not support a conclusion that the defendant attempted to slam the door against the officer in a reckless manner. The court noted instead that the video showed the defendant and Mrs. Baker attempting to close the door in the manner that any person might close the door to an unwanted visitor. The court noted that the focus is on whether the actor possessed the required culpability to effectuate the result that the legislature has specified. The court concluded that “because the evidence did not establish that Officer Mason’s injury was

actually the result of the defendant's reckless conduct, we reverse the defendant's conviction of assault and dismiss the charge."

DISSENTING OPINION: Judge Easter dissented and stated that he thought the evidence rose to the level of showing that the defendant participated in preventing or obstructing the service of process on his wife and likewise that the evidence established that Officer Mason's injury was caused by the defendant's reckless assault on the officer based on the circumstances of the case and what the officers were attempting to do.

State v. Baker (Tenn. Cr. App. 7/5/22)

PLEA AGREEMENTS

PLEA AGREEMENTS: BASIC PRINCIPLES FROM RECENT CASES

1. The decision to accept or reject a plea agreement lies within the trial court's discretion.
2. A trial court abuses its discretion when it applies an incorrect legal standard or reaches a conclusion that is illogical or unreasonable and causes an injustice to the complaining party.
3. In considering the plea, the court must determine if the plea agreement is helpful in the administration of justice and is in the best interest of the public.
4. The court is not obligated to accept any agreement, but if the agreement is to a specific sentence, the court must give the defendant an opportunity to withdraw the plea if the agreement is not accepted by the court.
5. The trial court is taxed with the ultimate decision to accept or reject a plea bargain, and a plea agreement has no force prior to its acceptance by the court.
6. The discretion of the trial court in rejecting a plea agreement is not absolute. A trial court's discretion must be guided by sound legal principles. There are limits to the exercise of a trial court's discretion in accepting or rejecting a plea agreement.
 - (a) For example, a blanket policy of rejecting plea agreements in which the defendant does not acknowledge guilt may be an abuse of discretion.
 - (b) Rejection of a plea agreement based on an error of law is also an abuse of discretion.

State v. Lawson (Tenn. Cr. App. 8/23/22)

7. There is no constitutional right to a plea bargain.
8. The decision to extend, or, conversely, withdraw a plea offer at any time prior to its acceptance by the trial court lies solely within the discretion of the prosecutor, and there is simply no authority for the proposition that a plea agreement can be enforced prior to acceptance by the court.
9. When there are multiple defendants, the district attorney general may make an offer of settlement contingent upon all of the defendants accepting the offer and pleading guilty. The appellate courts of Tennessee have consistently approved of “all or nothing” or “package” deals.
10. A prosecutor acts properly and does not engage in prosecutorial vindictiveness by making a joint plea offer to two co-defendants and then withdrawing the offer when one co-defendant declines to plead guilty.
11. Prosecutorial vindictiveness occurs when a prosecutor punishes or retaliates against a defendant for exercising his legal or constitutional rights.

State v. Samuel (Tenn. Cr. App. 8/26/22)

PROSECUTORIAL DELAY

**PROSECUTORIAL DELAY: IN A CASE INVOLVING
MULTIPLE CHARGES OF AGGRAVATED RAPE
AND CRIMINAL SEXUAL CONDUCT, THE TRIAL
COURT’S GRANTING OF THE MOTION TO
DISMISS THE CASE DUE TO PROSECUTORIAL
DELAY WAS PROPERLY GRANTED BECAUSE OF
THE FORTY YEAR DELAY BETWEEN THE
COMMISSION OF THE FIRST OF THE ALLEGED
CRIMES AND THE INDICTMENT OF THE
DEFENDANT FOR THE SAME**

FACTS: On 5/06/19, the Rutherford County grand jury returned a six-count indictment, alleging that the defendant engaged in the unlawful sexual penetration of his daughter who was born in July 1969.

On 12/1/20, the trial court entered a written order granting the defendant’s motion to dismiss the indictment for prosecutorial delay. The

trial court noted that, in the case, the DCS, the Rutherford County School Board, and Center Stone had responded to subpoenas in the case and advised the trial court that they were no longer able to provide any records for the victim or her parents.

The trial court also summarized the facts presented at the hearing and found that the victim first reported the abuse to her mother when she was five years old and that the victim reported the abuse again to someone at her junior high school when she was in the seventh or eighth grade. The trial court noted that after the disclosure at school, DCS (at the time DHS) had interviewed the victim and her mother and the defendant was referred to counseling at Luton Center. The trial court also noted that the victim disclosed the abuse to other individuals on numerous occasions following her disclosure at school but that the victim had failed to take any steps to initiate a formal prosecution of the defendant from the time she moved out of the defendant's home in 1987 until she notified law enforcement in June 2018. The trial court also found that the victim's reason for failing to notify law enforcement earlier was that "she did not think anyone would do anything about it."

The trial court concluded that the delay was due to the state's failure to prosecute the case following the victim's disclosure at school but determined that the delay of approximately forty years was excessive and that the state had not provided a proper reason for the delay. The trial court found that the defendant had shown that multiple witnesses who would have been available closer in time are now deceased; that the memories of the living witnesses have faded over the last forty or so years; and that DHS, school, and counseling records related to the case have been destroyed.

The trial court concluded that based on the diminished memories of the living witnesses, including the victim, along with the unavailability of material witnesses, and the destruction of material evidence, that the continued prosecution of the defendant would violate due process. The trial court therefore granted the defendant's motion to dismiss the indictment for prosecutorial delay.

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion by granting the defendant's motion to dismiss the indictment.

The Court of Criminal Appeals noted the following key principles in the courts making its determination in this case:

1. The trial court's ruling on the motion to dismiss the indictment is reviewed by the appellate court based upon an abuse of discretion. The court found that the proper analysis of the case required that the court review

the case under the standards set out in State v. Gray (Tenn. 1996). The court found that the Gray case provided clear direction for cases in which “pre-accusatorial delay” is involved, which is the time between the commission of the offense and its disclosure to law enforcement.

The court noted that the prongs of the Gray test are as follows:

1. The length of the delay;
2. The reason for the delay; and
3. The most important prong, the prejudice to the defendant.

The court noted that the current case was very similar to the Gray case due to the fact that the Gray case involved a delay of forty-two years whereas the delay in the present case involved a delay of approximately forty years.

The court found that the Tennessee Supreme Court noted that the Gray case had established “a prima facie showing of prejudice” because the evidence in the Gray case revealed that the lapse of time had diminished the victim’s memory, that witnesses thought to be material were unavailable, and that the victim could not specifically date the incident which would require the defendant in the Gray case to account for his whereabouts and his conduct during a six-month period forty-two years in the past. The Tennessee Supreme Court therefore reversed the Court of Criminal Appeal’s decision and reinstated the trial court’s dismissal of the indictment.

The Court of Criminal Appeals noted that in the present case, the investigation by DHS (the predecessor to DCS) was tenuous at best. The court noted that the trial court calculated the incident in this case as happening between 1981-1983, that a DHS investigation of child abuse was supposed to include a visit to the child’s home, a physical and psychological psychiatric examination of the child, and an interview with the child, followed by a complete written investigation report including its recommendations. The trial court in the present case noted that the victim’s mother testified that she and the defendant went to the DHS office in Murfreesboro and that a DHS investigator met with the victim in their home. The court noted that nothing indicated that a DHS investigator substantiated the victim’s allegations or that a child abuse review team reviewed her case at any time. The DHS records that could have shed light on the extent of DHS’s investigation no longer exist.

The court also noted that the victim testified in regard to the reason for delay in her reporting to law enforcement was that she was afraid to reveal the abuse because the defendant threatened to harm her if she told anyone. The court did find that the victim found the courage to reveal the abuse when she was in the seventh or eighth grade and that the facts also established that the victim turned 18 years old in 1987 and moved out of her parent's home prior to that date and married her first husband the day after her 18th birthday. The defendant had even given away the victim at her wedding. The court noted that the victim continued to interact with the defendant but had waited an additional thirty-one years as an adult to report the abuse to the police. The court noted it was disturbing that the victim's mother did not contact the police and that the victim's mother allowed the defendant to remain in the home even though the defendant had admitted touching the victim, and the court also noted that it could understand the victim's belief the defendant would never be held accountable and why she would be apprehensive about reporting the abuse to law enforcement. The Court of Criminal Appeals however concluded that all of this taken together was "not reasonable justification for such a profoundly excessive delay."

In conclusion, the court found the following key factors:

1. The school, DHS, and medical records that would have shed light on the case had all been destroyed;
2. Some key witnesses were now deceased and the lapse of time had diminished the memories of most all of the surviving witnesses, including the victim.
3. Some significant witnesses had no memory of the victim's allegations; and
4. The defendant would have had to account for his whereabouts and his conduct six times during a four-year period thirty-seven to forty-one years ago, which the court found was an "even more daunting task" than the defendant had faced in the Gray case. The court also noted that the state had not even provided the defendant with a bill of particulars so he had very little information to consider in regard to his possible defenses. The court concluded that the trial court had not abused its discretion by granting the defendant's motion to dismiss the indictment.

PRACTICE POINT:

(1) This is a very sad case to review as reading the plight of the victim over the course of many years and the failure for certain participants to follow through with investigations would have been very disappointing,

including the actions of the DHS, the victim's family, and other key figures including school officials in the case.

(2) The actions of the victim's family and the school system and others had let down the victim who ultimately ended up residing with the perpetrator of the sexual offenses for a number of years - period of time in which she was exposed to continuously improper sexual misconduct by her own father.

(3) The case makes good reading for all people who participate in the criminal justice system including those in juvenile court as it reveals the total injustices and horrific actions that can be inflicted upon a child victim when people in positions of authority, such as parents, school officials, persons involved in counseling and psychiatry, as well as law enforcement and the judicial system fail to take appropriate action.

While the actions of the trial court and the appellate court are understandable based upon the facts of the case and existing appellate decisions, the tragedy over many years and how people let down the victim is very revealing and shows what happens when people in authority fail to live up to their responsibilities.

State v. Turner (Tenn. Cr. App. 6/6/22)

RIGHT OF CITIZENS TO FILM POLICE OFFICERS

RIGHT TO FILM POLICE OFFICERS: THE TENTH CIRCUIT UNITED STATES COURT OF APPEALS HELD THAT THE RIGHT TO RECORD POLICE OFFICERS PERFORMING THEIR DUTIES IN PUBLIC IS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

FACTS: Early in the morning of 5/26/19, Abade Irizarry, a YouTube journalist and blogger, was filming a DUI traffic stop in Lakewood, Colorado. Officer Yehia arrived on the scene and stood in front of Mr. Irizarry, obstructing his filming of the stop. When Irizarry and a fellow journalist objected, Officer Yehia shined a flashlight into Mr. Irizarry's camera and then drove his police cruiser at the two journalists.

Irizarry later sued under 42 U.S.C. Section 1983, alleging that Yehia violated his First Amendment constitutional rights. The District Court dismissed the complaint for failure to state a claim finding that Irizarry had alleged a constitutional violation but holding that Yehia was entitled to qualified immunity because the violation was not one of clearly established law.

HELD: The Tenth Circuit of the United States Court of Appeals held that Irizarry had established a violation of a clearly established law by Officer Yehia, and Yehia was not entitled to qualified immunity from the claim of Irizarry.

The court noted that to overcome qualified immunity, Mr. Irizarry was required to clearly establish the three prongs to his claim:

- (1) That he was exercising a First Amendment right to film the police performing their duties in public;
- (2) That Officer Yehia's actions would chill a person of ordinary firmness from continuing to film the traffic stops; and
- (3) Irizarry's protected activity motivated Officer Yehia's actions.

First, the Tenth Circuit held that Irizarry had clearly established that he was engaged in protected activity, in that he clearly established a First Amendment right to film the police. The court noted that the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have all concluded in published opinions that the First Amendment protects a right to film the police performing their duties in public. The court noted that at least four of those opinions involve facts materially similar to the facts in the present case. The court noted that even though the United States Supreme Court and the Tenth Circuit had not specifically held that there was such a constitutional right, the weight of established law establishes a clear constitutional right to film the police, and that supports the conclusion that a reasonable officer would have known that there was a First Amendment right to film the police performing their duties in public.

Secondly, the plaintiff clearly established that Officer Yehia caused injuries efficient to chill a person of ordinary firmness from continuing to film the traffic stop. The officer's conduct infringed upon the plaintiff's right to film the police and his conduct was at least as egregious as police conduct previously found unconstitutional in the weight of other cases.

Thirdly, the plaintiff clearly established that the officer's motivation for retaliation was due to the plaintiff's exercising his constitutional right to film the police.

The court therefore found that all three elements of a First Amendment retaliation had occurred and the plaintiff had shown a violation of clearly established law, and Officer Yehia was not entitled to qualified immunity for his actions.

Irizarry v. Yehia (United States Court of Appeals for the Tenth Circuit, 7/11/22)

SEARCH AND SEIZURE

**CONTINUATION OF SEARCH FOLLOWING BRIEF
DELAY: TRIAL COURT ERRED IN RULING THAT
TROOPERS DID NOT HAVE PROBABLE CAUSE
FOR CONTINUING SEARCH OF VEHICLE BY
SEARCH OF SPARE TIRE, AS THE COURT OF
CRIMINAL APPEALS REVERSED THE DECISION
OF THE TRIAL JUDGE WHO FOUND THAT A
DELAY BY THE OFFICERS FOLLOWING THE
INITIAL SEARCH HAD RESULTED IN A SECOND
SEARCH FOR WHICH THERE WAS NO PROBABLE
CAUSE**

FACTS: On 7/31/18, Troopers Cothron and Foster of the THP Interdiction Plus Team conducted a traffic stop of a 2000 red Honda CRV in which the defendant was the rear passenger. Two other co-defendants occupied the driver's seat and the front passenger seat. The stop was based upon observations that the driver was not wearing a seatbelt plus the observation that the front seat passenger was also not wearing a seatbelt. After pulling the vehicle over, Trooper Cothron approached the front passenger window to talk to the driver and while talking to the co-defendant, he noticed a folded dollar bill inside a shot glass in the front cup holder that aroused his suspicions. Trooper Cothron had twice before encountered a dollar bill folded in a similar fashion and in each instance had found that it contained drugs. Trooper Cothron asked for and received consent to see the bill.

When Cothron unfolded the bill he found that it contained a white powder. Trooper Cothron asked for the co-defendants to all step out of the vehicle, and they were taken to the rear of the vehicle, patted down for weapons prior to the troopers beginning a search of the vehicle. During the

search of the vehicle, the troopers located a marijuana pipe and grinder inside the vehicle. The officers also found evidence of the occupants having taken a trip to California, and the co-defendants admitted that they had been to California. The troopers knew that California was what they considered a “source state” for drugs. The defendants were cooperative in allowing the search.

At one point in time both officers discontinued an active search of the vehicle and had a discussion over the radio and a discussion among themselves where they called the co-defendants “bad dudes” and discussed that they know something was going on but they don’t know for sure what it is. After approximately a three-minute delay (from 11:06 p.m. to 11:09 p.m.) one of the troopers mentions the spare tire on the rear of the vehicle and asked the other if that has been looked at. Having confirmed that neither has looked at the spare tire, they inspect the spare tire and find something hard, following which the spare tire is removed and inspected. Neither trooper asked for consent to do the inspection. The defendant was asked what was inside the tire but did not respond, following which the men were handcuffed and read their rights. The defendant told Trooper Cothron that the tire was “loaded,” and Trooper Cothron let the air out of the tire, cut into it, and found five bags of methamphetamine.

The defendant filed a motion to suppress, arguing that the search of the spare tire was unconstitutional because it was conducted after the initial search of the vehicle had been completed and without sufficient probable cause. The trial court granted the motion to suppress and subsequently dismissed the indictment upon the request of the defense.

The state appealed arguing that the officers had probable cause for the search of the spare tire and that the troopers did not unreasonably detain the defendant to complete the search.

HELD: The Court of Criminal Appeals held that the trial court erred in granting the defendant’s motion to suppress, and the case was remanded to the trial court for further proceedings consistent with the opinion.

The Court of Criminal Appeals noted that the trial court had found that the thirty-minute thorough search, in which the troopers closely examined adversely every part of the vehicle, should have and did in fact dispel any suspicions that they might have had based upon the specific and articulable facts that they were aware up to that point. The court noted that there were three minutes before either turned their attention to the tire after the troopers had completed their search. The Court of Criminal Appeals noted that the trial court gave “great weight” to the three-minute delay and that the trial court had found that the troopers’ decision to extend the

direction of the stop without continuing the search at this point resulted in the search being unconstitutional.

The Court of Criminal Appeals stated that the court respectfully disagreed with the conclusions reached by the trial court. The CCA noted that for part of the three-minute delay the troopers were waiting for information from dispatch in talking among themselves and with the co-defendants. The court stated that neither the duration nor the scope of the search was unreasonable under the circumstances of the case.

The court noted some principles which apply in cases of this nature which are as follows:

1. The proper inquiry is whether during the detention, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.
2. A reasonable traffic stop can become unreasonable and unconstitutionally invalid if the time, manner or scope of the investigation exceeds proper parameters.
3. However, no hard and fast time limit exists beyond which a detention is automatically considered too long and thereby unreasonable.

The court concluded that the total duration of the traffic stop prior to the discovery of the meth was under an hour, and only three to three and a half minutes elapsed between the troopers' pause in their search of the vehicle until Foster began his examination of the spare tire. The court noted that the troopers had extensive training in the use of hidden compartments in vehicles used by traffickers to conceal contraband and that Trooper Cothron additionally testified that the quick turn-around trip to California, a source state for illegal drugs, along with the unusual tire tools and tire weights, increased his suspicions because drug traffickers are known to make quick turn-around trips.

The court therefore concluded that the trial court erred in granting the defendant's motion to suppress and the case was remanded to the trial court for further action.

State v. Autrey (Tenn. Cr. App. 7/18/22)

**FAILURE TO YIELD: EVIDENCE DID NOT
PREPONDERATE AGAINST TRIAL COURT'S
RULING THAT STOP OF VEHICLE WAS
SUPPORTED BY PROBABLE CAUSE DUE TO
FAILURE TO YIELD, THE COURT FINDING THAT**

**THE DUTY TO YIELD BEGINS WHEN IT WOULD
APPEAR TO A PERSON OF ORDINARY PRUDENCE
THAT AS TWO VEHICLES CONTINUE ON THEIR
RESPECTIVE COURSES A COLLISION WILL BE
LIKELY TO OCCUR IF THE PERSON WITH THE
DUTY TO YIELD DOES NOT DO SO**

FACTS: In a case in which the defendant was found guilty of possession of a firearm by convicted felon among other charges, the defendant maintained that the trial court erred in denying his motion to suppress the stop and subsequent search of his vehicle, asserting that the deputies did not have probable cause to stop his vehicle because the “dashcam video introduced into evidence shows that the defendant clearly yielded.”

HELD: The Court of Criminal Appeals found that the evidence did not preponderate against the trial court’s finding that the officer’s stop of the vehicle was supported by probable cause based upon the finding that the defendant violated TCA 55-8-130(c)(1), being failure to yield. The court noted that the dashcam recording of the alleged failure to yield supported the officer’s testimony that the defendant failed to yield the right of way. The court found that the defendant’s vehicle was in such a position that, had Deputy Martin not exercised extreme caution and maneuvered his vehicle close to the wall of the tunnel, the vehicles would have collided, which is the “very scenario the failure to yield statute seeks to avert.”

The Court of Criminal Appeals noted the following principles in failure to yield cases:

1. A warrantless search or seizure is presumed unreasonable unless the state demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.
2. One of these narrow exceptions is when an officer has probable cause or reasonable suspicion to believe that a traffic violation has occurred when he or she initiates a traffic stop.
3. Accordingly, the court must determine whether the officer had a probable cause or reasonable suspicion to believe that a traffic violation had occurred when he initiated the stop of the defendant’s vehicle.
4. It is well established that a traffic violation, however minor, creates probable cause to stop the driver of a vehicle.
5. Many traffic statutes create offenses which render it simple for an officer to determine whether a motorist has committed a violation. Some examples

of this principle are running a stop sign, exceeding the speed limit, or running a red light. When an officer witnesses any of the foregoing, an officer may have probable cause to stop a motorist.

6. However, certain driving conduct may or may not constitute a traffic offense and may require an officer to investigate further to discern whether an offense is being committed, such as questionable behavior of a defendant weaving within his lane of travel, driving below the speed limit, or engaging in prolonged delays at four-way-stop intersections in the absence of other traffic. In these instances, even if the officer lacks probable cause to seize a motorist, he nevertheless may legitimately initiate a brief, investigatory traffic stop if he possesses a “reasonable suspicion”, supported by specific and articulable facts, that a criminal offense has been or is about to be committed.

The Court of Criminal Appeals noted that the deputy in the present case stopped the defendant for violating TCA 55-8-130(c)(1) which provides generally that the driver of the vehicle who is faced with the yield sign “is not necessarily required to stop, but is required to exercise caution in entering the intersection” and to yield the right-of-way to other vehicles which have entered the intersection, and the driver having so yielded may proceed when the way is clear. The court noted that in such a situation, though not explicitly defined by statute or case law, the TPI (Tennessee Practice Pattern Jury Instructions) defines “immediate hazard” as existing “whenever a reasonably careful driver would realize that another vehicle, if continued in the same direction at the same speed, would probably collide with the driver’s vehicle if the driver entered the intersection.”

The trial court reviewing the statute found that the defendant had violated the statute, and the Court of Criminal Appeals concluded that the evidence did not preponderate against that finding based upon the dashcam recording and the testimony in the case.

In an interesting footnote, the Court of Criminal Appeals noted that the defendant was also indicted in the District Court for the Western District of Tennessee for offenses stemming from the same set of facts and that a similar motion was filed to suppress the evidence due to an alleged illegal stop and seizure. In that Federal District Court case, the judge granted the motion, concluding that Deputy Martin did not have probable cause to stop the defendant. The CCA noted that the district court “placed the onus on Deputy Martin, the driver with the right-of-way, to exercise reasonable care to avoid an accident.” The Court of Criminal Appeals noted that it was not

bound by federal district court jurisdiction, and “we decline to adopt its analysis as suggested by the defendant.”

PRACTICE POINT: You win some and you lose some.

State v. Nichols (Tenn. Cr. App. 9/8/22)

**WARRANTLESS SEARCH OF VEHICLE: OFFICERS
HAD PROBABLE CAUSE TO SEARCH THE
DEFENDANT’S VEHICLE DUE TO THE FACT THAT
OFFICERS HAD SET UP A CONTROLLED BUY
USING A THIRD PARTY’S MAILBOX, AND
THE OFFICERS OBSERVED THE DEFENDANT
TAKE MARKED BILLS OUT OF THE MAILBOX
AND THEN FOUND HEROIN IN THE MAILBOX**

FACTS: In a case involving second degree murder, delivery and sale of a scheduled I controlled substance and an illegal firearm charge, the defendant maintained that the state had performed an improper warrantless search of his vehicle resulting in their seizure of a garage door opener through which the police gained access to a house in which police found further incriminating evidence against the defendant.

The facts established that victim Jessica Lyday, who ultimately died of an overdose, struggled with an opioid addiction and that she was seeking to go through rehabilitation at the time of her death. The victim was planning on a year-long treatment program, and on 7/2/15, the victim had the final interview with the program and was due to go to Nashville the next day to begin her ultimate one-year treatment program.

On the morning of 7/3/15, the victim’s mother found the victim in the tub with her nose under water, with the ultimate conclusion that she had basically died from a drug overdose.

Investigator Jinks searched the victim’s cellular phone and discovered that she had been in contact with Justin Lee with whom she had a close relationship. Officers conducted a further investigation ultimately talking to Mr. Lee and seizing his cell phone. Mr. Lee’s telephone rang constantly and the caller was identified as the defendant in this case. In the cell phone text, the defendant told Mr. Lee to check his mailbox and various other text

messages revealed that the defendant had used Mr. Lee's mailbox "as kind of a conveyance for drugs and money."

Ultimately, Mr. Lee agreed to cooperate with the police in a controlled buy and called the defendant to order 2 grams of heroin for \$360. Thereafter, investigators observed the defendant go to the mailbox, retrieve the marked bills from the mailbox and apparently leaving the heroin in the mailbox which the officers located after the defendant had left the area. Investigator Jinks then informed the other officers that the controlled buy was complete, after which one of the officers following the defendant's vehicle effectuated a traffic stop during which the defendant pulled his vehicle into the driveway at 1012 Morrell Road. The officer pulled in behind the car and activated blue lights, following which the defendant immediately opened the driver's door of his vehicle and ran on foot, dropping a cellular telephone outside of the vehicle. The defendant removed his shorts and t-shirt as he ran and then hid in some bushes. Inside the removed shorts, Investigator Jinks recovered \$360 of marked bills used in the controlled buy. Jinks used his telephone to call the telephone number identified as belonging to the defendant, and the cellular telephone which the defendant dropped rang with an incoming call from Investigator Jinks.

At that point, the officers thought that the defendant had just pulled into the house and that there was no connection of the defendant with the house. Investigator Jinks went to the house and told a woman inside who opened the door what was going on so she wouldn't be alarmed, after which she closed the door. The officers proceeded to search the defendant's vehicle at which time the officers found a garage door opener laying in the driver's seat. When the officer pressed the button on the garage door opener, the garage door at 1012 Morrell Road opened. After learning that the defendant's vehicle was associated with the house, Jinks arrested the woman for giving a false statement and a false name, following which the officer went into the house to check on the woman's two children aged 3 and 5 and to secure the house.

Based on all the information, the officers proceeded to obtain a search warrant for the house and recovered a loaded semi-automatic pistol and a loaded pistol magazine, along with a large amount of money totaling just over \$43,000.00, and 14.45 grams of heroin and other substantial evidence of drug paraphernalia and items consistent with the sale and delivery of illegal drugs.

The trial court ruled that the officers had probable cause to effectuate a traffic stop and that the defendant lacked standing to suppress the results of

the search of the house, also finding that the evidence in the vehicle was subject to “inevitable discovery doctrine”.

HELD: The Court of Criminal Appeals found that based upon all the facts the officers had probable cause to believe that the defendant’s vehicle contained evidence of the controlled heroin exchange and specifically the marked bills. The court found that all of the evidence leading from the discovery of the body, the victim’s relationship with Mr. Lee, the information garnered from Mr. Lee’s cell phone, and the controlled buy all gave the officers probable cause to believe that the defendant’s vehicle contained evidence of the controlled heroin exchange.

The court found that because the search of the defendant’s vehicle was lawful, there was no “fruit” of the search that was subject to suppression. The court stated as follows: “Even if the evidence recovered from the house was the fruit of the search of the defendant’s vehicle, the search of the vehicle was not illegal.” The CCA noted the observations of Investigator Jinks in regard to Mr. Lee’s mailbox and the evidence of the controlled buy which confirmed that the defendant had deposited heroin in the mailbox, all information that the officers knew prior to effectuating a traffic stop.

The court noted that the defendant in the motion to suppress had conceded that he had no privacy interest in the house on Morrell Road and that he lacked standing to challenge the search of the house, the court noting that the defendant was only challenging the search of the vehicle that ultimately led to the discovery of evidence inside the house.

PRACTICE POINT: The factual circumstances of this case provide a very interesting view of the police discovering a death by drug overdose and then following the evidence about how the victim had received the illegal drugs and ultimately following the evidence to establish second-degree murder as well as convictions for drug charges and gun charges.

State v. Reynolds (Tenn. Cr. App. 5/31/22)

SENTENCING

**JUDICAL DIVERSION: TRIAL COURT ERRED BY
INFERRING SOLELY FROM THE VICTIM IMPACT
STATEMENT THAT THE CIRCUMSTANCES OF
THE OFFENSE (STATUTORY RAPE) INVOLVED**

FORCE AND IN FAILING TO PROPERLY EXPLAIN HOW THE FACTORS WEIGHED AGAINST GRANTING JUDICIAL DIVERSION

FACTS: The defendant was charged in Knox County Criminal Court with rape by force (Count I), rape without the consent of the victim (Count II) and a third count by amended presentment of statutory rape. Pursuant to a plea agreement, the defendant pled guilty to statutory rape, which is sexual penetration of a victim by a defendant when the victim is at least fifteen years old but less than eighteen years old and the defendant is more than five but less than ten years older than the victim. Since the charge of statutory rape is a Class E felony for which a person is eligible for judicial diversion and there was no other disqualifying feature of the crime (since statutory rape is not classified as a sexual offense for purposes of judicial diversion), the parties stipulated that the defendant was eligible for judicial diversion. The plea agreement left it up to the trial judge as to whether a judicial diversion would be granted and whether or not the defendant would be placed on the sex offender registry.

The defendant maintained that the trial court erred by denying his request for judicial diversion because the court failed to offer any “detailed discussion” regarding the diversion factors. The defendant further claimed that the trial court was in error in ordering that the defendant be placed on the sex offender registry.

HELD: The Court of Criminal Appeals concluded that the trial court erred by inferring solely from the victim impact statement that the circumstances of the offense involved force. The court also found that given the fact that the trial court denied judicial diversion based on the circumstances of events and did not explain why any of the other factors weighed against granting judicial diversion, the trial court erred by denying diversion.

The court also concluded that the trial court’s determination that the defendant be placed on the sex offender registry was also in error and should be reversed, with the court ordering that the case be remanded for the trial court to reconsider the defendant’s request for judicial diversion and whether he should be placed on the sex offender registry.

The Court of Criminal Appeals pointed out that in considering judicial diversion, the trial judge should consider the following factors:

1. The defendant’s amenability to correction;
2. The circumstances of the offense;
3. The defendant’s criminal record;

4. The defendant's social history;
5. The status of the defendant's physical and mental health;
6. The deterrence value to the defendant and others; and
7. Whether judicial diversion will serve the interest of the public as well as the defendant.

The CCA pointed out the following key factors which apply in these type of sentencing issues:

1. The record must reflect that the trial court has taken all of the factors into consideration, and the court must explain on the record why the defendant does not qualify under its analysis. If the court has based its determination on only some of the factors, it must explain why these factors outweigh the others.

2. When reviewing a trial court's decision to grant or deny judicial diversion, the standard of review is abuse of discretion with a presumption of reasonableness.

3. However, if the trial court fails to weigh and consider the relevant factors, the Court of Criminal Appeals may conduct a de novo review or remand the case for reconsideration.

In the instant case, the Court of Criminal Appeals noted that the trial court did not specifically address all of the factors in denying the defendant's request for judicial diversion. The Court of Criminal Appeals did state, however, that defense counsel addressed each of the factors and the trial court stated that it had considered all the related factors that were laid out by the defense lawyer. The court therefore found that the trial court's ruling would be entitled to a presumption of correctness.

The Court of Criminal Appeals also noted that the circumstances of an offense alone may support a denial of judicial diversion. The Court of Criminal Appeals did state that "what troubles this court is how the trial court reached that conclusion." Specifically, the court noted that the prosecutor had advised that each of the sides in the case (prosecution and defense) had a number of favorable and unfavorable facts making a settlement short of trial acceptable to both parties. The court noted that the prosecutor thought it was in the state's best interest for the defendant to plead guilty to statutory rape rather than the state pursuing a trial for rape involving force or lack of consent. The trial court itself called the plea agreement "wise."

Very importantly, the Court of Criminal Appeals noted that the trial court determined that the defendant penetrated the victim by force and that the state would have pursued a conviction for forcible rape if the case had

gone to trial. The CCA noted that the trial court apparently “inferred” force solely from the victim impact statement because the victim had immediately claimed to others that she had been sexually violated. The court noted that while a trial court can consider a victim impact statement as it reflects on the circumstances of the case, that the victim impact statement in the present case reflected that there was no evidence in the record that the victim claimed that she had been forcibly penetrated or sexually violated.

The Court of Criminal Appeals stated specifically that the record demonstrated that the parties “went to great lengths to negotiate a plea agreement that did not include the stipulation to force, and the state even argued at sentencing that the trauma the victim experienced, not forced, justified denying diversion based on the circumstances of the offense.”

The Court of Criminal Appeals therefore concluded that the trial court had erred by inferring solely from the victim impact statement that the circumstances of the offense involved force. The case was therefore remanded for the court to reconsider the case and make a further determination on whether judicial diversion should be granted or not and also further decide whether or not the defendant should be placed on the sex offender registry and to state full reasons for the conclusions.

PRACTICE POINT: While Sessions Court is less formal, it is important for the court to consider all factors in granting or denying judicial diversion as judicial diversion is an important part of sentencing in Sessions Court as well as Circuit Court. The statutes for pre-trial diversion and judicial diversion are important in providing for defendants, even if guilty, to be given an opportunity to keep a conviction off their record under certain circumstances. This has been deemed an important feature for sentencing and in helping young people and other deserving candidates to be given an opportunity under supervision of the court to keep a conviction off their record which could have a lasting impact. This is a good case to show the importance that a judge should place on considering all factors and the history of the defendant along with the circumstances of the offense.

State v. Killgo (Tenn. Cr. App. 6/24/22)

**RESTITUTION: THE PROCEDURE FOR SETTING
RESTITUTION REQUIRES THAT THE TRIAL
COURT CONSIDER THE FINANCIAL RESOURCES
AND FUTURE ABILITY TO PAY OR PERFORM**

FACTS: In a case involving vandalism of property, in which the defendant was found guilty, the trial court at the sentencing hearing sentenced the defendant as a Range I, standard offender to serve two years on probation after serving four months in confinement and ordered the defendant to pay \$2000.00 in restitution.

The defendant contended on appeal that the trial court erred by setting his amount of restitution at \$2000.00 and by not considering his ability to pay.

HELD: The trial court's order of restitution was reversed and remanded to the trial court for a hearing on the matter of restitution, due to the fact that the trial court did not consider the defendant's ability to pay or specify the amount of payment.

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

1. TCA 40-35-304 (a) provides that a sentencing court may direct a defendant to make restitution to the victim of the offense as a condition of probation.

2. The amount must be based on the victim's pecuniary loss.

3. "Pecuniary loss" consists of special damages and out of pocket expenses incurred by the victim relative to investigation and prosecution of the crime.

4. All restitution orders must be determined pursuant to the procedure in TCA 40-35-304. Among other things, the court must specify at the time of the sentencing hearing the amount and time of payment and may permit payment or performance in installments.

5. The procedure also requires that the court consider the financial resources and future ability of the defendant to pay or to perform. The trial court must consider what the defendant can reasonably pay.

6. An order of restitution which obviously cannot be fulfilled serves no purpose for the defendant or for the victim.

7. The Court of Criminal Appeals reviews this issue based upon the standard of abuse of discretion.

The trial court in the present case did not consider the defendant's ability to pay or specify the amount of payment therefore the case was reversed and remanded to the trial court for hearing on the matter of restitution.

State v. Appelt (Tenn. Cr. App. 6/22/22)

**SPECIAL CONDITIONS OF PROBATION SUCH AS
SIGNIFICANT COMMUNITY SERVICE HOUR
REQUIREMENTS: THE DEFENDANT HAS THE
BURDEN TO DEMONSTRATE THE IMPROPRIETY
OF A PROBATION CONDITION**

FACTS: In the present case, the defendant was convicted of the offense of criminally negligent homicide and as a condition of the defendant's probation, the trial court imposed 1,768 hours of community service to be performed at a local drug recovery center.

The case had a significant factual situation as the charge arose out of a situation in which the defendant, a deputy sheriff at the time, initiated a traffic stop based upon a driver speeding. When the driver did not stop, a high-speed chase ensued. After the pursued vehicle eventually stopped, the defendant officer exited his patrol vehicle with a service weapon drawn and ordered the driver to exit the vehicle. The driver pointed a gun at the defendant and drove his vehicle towards the defendant. As the vehicle sped past, the defendant officer jumped behind his patrol car and fired his service weapon into the vehicle's front windshield, the driver's side door, and the rear windshield. The 20-year-old female passenger, the victim in the case, was killed as a result of the defendant's gun shots. The jury ultimately convicted the defendant of the lesser-included offense of criminally negligent homicide.

At the sentencing hearing, the trial court denied the defendant's motion seeking judicial diversion, ordered the defendant to serve three years of probation, and imposed 1,768 hours of community service at the Blue Monarch Residential Recovery Unit for young women. The trial court noted that this arrangement would allow the defendant to maintain other employment while benefitting young women in their community where the defendant would be required to work every Monday and Tuesday from 8:00 a.m. to 4:30 p.m. for a period of two years.

The defendant appealed the denial of his motion for judicial diversion and the substantial requirement of community service hours.

HELD:

1) The Court of Criminal Appeals held that the trial judge had erred in not granting to the defendant the opportunity for a judicial diversion. The CCA noted that the trial court did not want to condone the defendant's "bad mistake" by granting judicial diversion since the defendant had fired into the

back of the victim's Mustang which was contrary to the policy of the sheriff's department which did not condone firing into the rear of a car. The CCA did note that firing into the vehicle and striking the victim were already incorporated into the elements of criminally negligent homicide and should not have been used as factors to deny judicial diversion because the defendant did in fact qualify as a candidate for judicial diversion.

On a total review of the circumstances, the court found that the circumstances of the offense weighed in favor of the defendant who had a good social history, a four-year college degree, had been elected to the school board and served as a volunteer fireman, and had a close relationship with his family.

2) In regard to the defendant's contention that the trial court abused its discretion by imposing an excessive number of hours of community service, the Court of Criminal Appeals found that the defendant was not entitled to relief.

The court noted the following factors in regard to imposing conditions of probation:

- 1) The primary purpose of a probation sentence is "rehabilitation of the defendant," and the conditions of probation must be suited to this purpose.
- 2) Once the trial court determines that probation is justified under the circumstances, the conditions imposed must be reasonable and realistic and must not be so stringent to be harsh, oppressive or palpably unjust.
- 3) The court is not granted "unfettered authority" to impose any condition on the defendant's probation but limits the court's discretion to the "bounds of traditional notions of rehabilitation."
- 4) The burden of demonstrating the impropriety of a probation condition rests with the defendant.

Looking at these factors, the CCA noted that the trial court acknowledged that it was imposing an "usually high amount of community service." The trial court explained the purpose of the Blue Monarch Residential Recovery Unit and noted that this type of service "would allow the defendant to maintain other employment while benefitting young women in their community." The court also noted that it was its intention that the condition would also serve as a statement to other officers in Grundy County about their duty and service to the community, the court noting that all the defendant had to do was get the license number of the vehicle and that the driver of the vehicle would be ultimately apprehended.

The court noted that while the defendant complained that the imposition of 1,768 hours of community service would conflict with his

ability to work, there was nothing in the record that indicated how the condition impaired his ability to work. The court noted that “it is the defendant’s burden to demonstrate the impropriety of a probation condition.”

The Court of Criminal Appeals stated that without any evidence of the defendant’s employment schedule, the court could not conclude that the sentence interfered with his employment.

PRACTICE POINT: This case points out the importance of imposing reasonable conditions, and it is important for a judge not to be punitive or unrealistic in imposing probation conditions. The court notes however, very importantly, that there is a burden on the defendant to demonstrate how a condition impairs his or her ability to work and to demonstrate otherwise the impropriety of a probation condition.

State v. Holmes (Tenn. Cr. App. 6/23/22)

SEQUESTRATION OF WITNESSES

SEQUESTRATION OF WITNESSES: THE COURT OF CRIMINAL APPEALS FOUND THAT THE TRIAL COURT DID NOT COMMIT ERROR BY ALLOWING TWO VICTIMS TO BE PRESENT IN THE COURTROOM PRIOR TO THEIR TESTIMONY BASED UPON THE FACT THAT THE STATE HAD MADE A DE FACTO DESIGNATION OF THE VICTIMS AS THE STATE’S REPRESENTATIVES DURING THE TRIAL AND ALSO DUE TO THE FACT THAT THE DEFENSE DID NOT IDENTIFY ANY ALLEGED INSTANCES IN WHICH EITHER OF THE VICTIMS IMPROPERLY CHANGED THEIR TESTIMONY

FACTS: In a case involving multiple counts of aggravated rape, aggravated kidnapping and other charges, the defendant contended that the trial court erred by allowing both of the victims to be present in the courtroom before their respective testimonies, arguing that the defendant’s due process rights were impacted. The state argued that the victims were

entitled to be in the courtroom and that any error was harmless.

HELD: The Court of Criminal Appeals held that the defendant was not entitled to any relief on this issue due to the fact that it was implicit in the state's arguments that the victims were designated by the state as the state's representatives at the trial and further due to the fact that the defendant did not identify any testimony by either victim establishing that any testimony was altered to fit the state's evidence.

The Court of Appeals noted that the purpose of the sequestration rule which was codified as Rule 615 of the Tennessee Rules of Evidence "is to prevent one witness from hearing the testimony of another and adjusting his testimony accordingly." The court noted that the rule provides, in pertinent part, as follows:

"At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing... The court shall order all persons not to disclose by any means to excluded the witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause."

The Court of Criminal Appeals noted specifically the Advisory Commission Comments to the 1997 Amendment which specifies that "a party that is not a natural person includes the State of Tennessee. Consequently, the prosecuting attorney could designate a crime victim, a relative of the crime victim, or an investigating officer. Like category (1), category (2) is a matter of right."

The Court of Criminal Appeals also noted that for a defendant to be granted appellate relief based upon a Rule 615 violation the defendant "must demonstrate that a witness improperly changed his or her testimony after hearing other witness's testimony." The court noted that in the present case the defendant asked for the rule of sequestration pursuant to Tennessee Rule of Evidence 615. The state requested that the trial court allow both victims to remain in the courtroom, claiming that was their right under the victim's rights clause of the Tennessee Constitution. The court decided to allow the presence of the victims in the courtroom.

The Court of Criminal Appeals noted that under prior case law that even when the state fails to specifically designate the victims as its

representative at trial, the state may by implication make a de facto designation of a victim or victims as the state's designated representatives. The court noted that the state made no other designation of a law enforcement officer or other individual as its representatives and therefore the prior case law applied in this case to show that the victims were impliedly the state's representatives at trial.

The court also noted that the defendant has not identified any alleged instances in which either of the victims improperly changed their testimony or altered their testimony to fit the state's evidence or theory of the case. The Court of Criminal Appeals also noted that the defense counsel thoroughly cross-examined the victims using their preliminary hearing testimony and police statements and that the jury had ample information with which to make its credibility determinations.

The court therefore found that the defendant was not entitled to relief on this issue.

PRACTICE POINT: It is a good practice that when a party makes a request or demand for the Rule of Sequestration, that the court allow the state to designate who the representative will be for the state. The trial court, including Sessions Judge can then request that all other persons exit the courtroom and or make any appropriate rulings as to who shall be the legal representative for the State of Tennessee. It is best to have this clarified on the front end rather than have it come up during the course of the hearing of either a trial or a preliminary hearing. If any party has any special arguments to make then they can be heard on the front end, and the court can make a decision based on its own discretion about what the proper ruling should be based upon the arguments that are presented and the status of the law. This case is one of the latest rulings on the issues pertaining to sequestration of witnesses.

State v. Burgins (Tenn. Cr. App. 6/28/22)

STATUTORY RAPE BY AN AUTHORITY FIGURE

SUFFICIENCY OF EVIDENCE: SINCE THE PROOF ESTABLISHED THAT THE DEFENDANT UTILIZED HER POSITION AS THE MOTHER OF J.J.'S GIRLFRIEND, A SURROGATE MOTHER, A CHURCH YOUTH LEADER, AND A TRUSTED

**FAMILY FRIEND TO CULTIVATE AN
INAPPROPRIATE RELATIONSHIP WITH J.J. AND
BRING TO COMPLETION THE SEXUAL
PENETRATION WITH J.J., THE PROOF IS
SUFFICIENT TO SUSTAIN HER CONVICTION FOR
STATUTORY RAPE BY AN AUTHORITY FIGURE**

FACTS: The defendant argued that the evidence was insufficient to sustain her conviction for statutory rape by an authority figure, claiming that the state failed to prove that she had attained a “position of trust” at the time the sexual acts were accomplished with J.J.

The proof had established that sex had occurred between the defendant and J.J., a fifteen-year-old male. Witnesses had testified that the victim (J.J.) had been dating the defendant’s daughter, that the defendant taught the victim as a substitute teacher, that the defendant was a youth leader to the victim in church activities, and that the defendant was “a mother figure” to the victim. The defense position was that, while the sexual contact had taken place, the proof was insufficient at any particular point to establish that the defendant was an authority figure “at the time that the incidents occurred.” There was substantial evidence in regard to the sexual contact that was made and that the victim had spent the night at the defendant’s home.

HELD: The Court of Criminal Appeals found that the proof established that the defendant had utilized her position as the mother of J.J.’s girlfriend, a surrogate mother, a church youth leader, and as a trusted family friend to cultivate an inappropriate relationship with J.J. and bring to completion the sexual penetration with J.J. as charged in the appropriate counts, and that the proof was therefore sufficient to sustain the defendant’s convictions for statutory rape by an authority figure.

The court noted that statutory rape by an authority figure is unlawful sexual penetration of a victim by the defendant or the defendant by the victim when: (1) the victim is at least thirteen but less than eighteen years of age; (2) the defendant is at least four years older than the victim; and (3) the defendant was at the time of the offense in a position of trust or had supervisory or disciplinary power over the victim by virtue of the defendant’s legal, professional, or occupational status and used the position of trust or power to accomplish the sexual penetration.

The Court of Criminal Appeals found that despite the defendant's contention that there was no direct testimony from J.J. regarding the nexus between the defendant and any evidence that she was an authority figure to the victim at the time any of the offenses occurred, the totality of the evidence by multiple witnesses showed that the defendant was in each of these roles in the victim's life and in such a way and manner as to qualify as an authority figure at the time of the sexual offenses.

PRACTICE POINT: This is a good case to have in mind when a General Sessions Judge has a preliminary hearing involving the charge of statutory rape or any other sexual offense involving an authority figure to show the types of proof, including direct and or circumstantial proof that could establish this type of relationship of the defendant to the victim through her potential roles as an authority figure. In this case, the proof established multiple roles including as mentioned the defendant being the mother of J.J.'s girlfriend, being a surrogate mother to the defendant, being a church youth leader, and being a trusted family friend who had through these multiple roles cultivated an inappropriate relationship with J.J. and authority over him.

State v. Tice (Tenn. Cr. App. 7/18/22)

SUFFICIENCY OF THE EVIDENCE

SUFFICIENCY OF THE EVIDENCE: IN REVIEWING SUFFICIENCY OF THE EVIDENCE, A COURT MUST FIRST EXAMINE THE RELEVANT STATUTES IN ORDER TO DETERMINE THE ELEMENTS THAT THE STATE MUST PROVE TO ESTABLISH THE OFFENSE AND THEN TO SEE IF THE DEFENDANT'S GUILT IS SUPPORTED BY DIRECT EVIDENCE, CIRCUMSTANTIAL EVIDENCE, OR A COMBINATION OF BOTH

FACTS: In a case in which the defendant was convicted at trial of sexual battery and possession of cocaine with the intent to sell or deliver, the

defendant contended that the evidence was insufficient to support his convictions.

HELD: The Court of Criminal Appeals found that the evidence supported both of the defendant's convictions for sexual battery and for possession of cocaine with intent to sell or deliver.

The Court of Criminal Appeals noted that certain key principles exist in regard to a review of issues pertaining to the sufficiency of the evidence, which are as follows:

- 1) In reviewing the sufficiency of the evidence supporting a criminal conviction, the court is first required to examine the relevant statutes in order to determine the elements that the state must prove in order to establish the offense.
- 2) The appellate court determines 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.
- 3) Once a defendant has been convicted, the presumption of innocence is replaced with the presumption of guilt on appeal.
- 4) To overcome a presumption of guilt on appeal, the defendant bears the burden of showing the evidence presented at trial was "insufficient for a rational trier of fact to find guilt of the defendant beyond a reasonable doubt."
- 5) On appeal, the state is entitled to the strongest legitimate view of the trial evidence and all reasonable and legitimate inferences which may be drawn from the evidence.
- 6) A defendant's guilt may be supported by direct evidence, circumstantial evidence, or a combination of both.

In regard to the defendant's argument that the evidence was insufficient to support his conviction for sexual battery, the court noted that "sexual battery" is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

- (1) Force or coercion is used to accomplish the act;
- (2) Sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent;
- (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
- (4) The sexual contact is accomplished by fraud.

In regard to the sexual battery charge, the court found that when viewed in the light most favorable to the state, the defendant had picked up the victim at around 12:00 a.m. on 6/27/20 and instead of driving her to her home he drove to a trailer located in Humboldt. The defendant eventually wielded a knife and prevented her from leaving. During the course of an hour and a half or two hours, the defendant beat the victim, tore her clothes, tried to force her to consume alcohol and a white powdery substance, and raped her vaginally. The victim had told him “no” and that she wanted to leave but the defendant continued his attack, according to her testimony. After law enforcement approached the defendant’s vehicle after receiving a 911 call on her cell phone, she reaffirmed that she had been raped and she was observed to have two nickel-sized bruises on her leg and a bruise on her wrist. The defendant’s DNA was a match found on the victim and her shorts. Based upon all of this evidence the court found that the evidence was sufficient to show that the defendant used force or coercion to accomplish sexual contact with the victim or that he had sexual contact with her without her consent.

In regard to the cocaine conviction, the court found that the evidence was sufficient to show that the defendant intended to sell or deliver the substance. The court noted that previous cases and the statute established that intent may be inferred from the amount of the controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, including the fact that the controlled substance was possessed with the purpose of selling or otherwise dispensing. The court noted that such “other relevant circumstances” may include the absence of drug paraphernalia and the weight, street value, and packaging of the drugs and the presence of weapons.

The court noted when viewed in the light of the most favorable to the state, the defendant had held the victim at knife point and tried to make her consume a white powder. The defendant demanded money from the victim and drove the victim to Hardees, whereupon observing law enforcement nearby, the defendant had the victim conceal drugs in a body cavity. When the defendant’s vehicle was towed to an impound lot, officers found three rocks of crack cocaine weighing a total of 0.81 grams under the driver’s side floor mat in the defendant’s vehicle. The court noted that the amount of drugs found coupled with the use of a knife to accomplish the sexual battery, his demanding money from the victim, his attempt to conceal the drugs in the victim’s vagina., and the absence of drug paraphernalia

provided the jury with a reasonable basis to infer the he possessed the crack cocaine with the intent to sell or deliver the substance.

State v. Fitzgerald (Tenn. Cr. App. 7/1/22)

VIOLATION OF PROBATION

CONTACTING THE VICTIM: THE DEFENDANT FAILED TO COMPLY WITH THE CONDITION OF HIS PROBATION REQUIRING HIM NOT TO CONTACT THE VICTIM, AND THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REVOKING THE DEFENDANT’S PROBATION

FACTS: On 7/29/21, the defendant’s probation officer filed an affidavit alleging that the defendant had violated the conditions of his probation by violating the order that he would not engage in any assaultive, abusive, threatening, or intimidating behavior due to the fact that he was arrested for stalking.

At the probation hearing, the state asserted that the defendant wrote a letter to the victim in violation of his probation. Defense counsel responded that the defense did not dispute that but that the defendant was sorry for writing the letter and that he has stopped writing the victim “all together.”

At the hearing, the victim identified the letter that she received from the defendant on 7/22/20 and explained that the receipt of the letter caused her fear “because she thought since he had pled guilty, he wasn’t going to contact her anymore.” When she was asked how the letter had affected her, she replied, “He keeps terrorizing me and my family and I just wanted him to leave me alone and he won’t leave me alone.” The victim had described the impact that the defendant’s contact had on her family by saying that her daughter had tried to kill herself and that she was only eleven years old; that the daughter had been in therapy and their son had to go to therapy. She advised that the daughter cries at night and can’t sleep because she is afraid that the defendant is going to come and find us and kill us. The victim also said that she had nightmares and did not leave the house because she was afraid she would run into him.

At the hearing, the defendant agreed that his ten-year probation sentence was probably light in lieu of his very serious offenses for which he

had been placed on probation. He also agreed that he had pled guilty to a violation of a protective order for contacting her in the past. The defendant claimed that the letter had been a “stupid mistake” and that he would not do it again.

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion when it ordered the defendant to serve the remainder of his sentence. The court noted that the defendant had failed to comply with the condition of his probation requiring him not to contact the victim and that he had a prior conviction for violating an order of protection against the victim, which exhibited a pattern of difficulty with compliance.

The court based its decision on:

- 1) The defendant admitted contacting the victim after understanding that he was not to have any contact with the victim and was aware of the consequences of failing to comply.
- 2) The defendant had offered no explanation as to why he had previously told the court he would not contact the victim knowing that there was already a letter that would be sent to her that she would receive after the assertion to the court.
- 3) The defendant had acknowledged his intention to “skirt around the law.”

PRACTICE POINT: This case reiterates the point that when there has been a serious set of circumstances in regard to domestic violence that any contact after that point is a serious matter for the courts to consider in any kind of case such as violation of probation.

State v. Smith (Tenn. Cr. App. 8/11/22)

PLEA AGREEMENT: THE TRIAL COURT IMPROPERLY SENTENCED THE DEFENDANT TO A SENTENCE OF FIVE YEARS PLUS TWELVE YEARS OF PROBATION WHEN HIS PLEA AGREEMENT CAPPED HIS SENTENCE AT FIVE YEARS

FACTS: At a hearing on 12/14/20, the defendant pled guilty to two counts of aggravated animal cruelty and one count of aggravated assault. During the hearing, the defendant testified that he was sixty-eight years old, a graduate of high school, and was entering the plea of his own free will with no promises made to him. The trial court went through all of the regular procedures in regard to the defendant having consulted with counsel and was

entering the plea freely and voluntarily. The trial court informed the defendant, as he was pleading guilty to aggravated assault, that his sentencing could be between three and six years to be served at thirty percent. The trial court said that, pursuant to the agreement, “the number of years that I can impose is capped at five years; do you understand?” The judge reminded the defendant that the trial court would determine his sentence after a sentencing hearing and the trial court would determine if the defendant would serve his sentence, all or part, in confinement or on probation.

Proof at the hearing included that the owner of the dogs, Diana Spisak, the victim in the case, stated that she witnessed the unidentified male with a gun and that the male walked to his truck, retrieved a shot gun and then walked on the porch and began knocking at their residence. On a 9-1-1 call, the victim stated that the male was going to kill her and the deputies responded. Responding officers investigated the fact that the unidentified male had gotten out of his white truck and shot one dog on the porch and shot a second dog in the driveway. The defendant claimed that he shot both dogs in self-defense.

Based upon the totality of the facts, the trial court accepted the defendant’s guilty plea and scheduled a sentencing hearing.

At the sentencing hearing, after considering all factors and testimony, the trial judge ultimately sentenced the defendant to serve eleven months and twenty-nine days at one-hundred percent in the Sumner County Jail, which was to begin immediately, followed by probation for twelve years. The court noted that would be the maximum period of time that the defendant would be eligible for. The court noted that defendant was taking medication for a mental health issue and that while his criminal record was favorable his mental health was not good, an unfavorable factor. The court also noted that there was deterrent value, and the court needed to avoid depreciating the seriousness of the offense.

The defendant appealed the case, contending that the trial court improperly sentenced him to a sentence of five years plus twelve years of probation when his plea agreement had capped the sentence at five years. The defendant also appealed the issue of being given a special condition of probation that he not be allowed to leave Maury County during the twelve years of probation except for medical reasons.

HELD: 1) The Court of Criminal Appeals concluded that the trial court erred when it sentenced the defendant to a term of probation beyond the five-year term that the parties agreed to in the binding and enforceable plea agreement. The CCA noted that the defendant, who suffered from mental

illness, “was told by the trial court during a plea colloquy that the pleas he was entering and the agreed-to sentence was capped at five years.” The court noted that the defendant would be reasonably entitled to assume that the trial court’s sentencing determinations would all fall within the five-year time frame.

The Court of Criminal Appeals noted that the trial court was to determine the “manner of service,” but that by its plain meaning, the term, “manner of service” means incarceration, probation, or split confinement. The court noted that the term does not by its plain meaning mean extension of the duration of the sentence agreed to by seven years. The court noted that “to allow defendants to be sentenced to restricted terms of probation years beyond an ‘agreed to’ sentence length, negotiated by the attorneys and approved by the trial court, would be totally improper.”

The court therefore concluded that the trial court erred when it sentenced the defendant to a term of probation beyond the five-year term that the parties agreed to in the binding and enforceable plea agreement.

The court noted that existing case law in Tennessee provides that “once a plea agreement is approved by the trial court, it becomes a binding and enforceable contract.” Therefore, pursuant to the defendant’s plea agreement in this case, the only item to be determined by the trial court was the manner of service of the sentence with the cap of a total of five years for the entire sentence, including time to be served in jail and on probation.

2. In regard to the issue about the condition of probation that the defendant not leave Maury County while serving his probation, the court concluded that the travel restriction requiring the defendant not to leave the county of residence for a period of twelve years is overly broad and not reasonably related to the purpose of his sentence and is therefore unduly restrictive.

The court noted that under TCA 40-35-303(d) the statute permits trial courts to impose conditions of probation that are “reasonably related to the purpose of the offender’s sentence and not unduly restrictive of the offender’s liberty, or incompatible with the offender’s freedom of conscience.” The court noted that it is defendant’s burden to demonstrate that the impropriety of a probation sentence exists.

The court noted that while this was a case of first impression in Tennessee, federal statutes codify that there are situations and cases in which it is justified to require defendant to remain in a jurisdiction except when granted permission to leave by the court or his/her probation officer. The court noted that in a Colorado case, a geographical restriction imposed as a condition of an assault, which prohibited a defendant from being found

in the area where the victim lived, was reasonably related to the underlying offense, and the condition was designed to prevent the possibility of physical contact between the defendant and the victim for a period of probation, and the defendant neither lived nor worked in the area covered by the restriction. The court also noted that in a California case, the appellate court had found it was not unreasonable or an unconstitutional violation of the defendant's right to travel to have as a probation condition that the defendant must maintain a distance of at least fifty yards from the victim's home. In that case, the victim had suffered through certain circumstances of the defendant returning to the victim's home uninvited and intruded in the life of the victim and therefore the intrusion on the defendant's travel was minimal and the forbidden zone was specifically linked to his past crime.

The court noted that in all travel restrictions, as with other conditions of probation, they must be reasonably related to the purpose of the defendant's sentence. The court concluded that in the present case the travel restriction requiring the defendant not to leave his county of residence for a period of twelve years was overly broad and not reasonably related to the purpose of this sentence and was unduly restrictive.

The court found that in the interest of judicial economy and in accordance with the holdings, the CCA would remand the case to the trial court with direction for the trial court to enter amended judgments that reflect that the defendant would be sentenced to a term of three-hundred sixty-four days of incarceration followed by four years and one day of probation, for a total period of five years, as agreed to by the parties.

The court further included as a condition of probation that "he not knowingly go within fifty miles of the victim or her residence, except as required by any pending civil litigation, and that he willingly leave were he to unwittingly encounter her or her family". The court further found that it was appropriate as the trial court had previously ordered to have a condition of the defendant's probation that he remain on his medication and that he not own or attempt to possess a firearm since he was a convicted felon.

State v. Looper (Tenn. Cr. App. 8/11/22)

REQUIREMENT OF CONFINEMENT IN JAIL: TRIAL JUDGE DID NOT ABUSE DISCRETION IN ORDERING CONFINEMENT FOR THE DEFENDANT INSTEAD OF ALLOWING DEFENDANT TO ENTER INTO ALTERNATIVE NON-JAIL PROGRAM,

**AS EVEN THOUGH DEFENDANT HAD RECEIVED
CONDITIONAL ACCEPTANCE INTO DRC (DAY
REPORTING CENTER) THE DEFENDANT HAD NOT
TAKEN ADVANTAGE OF BEING FULLY
ACCEPTED INTO THE DRC PROGRAM IN THE
TIME ALLOWED**

FACTS: The defendant pled guilty to a drug charge and was sentenced to eight years split between one year in confinement and the remainder on probation. Following the revocation hearing, the defendant's probation was revoked and he was ordered to serve the balance of his sentence in confinement.

The defendant contended that the trial court abused its discretion by ordering him to serve his sentence in confinement instead of on intensive probation through the DRC or a similar program because such a program is the least severe measure necessary to achieve the purpose and principles of sentencing.

HELD: The Court of Criminal Appeals held that there was no abuse of discretion in the judge sentencing the defendant to confinement rather than considering an alternative program, since trial court in ordering confinement chronicled the defendant's history in its order and found that the defendant had been convicted of a serious sentence of aggravated domestic assault due to his choking the victim and nearly caused her to lose consciousness.

The trial court had scheduled a separate hearing to give the defendant time to be qualified for the DRC program, giving the defendant 56 days to fully qualify for the DRC program. The defendant provided proof and information to the trial court that he had been conditionally accepted into the DRC program at the sentencing hearing but the trial court found that the defendant's failure to fully qualify for the program contributed to the court's decision to require the sentence to be served in incarceration. The Court of Criminal Appeals also found that there was no evidence in the record that the defendant took the necessary steps to be fully accepted into the program in order to avoid incarceration.

In considering this case the court noted the following principles regarding violation of probation:

1) Probation revocation requires a two-step consideration by the trial court, whereby the court first determines whether a preponderance of the evidence

exists to revoke the defendant's probation and secondly the court then determines the appropriate consequence for the revocation.

2) Trial courts are not required to hold an additional hearing to determine the proper consequences for revocation but it is a two-step process within the hearing.

3) In regard to the first step, a defendant's admission that he violated the terms of his probation, in and of itself constitutes substantial evidence to support the revocation of probation.

4) A trial court is not required to consider the sentencing statute in a probation revocation hearing, as the terms of TCA 40-35-103(1) are not relevant to the analysis of the trial court's probation revocation decision.

The court noted that on a violation of probation hearing, once the trial court found that the defendant had violated his probation, the trial court was under no duty to presume that defendant should be reinstated to probation or some other alternative sentence as a judge would be at the time of considering the sentence upon the conviction of the defendant of the original charge.

The Court of Criminal Appeals pointed out that appellate courts in Tennessee have "repeatedly held that an accused, already on a suspended sentence, is not entitled to a second grant of probation or another form of alternative sentencing."

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

WRIT OF CORAM NOBIS

WRIT OF CORAM NOBIS: A WRIT OF ERROR CORAM NOBIS CAN BE CONSIDERED FOR SUBSEQUENTLY OR NEWLY DISCOVERED EVIDENCE RELATING TO MATTERS WHICH WERE LITIGATED AT THE TRIAL IF THE JUDGE DETERMINES THAT SUCH EVIDENCE MAY HAVE RESULTED IN A DIFFERENT JUDGMENT HAD IT BEEN PRESENTED AT THE TRIAL

FACTS: The defendant was convicted of first-degree murder along with other charges for a 2005 shooting in Davidson County. He was given a life sentence. On 12/8/20, the defendant filed a petition for a writ of error coram

nobis, alleging newly discovered evidence in the form of an affidavit showing that he did not participate in the crime. The defendant acknowledged he did not file the petition within the applicable statute of limitations but maintained that he was entitled to an equitable tolling and the state agreed that the defendant should in fact be entitled to the equitable tolling.

The Coram Nobis Court noted that it was not bound by the state's concession for an equitable tolling and dismissed the petition as untimely. The defendant then appealed to the Court of Criminal Appeals.

HELD: The Court of Criminal Appeals concluded that the ballistics evidence and affidavit regarding the same were in fact discovered after the expiration of the statute of limitations period and further concluded that strict application of the statute of limitations would effectively deny the defendant a reasonable opportunity to present his claims. The court found that an adequate investigation into whether the third parties were present at the shooting and whether the defendant was with them is important to serve the ends of justice. The court therefore concluded that the state's interest in preventing stale litigation is outweighed by the defendant's interest in presenting his meaningful claim.

The Court of Criminal Appeals therefore found that the defendant was entitled to an equitable tolling of the statute of limitations which entitles him to have a hearing on his claims. The judgment of the trial court was reversed and the case remanded for a hearing on the defendant's coram nobis petition.

In analyzing the defendant's coram nobis petition, the court noted the following principles in regard to writs of error coram nobis:

- 1) A writ of error coram nobis is an extraordinary procedural remedy, filling only a slight gap into which a few cases may fall. TCA 40-26-105 states that "the relief obtainable by this proceeding shall be confined to errors... that were not or could not have been litigated in the trial of the case. The statute further states that "upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence...."
- 2) Normally, the writ of error coram nobis is subject to a one-year statute of limitations which is measured from the date the judgment becomes final.
- 3) Before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims

at a meaningful time and in a meaningful manner.

4) Whether due process considerations require a tolling of a statute of limitations is a mixed question of law and fact.

5) To be entitled to an equitable tolling, a prisoner must demonstrate with particularity in the petition (1) that the ground upon which the petitioner is seeking relief is a later arising ground that arose after the point and time the applicable statute of limitations normally would have started to run and (2) that based on the facts of the case the strict application of the statute of limitations would effectively deny the prisoner a reasonable opportunity to present his or her claims.

6) Coram nobis relief is available only when a court determines that the new evidence may have led to a different result.

7) The petition need only show that the newly discovered evidence, had it been admitted at trial, may have resulted in a different judgment.

Based upon all the factors considered in these types of cases, the Court of Criminal Appeals found that this case did involve such a claim that would be proper for a hearing to take place, and the judgment of the trial court was reversed and remanded.

Thomas Edward Clardy v. State of Tennessee (Tenn. Cr. App. 7/12/22

ETHICS

EX PARTE COMMUNICATIONS

CIVIL CASES: IN SEVERAL CASES, JUDGES IN CIVIL CASES WERE DISCIPLINED FOR CONTINUING TO HAVE CONVERSATIONS WITH ONE OF THE PARTIES TO A LAWSUIT AFTER THE OTHER PARTY HAD LEFT THE COURTROOM, AND IN ALL OF THESE CASES THE JUDGES WERE DISCIPLINED FOR INAPPROPRIATE EX PARTE COMMUNICATIONS AND OTHER VIOLATIONS

FACTS: (1) In the case of In the Matter of Arndt, the judge had two ex parte communications in two small claims cases after one of the parties had left the courtroom. In the first case, the judge told one of the parties what he was probably going to do with the case after the other party had left the courtroom. In that matter, the court clerk intervened and told the defendant that the judge probably needed not to hear the conversation in the absence of the other party. In the second case involving the same judge, the judge reserved judgment in a case involving a house painting situation, and after one party had left the courtroom, the judge again advised one party the likelihood of what his ruling would be and continued the discussion until an attorney in the courtroom for an unrelated case advised the party that the judge was not permitted to give him legal advice or listen to him after the proceeding had ended.

(2) In another case, In the Matter of Kraker, the judge in a dispute between a homeowner and a plumber listened to the case without administering an oath or affirmation, questioned witnesses and parties, and allowed for participation by a spectator in the courtroom, until the judge stopped the proceedings because matters were “starting to get heated.” The judge continued to have discussions with the plaintiff after the defendant had left the courtroom, following which the judge held ex parte communications with the man who had given his opinion in the courtroom and with the witness for the plaintiff.

HELD: In both of the cases described above, the New York State Commission on Judicial Conduct censured the judge for allowing the proceedings to get out of hand and for the ex parte communications.

PRACTICE POINT: In General Sessions Court, there are so many cases and many opportunities for conversations to get started, which emphasizes the importance of a General Sessions Judge not engaging with either party unless both parties are in the courtroom and not engaging with any party or witness outside the presence of any attorneys who are involved in the case and not losing control of the courtroom to the extent that people in the audience start participating and giving their opinions. As foolish as most of this sounds, most of us as General Sessions Judges can understand how little it takes for some of these conversations to be able to occur, so it is incumbent on judges to be aware in the midst of all circumstances and to prevent the situations from occurring, which do take away from the public's ability to have faith and confidence in the legal system and in the judge.

In the Matter of Arndt (New York State Commission on Judicial Conduct, 9/28/22)

In the Matter of Kraker (New York State Commission on Judicial Conduct, 10/6/22)

NOTE: These cases and others are cited and/or discussed in the Fall 2022 Judicial Conduct Reporter, Vol. 44, No. 3 (Fall 2022). The Judicial Conduct Reporter is available online and can easily be found by typing in Judicial Conduct Reporter, National Center for State Courts, with its director being Cynthia Gray.

**EX PARTE COMMUNICATIONS FOR SCHEDULING,
ADMINISTRATIVE, OR EMERGENCY PURPOSES:
JUDICIAL CONDUCT COMMITTEE REJECTS
JUDGE'S DEFENSE THAT COMMUNICATION
WITH A WITNESS WAS BASED UPON THE
SCHEDULING EXCEPTION FOR EX PARTE
COMMUNICATIONS**

FACTS: The plaintiff in this case instituted a legal action against his brother seeking his removal as trustee of two trusts established by their parents for the benefit of their children. The case was contentious, and a grievance was filed by an attorney representing the trustee in the case complaining about the judge's conduct, which included the judge's initiation of an ex parte communication with a witness and the judge's independent

factual research into personal information concerning the trustee's daughter without the parties' knowledge.

The judge had initiated a telephone call to a third-party witness, and while receiving no answer, left a message on the witness's voice mail. The contact came to the attention of the trustee who initiated the complaint.

The facts also indicated that the trustee had submitted supplemental certifications by contractors who performed work on a home which was an issue in the law suit, and the allegations were that the judge did an online search and further attempted to call the third-party witness. The judge also used his law clerk to seek information independently about the case through the registrar for vital statistics and through public real estate records. When the judge later rendered his opinion in the case, he used the information gleaned from this independent search.

HELD: The Advisory Committee on Judicial Conduct found that the judge's behavior implicated the judiciary's core ethic principles of integrity and impartiality including Canon 3, Rule 3.8, which prohibits judges from initiating or considering ex parte or other communications concerning pending or impending proceedings.

The committee further found that the judge's actions in "covertly" obtaining non-record information to independently verify certain concerns in the case violated Canon 3, Rule 3.6(C) which prohibits judges in the performance of their judicial duties from manifesting by words or conduct any bias or prejudice.

(1) In regard to the judge's reliance on the "scheduling" exception, the committee found the judges reliance on this exception to be "misplaced." The committee stated that "a judge's ex parte communications with a witness or potential witness for scheduling purposes is fraught with ethical concerns and when done off the record and without counsel's knowledge or consent, as occurred here, may reasonably lead counsel and the parties to question the judge's integrity and impartiality."

The committee stated "we can conceive of no circumstance under which a judge would need to communicate ex parte with a witness, even on an emergent basis, given the various judiciary personnel available to the judge to place such a telephone call or engage in such a conversation."

The court also found that the judge's argument, that an ex parte communication requires (1) actual contact between the parties and (2) the improperly contacted party's response to the initial contact, to be misplaced. The court found that the rule "prohibits not merely the act of communicating ex parte, but the initiation of that ex parte communication." The court found there is no exception to this prohibition just because the ex parte

communication is unsuccessful. The court found that such an exception would nullify the prohibition because the rule prohibits “initiation” irrespective of any reciprocal communication from the intended recipient.

The committee made this key observation: “There are few, if any, circumstances under which a judge may initiate an ex parte discussion with a witness, potential witness, party, or lawyer involved in the matter pending before the court, particularly when the judge presiding over the matter serves as both the trier of fact and law.”

The committee also noted that the judge had available to him several options to satisfy himself as to the authenticity of the witness’s certification without calling the witness, including (a) denying the trustee’s reimbursement request; (b) raising these concerns with the parties, or (c) scheduling a hearing for discussion with the parties. By initiating an ex parte telephone communication with a third-party witness, the judge “engendered the appearance that he lacked impartiality” and “impugned the integrity of the judicial process.”

(2) In regard to the issue of the judge’s impermissible use of “independent factfinding investigation,” the court noted that judicial ethics addresses the limits of independent factfinding by judges and stated that this principle is “predicated upon the belief, axiomatic to our legal system, that evidence should be tested through cross-examination and other adversarial methods of scrutiny.”

The court noted that this principle stands for the proposition that “judicial impartiality requires that a jurist consider only evidence presented on the record by the parties in court,” and “in short, it is a matter of fundamental fairness.” The committee also quoted the principle that “judges should not use the internet for independent fact-gathering related to a pending or impending matter where the parties can easily be asked to research or provide the information.” The same is true of the activities or characteristics of the litigants or other participants in the matter.”

The committee noted that the judge “subsequently used that information, which was not previously placed in the court’s record, against the trustee.” The committee noted that “a reasonable, fully informed person may construe this conduct as indicative of the judge’s bias against the trustee and question the legitimacy of the judicial process.”

The committee also noted that the judge had improperly claimed the use of the principle of “judicial notice”, but the committee noted that the rule in New Jersey “provides that a court may take judicial notice before notifying a party, so long as the party is afforded an opportunity to be heard on the matter.” The court noted that in the present case the judge advised the

parties about his obtaining and using information from outside the record “only after trustee filed a motion for disqualification.”

The committee issued a public reprimand of the judge in this case, noting the aggravating factors that the judge failed to concede any impropriety in his actions, that the judge had been previously disciplined for inappropriate demeanor on the bench, and that in mitigation the judge had lengthy years of service on the bench of approximately twenty-years.

In the matter of Arthur Bergman, A Judge of the Superior Court,
Supreme Court of New Jersey (10/6/22)

**GIVING ADVICE TO AN ATTORNEY IN AN ON-GOING
CASE: JUDGE MILLS WAS FOUND TO HAVE
COMMITTED WILLFUL MISCONDUCT BY
ENGAGING IN EX PARTE COMMUNICATION
WITH A PROSECUTOR AND GIVING THE
PROSECUTOR ADVICE WHILE THE CASE WAS
STILL PENDING**

FACTS: Judge Mills presided over a driving under the influence jury trial in the case of People v. Jeffers. At trial, the defense had presented an expert witness who challenged the accuracy of the breath machine. Later, on the day of trial (3/23/16) as the jury was deliberating, Assistant DA Moser was gathering his papers to leave the courtroom, Judge Mills engaged in a conversation with Moser outside the presence of the defendant and defense counsel.

Judge Mills asked Moser, “Do you want to know what I would have done?” The judge then told him about an argument that might have “defeated the defense theory,” or similar words to that effect. Judge Mills then offered Moser advice about how he could have countered an expert presented by the defense.

The jury in the Jeffers case deadlocked, resulting in a mistrial. The next day, Moser reported the conversation to his supervisor, who reported the conversation to the defendant’s defense attorney and to Judge Kennedy, the supervising judge of criminal courts. Judge Kennedy later explained that he understood from the conversation that Judge Mills included suggestions of things that Moser could have done to be more effective in his performance. A few days later, Presiding Judge Austin learned of the

conversation and met with Judge Mills, advising Judge Mills that the matter was “potentially serious,” and that Judge Austin might have to report it to the commission.

On 4/1/16, Judge Mills disclosed the conversation on the record before both parties, and recused himself from any further involvement in the case. Judge Mills also chose to self-report his conduct to the Ethics Commission, while at the same time Judge Austin had been seeking an ethics opinion on whether or not he had a duty to report the matter to the commission.

Judge Mills’s position at the hearing before the Special Masters was that he was simply sharing a “war story” with the DA. Moser, the DA, testified that he did not recall exactly what advice the judge gave him but understood that the judge was giving him a suggestion in what he could do to more effectively try these types of cases in the future.

Judge Mills provided a statement to the commission which basically described a DUI case he had worked on approximately twenty-nine years ago that had to do with an expert witness and a blood sample, which Judge Mills advised was basically a “war story.”

HELD: The State of California Commission on Judicial Performance concluded that the conversation of the judge with the district attorney outside the presence of defense counsel constituted an improper ex parte communication in violation of canon 3B(7) and willful misconduct. The commission concluded that the judge’s own version of the conversation established a violation of the rules against ex parte communications. The commission noted that canon 3B(7) prohibited a judge from initiating, permitting, or considering ex parte communications, “that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding.” The commission noted that the jury was deliberating in the case at the time.

The commission specifically concluded that “a case remains pending through any period during which an appeal may be filed.”

The commission noted the following principles in regard to the case:

1. “Offering advice to an attorney in a case before the judge outside the presence of opposing counsel and while the matter is pending constitutes an improper ex parte communication.”
2. If a judge is asked by trial attorney to critique attorney’s performance after trial, judge may do so only after the matter is finally resolved so as to avoid any appearance of impropriety.
3. There is no “war story” exception to the prohibition against ex parte communications.

The commission also found that in addition to violating the prohibition against ex parte communication, the judge's conduct created an appearance of impropriety and undermined public confidence in the integrity of the judiciary in violation of other canons.

The commission also concluded that Judge Mills committed “willful misconduct” by engaging in an ex parte communication with a prosecutor and giving him advice while the case was still pending. The commission noted that the judge's conduct took place in his judicial capacity and was “unjudicial.” The commission noted that those were the first two elements of misconduct, (1) acting in a judicial capacity and (2) performing conduct that was unjudicial. The court also noted that the third element of willful misconduct was that the judge acted in bad faith, which was shown by his engaging in the conversation with a “conscious disregard for the rules prohibiting ex parte communications and for a purpose other than the faithful discharge of judicial duties.”

The court noted that the judge should have been well versed in these principles because he had been previously disciplined.

Based upon several acts for which he was being disciplined and based on his history, the commission found good cause to censure the judge and bar him from seeking or holding judicial office, or accepting other positions as a judicial officer at any time in the future.

Inquiry Concerning Former Judge Bruce Clayton Mills, No. 201, State of California Commission on Judicial Performance (8/28/18)

**INAPPROPRIATE CONVERSATION WITH ASSISTANT
DA ABOUT AN ACTIVE CASE CLEARLY
REFLECTED THAT THE JUDGE KNEW HE
SHOULD NOT BE HAVING THE CONVERSATION
WITH THE DA**

FACTS: Judge Scott's term as judge began in January 2015, and shortly thereafter on 2/27/15, the jury had returned a verdict in a case tried before Judge Scott which had been tried by Deputy District Attorney (DDA) Kelly Meeker. Meeker returned to the courtroom to pick up some of her personal belongings as she was headed to an afternoon calendar to have discussions with the public defender's office on several pending cases. When Meeker entered the courtroom, the judge was seated at the court reporter's desk chatting with the bailiff and a court clerk. Judge Scott stood to leave the

courtroom and asked Meeker to come speak with him and she asked when he would like her to drop by. Judge Scott responded, “right now.” She walked to Judge Scott’s chambers and while standing in the doorway told Judge Scott that she looked forward to getting his feedback on her performance at trial, but that several people in her office had told her it was necessary to wait until after sentencing had occurred. Judge Scott told Meeker not to worry and that he and she would be “discreet,” or similar words to that effect. Judge Scott closed the chamber’s door and told her to sit down.

Judge Scott explained to her that things were changing and that a judge used to tell deputy district attorneys more about what to do in a trial while trials were still ongoing but things were different now. He said it was hard for him to sit and watch a deputy district attorney at a trial when he would do things differently. The judge told Meeker that she had done a great job at trial. DDA Meeker, who was aware that she and Judge Scott should not be discussing the case, interrupted and said that she had several “readiness conferences” in the department next door with the deputy public defender and that the public defender might be waiting on her. Judge Scott told her not to worry that he and she would be discreet and she should just “sit tight.”

Judge Scott then gave Meeker additional feedback on her trial technique, complimenting her style, and suggesting that she could make her direct examination shorter, and that if he had been the prosecutor, he would have been much more aggressive on rebuttal in response to arguments that defense counsel had made. Judge Scott told her that she had tried the case in a professional manner and that the jury had liked her. Judge Scott then made derogatory remarks about the way the deputy public defender had tried the case and asked the DDA what she thought, to which she responded that she thought the public defender’s performance was poor and that the defense was unprepared. The DDA again mentioned that she probably needed to go but Judge Scott told her not to worry, that they would be discreet, and then lead in a discussion of what sentence might be imposed on the defendant. The DDA advised that she really needed to go and would look forward to hearing about feedback on her performance at another time. As Meeker left the judge’s chambers, the judge said, “This conversation never happened.”

Shortly thereafter, Meeker reported the conversation to her supervisor and a news article about the matter appeared in the San Jose Mercury News on 3/17/15, following which Judge Scott reported his conduct to the commission which the commission received on 3/27/15.

HELD: The commission held that Judge Scott knowingly engaged in improper ex parte communication, contrary to the prohibition on ex parte communications set forth in canon 3B(7) of the California Code of Judicial Ethics, based upon a case that was pending sentencing before him. The commission found that the judge had deliberately engaged DDA Meeker in ex parte communication that violated her ethical obligations as an attorney. The commission also found that the judge violated canon 2A, which requires judges to conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

In response to the judge downplaying the seriousness of the fact situation, the commission referred to a 1998 case which came in front of them that when the judge in that case had an ex parte communication with an attorney and the attorney expressed discomfort about engaging in ex parte communications regarding a pending case, the judge had responded, “Chicken.” The commission found that in the present case, Judge Scott’s conversation including his mentioning there being “discreet” and saying that “this conversation never happened,” was similar to the judge in the 1998 case saying “chicken.” Commission noted that in both cases the conduct and conversation indicated that the judge knew better than to engage in the ex parte communication but still did so.

After evaluating the facts, including the mitigating factor that Judge Scott cooperated with commission and expressed remorse, and the aggravating factor that the judge knew at the time that his misconduct occurred he was conducting himself improperly, the appropriate penalty was a public admonishment. The commission noted that Judge Scott was a new judge at the time the misconduct occurred and had not yet attended “New Judges Orientation.” But the commission also noted that the judge clearly knew better even though he was a new judge.

PRACTICE POINT: Sessions Judges often have new and young attorneys appearing before them as assistant district attorneys or new public defenders or simply young attorneys practicing law with little experience. While judges can be encouraging to young attorneys who practice in their courts, it is very important to not engage in improper ex parte conversations.

It is also important to understand that as judges how any young attorneys could be intimidated or overwhelmed in discussions with the judges, and several of these fact situations show how uncomfortable these conversations come across and how the young or inexperienced attorneys can be lead into a situation where they are breaching their responsibilities not to have ex parte communications with judges and how they would feel

uncomfortable in having to cut off a judge from further conversation knowing it could be insulting to a judge and maybe detrimental to his or her career.

It may also be helpful to judges to think about how foolish these judges had to have felt when within a very short period of time the new attorneys were reporting what had gone on to a colleague or superior, with one judge immediately being confronted by a supervising judge about the situation and the other judge having to read about it in the newspaper.

Just don't do it.

In The Matter Concerning Judge Stuart Scott, Commission on Judicial Performance of the State of California (2/17/16)

FAILURE TO COMPLY WITH LAW

PATTERN OF FAILING TO APPOINT COUNSEL: JUDGE WHO RARELY APPROVED APPOINTMENT OF COUNSEL WAS FOUND GUILTY OF ETHICAL VIOLATIONS IN FAILING TO FOLLOW THE LAW CONCERNING APPOINTING COUNSEL, CONDUCTING IMPROPER INDIGENCY DETERMINATIONS, AND IN NOT RETAINING OFFICIAL RECORDS

FACTS: Judge Bourne of Arkansas was the subject of complaints about improper conduct in indigency determinations. Affidavits of indigency were submitted to the judge by defendants for years and rarely was a defendant approved for appointed counsel. The judge also failed to keep the affidavits as public records, as the same were destroyed as a matter of practice.

HELD: The Judicial Discipline and Disability Commission of Arkansas found that Judge Bourne failed to follow the law concerning appointing counsel and in conducting improper indigency determinations and in not retaining official records regarding the same.

The Commission noted the following principles in regard to appointment of counsel:

1) The decision to appoint counsel as a legal determination by the court and is governed by rules and case law that judges must follow. The Commission noted that a judge is capable of being incorrect and not running afoul of the Code of Judicial Conduct, but noted that Judge Bourne's pattern of failing to appoint counsel and his disregard for following the proper procedure and considering the legal standard is "what pushes his legal error into the realm of judicial misconduct."

2) Judge Bourne's improper conduct included his demeanor in misdemeanor cases with potential jail time that came in front of him in which he often discouraged defendants from seeking appointment of counsel and telling them they would "probably not" qualify for counsel even before he reviewed all of the factors in the affidavit. His comments included, "I am not going to appoint a lawyer for you. Get a job," instead of conducting a proper review. The Commission noted that Judge Bourne violated Rule 1.1 that a judge shall comply with the law, including the Code of Judicial Conduct.

3) The Commission found that the judge violated Rule 1.2 that "a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

The Commission noted that there was an extensive news report on Judge Bourne where an investigative reporter had interviewed many citizens who stated they were denied appointed counsel on misdemeanor charges in his court. The head of the Public Defender Commission reviewed the affidavits from Judge Bourne's court and agreed that the affidavits showed the defendants were not appointed counsel when they obviously qualified.

On an additional issue, the court found that Judge Bourne had also engaged in a pattern of injudicious conduct toward defendants in which his comments often pertained to factors that were not relevant to the proceedings and had no purpose in determining guilt, sentence, or administrative matters. The complainants had reported rash comments from Judge Bourne aimed at the appearance, background, residency, and ethnicity of the people who appeared in his court.

Examples of his conduct included (1) commenting to Spanish-speaking defendants that they needed to learn English if they were going to remain in this country; (2) commenting on people's employment status by saying that "if you were a good employee, you wouldn't have been laid off. Go get a job and get that crap out of your eyebrows."; (3) making comments on the appearance of litigants, particularly haircuts and hairstyles; (4) making negative comments about defendants who are not from Pope County, Arkansas such as "you should have stayed in California" or other

states or cities that he mentioned; and (5) general allegations of bullying, angry demeanor, and impolite behavior. The Commission noted that “taken as a whole, it amounts to serious, cumulative misconduct on the bench.”

Among other penalties, Judge Bourne was suspended without pay for ninety days with seventy-five of those days being held in abeyance for one year but with a serious limitation that Judge Bourne agreed not to run for judicial office again or accept an appointment for any judicial office after his term expired on 12/31/24.

Judicial Discipline and Disability Commission v. Judge Don Bourne
(8/1/22)

INDEPENDENT INVESTIGATIONS BY JUDGES

INDEPENDENT INVESTIGATION: AFTER CHILDREN’S SERVICES HAD ELECTED TO IMPLEMENT AN IN-HOME SAFETY PLAN FOR CHILDREN INSTEAD OF REMOVING THEM FROM THEIR HOME, JUDGE LEMONS HIMSELF, ACCOMPANIED BY LAW ENFORCEMENT OFFICERS, CONDUCTED HIS OWN INVESTIGATION OF THE RESIDENCE IN QUESTION

FACTS: On 1/12/17, D.M., a father of five children, was arrested on a charge of corrupting a juvenile with drugs and was held in the Scioto County Jail in Ohio. The mother of the children was also incarcerated. On the evening of D.M.’s arrest, a case worker for the Scioto County Children’s Services Board (SCCSB) visited the home where the children were living, and the SCCSB elected to implement an in-home safety plan for the children as an alternative to removing them.

The next day, a school resource officer contacted one of the judge’s staff members, and expressed concern for the well-being of the children. The staff member and a probation officer visited the home and found the home to be “filthy.” According to the staff member, the water had been turned off, the toilet was overflowing with human waste, the floor was littered with dog feces, the refrigerator was not working, and the children had no beds. These concerns were reported to Judge Lemons and to SCCSB, which sent a case worker to the home to again investigate the

situation. SCCSB again decided not to remove the children from the home, following which the judge talked to the case worker on the phone. The judge asked the case worker whether she would be comfortable leaving the children of SCCSB's director in the home, and the case worker responded, "Your honor, I would not leave my dog there."

The next day, Judge Lemons, accompanied by law enforcement officers, conducted his own investigation of the residence, and the judge confirmed the same conditions that his staff member had observed. Following the home visit, Judge Lemons returned to his chambers and issued an order "upon the court's own motion" and without a case number, which found that the children in the home were in imminent danger and ordered SCCSB to place the two children in its temporary custody and investigate the matter. The court had a somewhat delayed hearing beyond normal time frames, and at the actual hearing, SCCSB did not present any evidence about the condition of the home and the judge did not inform the parents, who both appeared at the hearing, that he had visited the residence. The judge did refer to the conditions at the home and noted that he would not consider placing the children at the grandmother's residence either if the home looked like the home of the parents.

Judge Lemons continued presiding over the children's dependency proceedings for almost two years, ultimately granting SCCSB permanent custody of the children. At no time during the proceedings from 2017-2019 did Judge Lemons inform the parties or their counsel that he had personally inspected the home and that his inspection was the basis for the January 14, 2017 emergency order.

In December 2021, disciplinary counsel charged Lemons with violating the Code of Judicial Conduct for independently investigating facts in a juvenile court matter, failing to recuse himself from the case, and failing to perform the duties of judicial office fairly and impartially.

Judge Lemons stipulated to the charged misconduct and he was given a public reprimand.

HELD: The Board of Professional Conduct concluded that Judge Lemons violated three rules of the Code of Judicial Conduct:

(1) First, the board found that there was no question that Judge Lemons violated provision 2.9(C), which prohibits a judge from independently investigating facts in a matter and requires a judge to consider only the evidence presented and any facts that may properly be judicially noticed. The court noted that by conducting the wellness check of the residence Judge Lemons made an independent investigation of facts

pertinent to what became a formal custody case brought before the judge and that his investigation was the “sole basis” for his emergency order.

(2) The board found that Lemons violated the provision of judicial conduct which requires a judge to disqualify himself or herself in any proceedings in which the judge’s impartiality might reasonably be questioned, including when the judge has a personal bias or prejudice concerning a party or party’s lawyer or personal knowledge of facts that are in dispute.

(3) The board found that Lemons violated the provision of judicial conduct which requires a judge to uphold and apply the law and perform all duties of judicial office fairly and impartially. The board found that the judge had “effectively usurped SCCSB’s legal authority by disregarding its decision to leave the children in place and then by conducting his own investigation and, sua sponte, initiating a custody action.

The board concluded that no matter how well- intentioned Judge Lemons’s conduct was, he “could not be both the source of a private referral based on his personal knowledge and an impartial arbiter of the issues as a judge.”

CONCURRING OPINION: Chief Judge O’Connor joined the majority opinion but wrote separately in order to note that the judge was not acting in self-interest but in the interest of the children who were living in an unsafe and unsanitary environment. Justice O’Connor stated: “Standing alone, the disciplinary record will not inform the public of the majority opinion’s recognition that Lemons was motivated by the best of intentions. Not only do I agree with that characterization of Lemon’s intentions, but I would go a step further and observe that his actions ultimately benefitted D.M.’s children by removing them from a dangerous environment devoid of capable caregivers and that left the children at risk of a tragedy occurring at any minute.”

The Chief Justice noted that it was the responsibility of SCCSB to ensure the safety of the children and that the judge had “felt compelled to act only when others had neglected their duty to remove the children from an unsafe environment. It is undeniable that Lemons went beyond what the Code of Judicial Conduct permits and must be sanctioned. But in my mind, he is also to be commended for securing the safety of D.M.’s children.”

Disciplinary Counsel v. Lemons, Slip Opinion No. 2022-Ohio-3625
(10/13/22)

RELIGIOUS BELIEFS

RELIGIOUS BELIEFS: TRIAL COURT’S RELIGIOUS COMMENTS SUCH AS STATING “THESE CRIMES INVOLVE PERVERSION, IMMORALITY AND PAGANISM,” AND THE CRIMES “WERE GODLESS BECAUSE YOUR GOD WAS YOUR SEXUAL APPETITE AND YOUR WEAPON WAS THE INTERNET”

FACTS: The defendant pled guilty in Sumner County Criminal Court to nine counts of sexual exploitation of a minor by electronic means. Pursuant to plea agreement, the defendant received an effective sixteen-year sentence as a Range I, standard offender with the trial court to determine the manner of service of the sentence. After a sentencing hearing, the trial court ordered that the defendant serve the sentence in confinement.

The defendant maintained that the trial court erred by “infusing its religious beliefs into its decision to deny his request for alternative sentencing.” Among other comments, the trial court said that “Justice must be firmly grounded upon moral standards of right and wrong that flow out from God’s character,” and that the crimes in the present case “involve perversion, immorality and paganism. They were Godless because your god was your sexual appetite and your weapon was the internet.”

HELD: The Court of Criminal Appeals held that the trial court’s religious comments on the case were improper, including the court’s statements that the defendant’s messages to the victim exemplified “godlessness and perversion.”

The court based its decision on the following principles:

- 1) TCA 40-35-102(4) provides that sentencing should exclude all considerations respecting religion of the individual.
- 2) The appellate courts of Tennessee have advised trial courts to “refrain from making religious remarks during sentencing.”
- 3) Reference to religious law during a criminal trial has been disapproved in this state, and trial court judges should therefore refrain from any discussion on religious law.

In finding that the religious comments were improper, the court did decide that the comments were harmless error due to the following corrective statements made by the judge:

1) After the trial court had made its comments, the Court of Criminal Appeals noted that the trial court went on to state that the judge's role was "to evaluate and judge cases fairly according to an established standard of law" and that the trial court was "going to rule today, according to what the facts are and the rule of law, nothing else."

2) The trial court also noted sentencing should "exclude all considerations about religion, including Christians and non-Christians in any religion under the sky."

3) The Court of Criminal Appeals noted that the trial court went on to give a lengthy, well-reasoned explanation for ordering confinement based on the circumstances of the offenses and deterrence.

The court therefore found that the defendant was not entitled to any relief on the issue.

State v. Richmond (Tenn. Cr. App. 9/22/22)

CONCLUDING REMARKS ON ETHICS

As a member of the American Judges Association, I recently received the new issue of Court Review, the Journal of the American Judges Association, Volume 58, Issue 4. This issue of the Court Review included two articles which caught my attention as being of significant importance to those of us who are General Sessions Judges in the State of Tennessee and are dealing with a multiplicity of issues on a daily basis.

The first is a brief article entitled, “Constructive Criticism,” by Cynthia Gray. Cynthia Gray is the director of the Center of Judicial Ethics which is “a national clearinghouse for information about judicial ethics and discipline.” I often use and quote her articles as key resources for issues pertaining to judicial ethics and discipline.

Her article, “Constructive Criticism,” discusses (1) the importance of judges in writing, lecturing, speaking, or teaching on legal subjects and (2) the extent that judges may address topics which are critical of court opinions and decision-making which have a potential of greatly impacting the law. Her article emphasizes the importance of making appropriate criticism of judicial decisions and in how speaking and writing about court opinions does “not undermine public confidence in the fair administration of justice.” She addresses “how judges can acknowledge disagreement among judges and call for improvements in administration of justice without undermining public confidence in the judiciary.”

Cynthia Gray makes this important observation in her discussion:

“A ‘silence is golden’ approach by judges may not promote confidence in the judiciary for a public very aware of the criticism and challenges courts face and sometimes invite. Judges may join the debate without tarnishing the judiciary’s reputation if they are thoughtful and constructive, requiring the balance judges are accustomed to bringing to all aspects of their role.”

The second article I wanted to bring to your attention from Court Review, is entitled “You Can Change Judging and Justice,” an article by Thomas R. French. This article addresses the importance of “procedural justice” in the legal system and in the courts in which all judges preside. The American Judges Association has for many years emphasized the

importance of procedural justice in all courtrooms, recognizing that there are four key factors in “determining whether procedural fairness has been provided.” These four key factors have been addressed for many years by the American Judges Association and its members who have written several key articles on these issues and trained numerous judges through the years on its key principles.

The first key factor is the factor of “voice.” As re-emphasized in this article, “voice has to do with people being given the opportunity to tell their side of the story before decisions are made in their cases.” If people have an opportunity to give their view of what happened, they are “more likely to view the legal system positively regardless of the outcome of their cases.”

The second factor is “neutrality.” This article once again points out that “people with cases in court appropriately expect judges to be neutral and principled decision-makers who consistently apply legal rules.” Neutrality emphasizes that “unbiased decision-making enhances perceptions of fairness,” and “neutrality involves transparency about how decisions are made.”

The third key factor is “respectful treatment.” The article notes that “people want to feel that their legal problems are taken seriously by the system and that they are treated with dignity and respect.” The article notes that when people are treated in a respectful manner, they “know that their needs are considered important.” This factor emphasizes courtesy, politeness and observance of constitutional rights.

The fourth key factor is “trustworthy authorities.” Research has clearly established that the character of judges is the “most important factor in the public’s evaluation of legal authorities.” The emphasis is upon sincerity, a caring attitude, and benevolence.

The article points out that “researchers have also discovered that the perception of fair treatment is the primary determinant of people’s willingness to accept court decisions.” The article notes: “In other words, getting a fair shake matters more than ‘winning.’”

I reached out to Judge David Dreyer, Judge of the Indiana Superior Court, and one of the editors of the Court Review, seeking his permission for me to present copies of these articles to each member of the General Sessions Judges Conference and to include these materials in the outline. Judge Dreyer and the editors of Court Review were very gracious in allowing us to use these materials in my outline, by reprinting the same for distribution to the entire conference, and for purposes of discussion on issues of ethics and court improvement. I greatly appreciate Judge Dreyer and all of the editors of the Court Review and the entire American Judges

Association for granting permission for reprinting and/or distribution of Court Review articles for our Tennessee General Sessions Conference.

These articles are originally published by, and reprinted with the kind permission of the editors of Court Review, the quarterly journal of the American Judges Association.

Judge Rader and I joined the American Judges Association many years back and have appreciated the resources the association makes available to its members as well as the excellent conferences which they hold all across the nation.

SUPPLEMENT TO THE CRIMINAL LAW OUTLINE

SEARCH AND SEIZURE

THE PLAIN SMELL OF “MARIJUANA”: IN WHAT COULD BE CONSIDERED DICTUM, THE COURT OF CRIMINAL APPEALS STATES THAT “UNTIL OUR SUPREME COURT OR OUR LEGISLATURE DETERMINES OTHERWISE, THE “SMELL OF MARIJUANA” CONTINUES TO ESTABLISH PROBABLE CAUSE FOR THE WARRANTLESS SEARCH OF AN AUTOMOBILE”

FACTS: In a case in which the defendants, Stephen Hampton and Margaret Hampton were charged with drug and weapon offenses in Madison County, Tennessee, the trial court granted motions to suppress statements made to a police officer and any evidence found from a search of the vehicle.

The testimony during the case established that, on 8/17/19, Investigator Robert Pomeroy of the Jackson Police Department was participating in an undercover prostitution operation and had been assigned to watch the parking lot of a hotel. As he sat in an unmarked police car, he “kept smelling marijuana,” saw an SUV parked at the dead end of Campbell Oaks Drive, and could see “the hot embers of something being moved back and forth,” at which time the two people got into a SUV and the SUV began traveling on Campbell Oaks Drive. Pomeroy pulled behind the SUV and followed it to another hotel and observed the vehicle pull into a parking space. Pomeroy parked his vehicle and got out of the car and walked toward the SUV and found that the smell of marijuana got stronger and stronger. Pomeroy asked, “Hey, why are y’all smoking marijuana in the parking lot?” After there were initial denials as to smoking marijuana, the officer continued the investigation which ultimately led to an answer by Mr. Hampton that there were about six ounces of weed in the car.

Pomeroy testified that the smell of marijuana gave him probable cause to search the SUV and that a search yielded 153 grams of marijuana and drug paraphernalia.

After the hearing on the motion, the trial court found that the officer had reasonable suspicion to believe the defendants were smoking marijuana when he began following their SUV and that he had the right to approach the SUV when they parked in the hotel parking lot. At that point, however, the trial court found that the officer had decided to detain the Hamptons when he began questioning them and, therefore, he should have given them Miranda warnings prior to questioning. The trial court found there were no exigent circumstances in the case and that a warrant was required prior to his searching the SUV. The trial court ordered that the statements made by the Hamptons and the evidence found in the SUV be suppressed.

The state maintained that the trial court erred by granting the motion to suppress because the defendants were not in custody when they made their incriminating statements and because the officer had probable cause to search their SUV based upon the smell of marijuana.

HELD: (1) The Court of Criminal Appeals concluded that the evidence established that the defendants were not in custody under the totality of the circumstances at the time they made their statements to the officer. The court noted that Officer Pomeroy merely followed the defendants and when he saw the defendants pull into a parking space at the hotel that Pomeroy also pulled into a parking space several spaces away from them. The CCA noted that Pomeroy did not block their SUV with his police car and he did not turn on his police car's emergency equipment. The CCA found that Pomeroy merely walked to the defendant's SUV as the Hamptons were getting out of their car and engaged in his discussion with them at the time the smell of marijuana was very strong. Pomeroy allowed Mr. Hampton to get out of the SUV and did not handcuff Mr. Hampton until he saw the gun in the driver's door.

The Court of Criminal Appeals therefore concluded that Mr. Hampton's initial statements were not made during a custodial investigation.

The court discussed the following principles in regard to cases in which the Miranda warnings apply:

1. The Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution provide a privilege against self-incrimination to those accused of criminal activity.
2. In Miranda v. Arizona (1966), the U.S. Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. The procedural safeguards must include

warnings prior to any custodial questioning that an accused has the right to remain silent, that any statement he makes may be used against him, and that he has the right to an attorney.

3. Miranda warnings are necessary only in situations involving custodial interrogation or its functional equivalent.

4. In determining whether a suspect is in custody for Miranda purposes, appellate courts must consider “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 a formal arrest.”

5. Whether a suspect is in custody is determined by an objective test.

The Court of Criminal appeals in considering all of the factors concluded that the defendant was not in custody under the totality of the circumstances.

(2) The Court of Criminal Appeals also held that Investigator Pomeroy had testified that he smelled marijuana coming from the defendant’s SUV. The CCA noted that “according to published case law by this court and our supreme court, the smell of marijuana alone can establish probable cause for the warrantless search of an automobile.”

The court noted that the defendant had asserted that the plain smell of marijuana no longer establishes probable cause for a warrantless search because the smell of marijuana is indistinguishable from the smell of hemp, which is now legal in Tennessee.

The Court of Criminal Appeals stated: “However, until our supreme court or our legislature determines otherwise, the smell of marijuana continues to establish probable cause for the warrantless search of an automobile.”

The Court of Criminal Appeals then stated: “In any event, given our conclusion in the previous section that Mr. Hampton’s initial statements about the marijuana were not the result of a custodial interrogation, his statements established probable cause for the warrantless search. Therefore, we conclude that the trial court also erred by granting the defendants’ motion to suppress the evidence found in their SUV.”

In effect, the last sentence reflected that the Court of Criminal Appeals had concluded that Mr. Hampton himself had admitted that the substance was marijuana and that his statement was not the result of a custodial interrogation, and therefore Mr. Hampton’s own statements established probable cause for the warrantless search which was not

dependent upon the smell of marijuana but rather only dependent upon the admission of Mr. Hampton that it was marijuana.

PRACTICE POINT: The CCA would not have been required to make a ruling on the plain smell of marijuana continuing to be a basis for probable cause as it was unnecessary for the determination in this case. This panel of the Court of Criminal Appeals did make the comment about the plain smell of marijuana continuing to establish probable cause until the supreme court or the legislature makes a definitive statement about the same but an argument can be made that the court's statement was dictum under the facts of this case.

State v. Hampton and Hampton (Tenn. Cr. App. 11/14/22)

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