TENNESSEE GENERAL SESSIONS JUDGES CONFERENCE

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Criminal Law and Ethics Update
Nashville, Tennessee

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TABLE OF CONTENTS

CRIMINAL LAW

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CONFESSION

"LIES TOLD BY POLICE": DESPITE THE DEFENDANT'S INTELLECTUAL DISABILITY, ISSUES OF COMPETENCY, AND LIES TOLD BY THE POLICE TO THE DEFENDANT, THE TOTALITY OF THE CIRCUMSTANCES INDICATED A VALID WAIVER OF MIRANDA RIGHTS BY THE DEFENDANT AND THAT A VOLUNTARY STATEMENT WAS MADE BY THE DEFENDANT

FACTS: The defendant was convicted of second-degree murder and possession of a firearm by a felon and received an effective sentence of forty-eight years imprisonment.

On 11/5/17, the defendant shot and killed Willie Bacon at the corner of Baldwin Street and 11th Street in Chattanooga after Bacon failed to repay the forty or fifty dollars the defendant had loaned him.

In an investigation of the crime, Sgt. Stokes interviewed the defendant after reading the defendant his constitutional rights, going through the waiver form with the defendant, and having the defendant sign the form as well as initialing each of the rights which they went over. The interview lasted approximately one hour and after forty-five minutes the defendant confessed to shooting Bacon.

The history of the defendant included the fact that his IQ was sixty-three, placing him within the mild range of intellectual disability. The defendant attended special education classes in school and sometimes needed help shaving or doing laundry. The defendant also received disability benefits because of his mental retardation, schizophrenia, post-traumatic stress disorder, bipolar disorder, and schizoaffective disorder. The defendant also took medication to help him focus and maintain self-

awareness. During the interview of the defendant, the officers told the defendant, in attempting to convince him to make a statement to them, that his ankle monitor (that he previously had been ordered to wear) revealed incriminating evidence about the whereabouts of the defendant, which was not accurate as the officers had exaggerated the accuracy of the GPS data from the defendant's ankle monitor. The officers had also emphasized that there were video cameras out at the scene and that "video cameras don't lie," even though the officers had not checked out any kind of surveillance cameras at the time they were indicating to the defendant the incriminating evidence.

The transcript reflected that immediately after advising the defendant of the incriminating GPS evidence (which was not factual), the defendant asked if the officers were "going to send me to jail?", after which the defendant stated, "All right. Dude threatened my life. There." The defendant went on to say that the victim had pulled a knife on him resulting in him firing a shot.

HELD #1: The Court of Criminal Appeals held that the trial court did not err in finding that the defendant's waiver of his Miranda rights was valid.

The Court of Criminal Appeals noted the following principles in resolving an issue of this nature:

1. Both the 5th Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the criminally accused the right against compelled self-incrimination.

2. To protect this right the United States Supreme Court created procedural safe guards in Miranda v. Arizona which are known as the defendant's Miranda rights.

3. A criminal accused, however, may waive his right against self-incrimination if the waiver is made voluntarily, knowingly, and intelligently. First, the waiver must be "voluntary in the sense it was a product of a free and deliberate choice rather than intimidation, coercion, or deception." Second, the waiver must have been "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

4. The state must prove the validity of defendant's waiver by preponderance of the evidence.

5. In determining whether a waiver is valid, the court must consider the totality of the circumstances including the age and background of the defendant; his education and intelligence level; reading and writing skills; demeanor and responsiveness to questions; prior experience with the police; any mental disease or disorder; any intoxication; and the manner, detail and language in which the Miranda rights were explained.

6. No single factor, such as IQ, is necessarily determinative in deciding whether a person was knowingly and intelligently waiving, and did so waive.

7. Though a defendant with an intellectual disability may be less likely to understand the implications of a Miranda waiver, the intellectual disability must be considered along with a totality of the circumstances.

The Court of Criminal Appeals in this case noted that certain factors weighed in favor of finding the defendant's waiver was invalid, namely the facts that the defendant attended special education classes, did not complete high school or obtain a GED, an IQ of sixty-three, and was found incompetent to stand trial nearly two and one-half years after the shooting.

The court noted, however, that these factors were outweighed by factors supporting the validity of the waiver, including the fact that the court found that he could read, write, and understand his rights. The defendant wrote and filed several pro se motions including motions for removal of counsel, reduction of bond, and a speedy trial. The defendant had read the waiver out loud with minimal difficulty, asked questions about his rights, and the officers provided explanations. The court noted that he had initialed next to each right and signed the form indicating he understood his rights and wished to waive them. The court further noted that he communicated clearly during the interview, was responsive to the officers' questions, and that he had substantial prior experience with the police.

The Court of Criminal Appeals therefore concluded that the totality of the circumstances showed a valid waiver.

HELD #2: The Court of Criminal Appeals also concluded that the misrepresentations of the officers ("lies") did not overbear the defendant's will so as to render the confession a product of coercion.

The court noted the following principles in regard to voluntariness of confessions:

1. The test of voluntariness for confessions under the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. The essential inquiry is whether a suspect's will was overborne so as to render the confession a product of coercion.

2. The state must establish the voluntariness of a confession by a preponderance of the evidence including the defendant's age; lack of education or his intelligence level; experience with the police; the repeated and prolonged nature of the questioning; length of detention of the accused before making statement; lack of advice to the accused of his constitutional rights; whether the accused was injured, intoxicated or drugged or in ill health; whether the defendant was deprived of food, sleep or medical attention and whether the accused was physically abused or threatened with abuse.

The Court of Criminal Appeals noted that the defendant confessed to shooting Bacon 45 minutes into the interrogation and after only 22 minutes of questioning. The court found there was no evidence that the defendant was injured, intoxicated, drugged or in ill health nor was there any evidence that he was deprived of any essential needs, nor was he threatened with abuse or that he suffered any physical abuse.

The court noted that the defendant alleged that the police coerced him by making him believe that he could go home if he confessed and that he was taken advantage of by the officers lying to him about certain evidence that did not exist and that they knew that the proof did not exist. This included the information that they claimed to know by the GPS data which was exaggerated in the video footage of the shooting which they had not even checked.

The court's ultimate determination was that "these misrepresentations did not overbear the defendant's will so as to render the confession a product

of coercion." The court found that the totality of circumstances reflected that the defendant's confession was voluntary and that the trial court did not err in denying the motion to suppress.

PRACTICE POINT: It appears to be very troublesome that a person with such fragile mental state and very susceptible to influence could be lied to by the officers about very significant information, including GPS tracking devices putting him at the scene and video evidence putting him at the scene, when that proof in fact did not exist.

Allowing extensive lying by law enforcement seems to go against the grain of Miranda cases which initially had established rules and principles for officers to search for the truth and for justice, and to deter unlawful or unethical practices by officers.

State v. Mayes (Tenn. Cr. App. 10/26/23)

MIRANDA RIGHTS: WHILE THE DETECTIVE MAINTAINED THAT SHE DID ADVISE THE DEFENDANT OF HIS MIRANDA RIGHTS AND THE DEFENDANT TESTIFIED THAT HE WAS NOT ADVISED OF HIS MIRANDA RIGHTS, THE TRIAL COURT WAS ENTITLED TO MAKE A CREDIBILITY DETERMINATION AND THE PROOF DID NOT PREPONDERATE AGAINST THE TRIAL COURT'S DECISION TO ACCREDIT THE DETECTIVE'S TESTIMONY

FACTS: The defendant contended that the trial court erred in denying his motion to suppress statements made to the police during what the defendant branded an "illegal" course of interrogation. The defendant maintained that he was never read his Miranda rights, as opposed to the detective, Investigator Roe, who stated that she did read the defendant his Miranda rights (even though she did not have the defendant sign a waiver form and her personal notes did not reflect any notation about her reading the defendant his Miranda warnings). The defendant also maintained that even

if the court did accredited Investigator Roe's testimony that she did read Miranda rights to the defendant, the defendant maintained that Investigator Roe coerced his statement based upon the fact the interrogation took place late at night after a traumatic event; the investigator placed him into custody as soon as he entered the hospital and even prior to Investigator Roe arriving at the scene or learning any significant facts about the case; that he was isolated from his family during the interrogation; and that the detective herself had noted that the defendant was upset, shaky, and crying.

HELD: The Court of Criminal Appeals concluded that the trial record supported the trial court's denial of the suppression motion, finding that the defendant failed to identify any proof that would preponderate against the trial court's decision to accredit Investigator Roe's testimony that she verbally provided the Miranda warnings to the defendant before questioning him.

The court noted the following key principles in regard to the issues of whether a confession is admissible:

1.The federal and state constitutions provide that no person shall be compelled in any criminal case to be a witness against himself and both constitutions provide the criminally accused the right against compelled self-incrimination.

2. Miranda v. Arizona (1966) established the right to remain silent, the right to the presence of an attorney, the right to an appointed attorney if one cannot be afforded among other rights.

3. Coerced confessions are inherently unreliable and only voluntary confessions are admissible.

4. In order for a statement to be voluntarily, it "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

5. Whether a confession is involuntary is a question of fact, and the state has the burden of establishing the voluntariness of a confessions by a preponderance of the evidence.

6. This determination is made by the court by examining the totality of the circumstances.

The Court of Criminal Appeals in the present case noted that Investigator Roe immediately isolated the defendant from other family members and that when Roe arrived at the hospital the defendant was alone in an isolated waiting room with an officer present. She acknowledged that the defendant was detained and not free to leave. She did insist that she read the defendant his Miranda rights before questioning him even though she did not have the defendant sign a waiver form and did not confirm the same in her notes.

From all the facts the court concluded as follows:

1. The defendant was read his Miranda rights and he was aware of each of his rights.

2. In evaluating the voluntariness of the defendant's statement, the court noted that the defendant was twenty-nine years old; that he immediately provided his statement after hearing his Miranda warnings; that the defendant was only questioned approximately fifteen minutes by Investigator Roe; there was nothing in the record indicating the defendant did not want to speak with the investigator at the time he provided the statement; there was no proof the defendant was injured, intoxicated, under the influence of drugs, deprived of food, physically abused, or threatened with abuse at the time he provided his statements; there were no direct or implied promises; there was no improper influence used against the defendant. The court therefore concluded that the evidence "demonstrates that the defendant provided a voluntary statement to Investigator Roe that was not coerced," and the trial court properly denied the motion to suppress the statement.

PRACTICE POINT: Judges should always use their due diligence and neutrality to make a proper decision about constitutional rights. When constitutional rights were first developed and interpreted by the Supreme Court of the United States, the court stated specifically that in order for a statement to be voluntary, it "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." The Tennessee Supreme Court used that quote from Bram v. United States, a 1987 opinion by the United States Supreme Court. This was a clear statement that no direct or implied promises were to be made, "however slight," nor by the exertion of

"any" improper influence. The reasons behind such rulings are as appropriate now as they ever were, so it is important to make a good faith, reasoned, fact-specific determination in each case because the opportunities for abuse of constitutional rights by the powers that be are especially dangerous in this day and time.

State v. Goodwin (Tenn. Cr. App. 11/7/23)

CONTINUANCE MOTIONS

THE COURT DID NOT ERR IN DETERMINING THAT THE DEFENDANT'S MOTION FOR A CONTINUANCE WAS NOT WELL TAKEN AS THE DEFENDANT FAILED TO SHOW THAT HE HAD BEEN DENIED THE RIGHT TO A FAIR TRIAL OR THAT A CONTINUANCE COULD HAVE PRODUCED A DIFFERENT RESULT

FACTS: In a case in which the defendant was charged with unlawful possession of a firearm by a convicted felon, the defendant argued that the trial court should have granted a continuance to the defendant to allow him to obtain a video he had subpoenaed from Advance Auto Parts. The defendant had filed a motion to continue the trial seeking more time to procure the video from Advance Auto Parts. During the hearing on the motion, defense counsel stated that Advance Auto Parts was looking for the video but could not find it. The trial court concluded that at best, the video's contents were speculative and denied the motion for a continuance.

HELD: The defendant failed to show that he had been denied the right to a fair trial or that a continuance would have produced a different result. The Court of Criminal Appeals looked to the following principles in making this decision:

1. In considering whether to continue proceedings, a trial court should balance the potential harm to the state caused by a delay against the potential harm to the defendant caused by no delay.

In considering such a motion, a trial court may consider the following factors, among others: (1) the length of the requested delay and the probability of locating witnesses or securing the evidence within the requested time; (2) the length of time the case has been pending; (3) whether other continuances have been requested and granted; (4) the convenience or inconvenience to the litigants, witnesses, counsel, and the court; and (5) whether the continuance would have made relevant witnesses available or added something to the defense.

The Court of Criminal Appeals concluded that in the present case the defendant had not shown that the trial court abused its discretion in denying the continuance, due to the following factors:

1. The defendant failed to show that the video actually existed. Advance Auto Parts confirmed that they could not locate any such video, and the court noted that the defendant still could not produce evidence of the video nearly three years later during the hearing on his motion for new trial.

2. The defendant could not show how long he reasonably needed to secure the video in light of his previous efforts to do so.

3. The fact that the defendant could not obtain the video even three years later is powerful evidence that the denial of a continuance did not harm the defendant. The defendant simply could not show that a reasonable additional delay would likely result in the appearance of a witness or the production of evidence.

4. The defendant could not establish how the video would add something to the defense due to the fact that the video's contents were at best speculative. The court noted that previous decisions had recognized the principle that "mere conclusory allegations or opinions, standing alone," are insufficient to support the granting of a continuance.

State v. Hurn (Tenn. Cr. App. 10/24/23)

DISCRIMINATORY OR SELECTIVE PROSECUTION

DISCRIMINATORY OR SELECTIVE PROSECUTION: THE DEFENDANT'S ARGUMENT THAT THE STATE PARTICIPATED IN SELECTIVE PROSECUTION WAS MISPLACED BECAUSE DEFENDANT ARGUED THAT WALMART'S POLICY WAS NOT TO PROSECUTE THEFTS VALUED AT UNDER TWENTY-FIVE DOLLARS, THE COURT FINDING THAT WALMART WAS A PRIVATE CORPORATION AND THE POLICIES OF A COPORATION DID NOT BIND THE DISTRICT ATTORNEY'S DISCRETION TO PURSUE PROSECUTION OF CRIMES

FACTS: On 5/18/20, the Hamilton County grand jury indicted the defendant with theft of property valued at $1,000.00 or less. The facts established that the total value of the items not paid for by the defendant amounted to $14.93. The defendant was convicted by a jury of misdemeanor theft.

The defendant argued that he was subjected to discriminatory or selective prosecution because in 2019, it was not Walmart's policy to prosecute individuals for theft valued at less than $25.00.

HELD: The Court of Criminal Appeals held that the record contained no evidence to support the defendant's claim that he was subjected to selective prosecution.

The Court of Criminal Appeals noted the following principles in regard to "discriminatory or selective prosecution" claims:

1. Allegations of prosecutorial vindictiveness or selective prosecution have constitutional implications, and may warrant dismissal of the indictment. For instance, State v. Skidmore (Tenn. Cr. App. 1999) held that due process maybe implicated if a prosecutor vindictively increases a charge to a felony after a misdemeanor has invoked an appellate remedy. The United States

Supreme Court has ruled that equal protection standards prevent selective prosecution on the basis of race, religion, or other arbitrary classifications.

2. As long as the prosecutor has probable cause to believe that an accused committed an offense, the determination whether to prosecute rests entirely within the prosecutor's discretion, subject to constitutional limitations.

3. A defendant claiming selective prosecution must establish that the law enforcement decision had a discriminatory purpose and produced a discriminatory effect.

4. The defendant must establish that (i) the government has singled out the claimant for enforcement action while others engaging in similar activity have not been subject to the same actions; and (ii) the decision to prosecution rests on an impermissible consideration or purpose.

5. The first element requires proof that other non-prosecuted offenders engaged in similar conduct; those offenders violated the same law the claimant is accused of violating; and the magnitude of their violation was not materially different from that of the claimant.

6. In regard to the second element, the claimant must establish the government singled out a protected class of citizens for enforcement, or the prosecution was intended to deter or punish the exercise of a protected right.

In regard to the principles being applied in the present case, the Court of Criminal Appeals noted that the defendant in attempting to establish the government singled out the defendant for prosecution, claimed that it was Walmart's policy of not prosecuting thefts valued at less than $25.00. The court noted that this argument is misplaced because "Walmart is a private corporation." The court concluded that the defendant had failed to show that "the government" singled him out for selective prosecution.

In regard to the "impermissible consideration" element, the Court of Criminal Appeals noted that the defendant failed to present any proof that the government exercised its discretion to prosecute based on the defendant's status as a member of a protected class of citizens or that the prosecution was intended to deter the exercise of a protected right. The court noted that the record contained no evidence to support the defendant's claim that he was subjected to selective prosecution.

State v. Stephens (Tenn. Cr. App. 12/14/23)

DISQUALIFICATION OF DISTRICT ATTORNEY

CONFLICT OF INTEREST: PROSECUTING ATTORNEY WHO OVER TEN YEARS EARLIER HAD REPRESENTED THE DEFENDANT ON AN UNRELATED CHARGE WAS NOT DISQUALIFIED FROM PROSECUTING THE DEFENDANT IN THE CURRENT CASE AS THE CASE DID NOT INVOLVE ANY DISCLOUSRE OF CONFIDENTIAL INFORMATION AND THE CASES WERE NOT "SUBSTANTIALLY RELATED"

FACTS: The defendant was charged with burglary, attempted first degree murder, aggravated assault and other charges. The defendant sought to disqualify the prosecuting attorney (Bare) maintaining that the district attorney's previous representation of the defendant created an actual conflict of interest and that the trial court had erred by failing to disqualify him in the case.

HELD: The Court of Criminal Appeals held that the previous representation of the defendant by the prosecuting attorney did not require disqualification. The court noted that ADA Bare represented the defendant on a completely unrelated case more than a decade before the matter before the court came to trial. The court also noted that despite the defendant's assertions that the cases were "substantially related" to the current case, the cases had totally different facts on different occasions and the mere fact that each case involved an aggravated assault charge did not make the cases "substantially related" under the law.

The Court of Criminal Appeals noted that the trial court had pointed out that ADA Bare did not disclose any confidential information he received from representing the defendant and also since the defendant did not testify, there was no way to use any confidential information against him. The court

noted that the only information used against the defendant was of public record, which were the convictions themselves, which did include the name of the prosecuting attorney on the judgment form.

The court noted that while the defendant asked the court to infer that ADA Bare was prejudiced against the defendant that the court would decline to make such an inference under the facts. The court concluded that the trial court had not abused its discretion in denying defendant's request to disqualify ADA Bare and grant a new trial in the case.

State v. Overstreet (Tenn. Cr. App. 2/22/24)

DUI

CONSENT FOR A BLOOD DRAW: IN A CASE INVOLVING VEHICULAR HOMICIDE BY INTOXICATION, THE EVIDENCE DID NOT PREPONDERATE AGAINST THE TRIAL COURT'S FINDINGS THAT THE THIRTY-SEVEN-YEAR-OLD DEFENDANT PROPERLY GAVE CONSENT FOR THE BLOOD DRAW DESPITE THE FACT THAT THE DEFENDANT HAD SIGNIFICANT INJURIES FROM A MOTOR VEHICLE CRASH

FACTS: The defendant maintained that the trial court had erred by denying his motion to suppress the evidence of drugs found in the defendant's blood because he did not voluntarily consent to the blood draw. The state responded that the trial court had carefully considered the totality of the circumstances and that the evidence did not preponderate against the trial court's findings.

HELD #1: The Court of Criminal Appeals held that the evidence did not preponderate against the trial court's findings and pointed to the following specific facts:

1. The evidence established that there had been a significant accident involving the defendant, and that the defendant had regained consciousness

with assistance was able to get out of the truck. The defendant was able to stand on his own and was able to talk to emergency personnel and give information about his driver's license, his name, where he was and the direction of his travel. The testing undertaken by emergency personnel revealed that he had normal or a slight impairment of brain function; his blood pressure, pulse and respiration were within acceptable limits; that EMS personnel were confident of his ability and his mental state at the time he was released to personnel at Vanderbilt Emergency Medical Center, concluding that he could sign papers with the facility.

2. When Trooper Olivas engaged with the defendant, the defendant displayed only slight nystagmus, and the Registered Nurse, Anna Blumhardt, took care to ensure that he was consenting to the draw, testifying that she would not force a patient to do something he or she could not agree to. The nurse required that the patient be alert, oriented, and not confused.

3. The court also noted that the defendant had a telephone conversation with his mother which confirmed that the defendant had allowed the officers to draw the blood, telling his mother, "You don't have to have a warrant if you agree to it." He also indicated to his mother that he had signed something in order to let them make the draw of blood.

The Court of Criminal Appeals noted that factors to be considered in whether consent was voluntary, intelligent, and unequivocal, are:

1. The time and place of the encounter, which was at a medical facility in which trained medical people were present.

2. Whether the event occurred in a public or secluded place, which the trial court judge concluded was in a "non-public place."

3. The degree of hostility displayed during the incident, the conclusion of which was that the officer was not hostile in any way toward the defendant.

4. The officer was wearing a firearm, did request consent, and did initiate the contact.

In final conclusion, the Court of Criminal Appeals noted that the defendant's injuries from the crash were significant but that in considering the totality of the circumstances the defendant did in fact provide proper consent for the blood draw.

HELD #2: On another alternative issue, the Court of Criminal Appeals concluded that exigent circumstances did not exist to justify a warrantless blood draw, in the event that a subsequent court concluded that the consent was not properly given. The Court of Criminal Appeals noted that the trial court assessed the totality of the circumstances and concluded that there were no exigent circumstances that would negate the requirement of a search warrant to obtain the defendant's blood. The Court of Criminal Appeals noted that the evidence did not preponderate against this finding by the trial court that exigent circumstances did not exist, because:

1. The trial court had properly concluded that there were "too many officers on the scene; too many individuals who were knowledgeable on how to go about getting a warrant,"; that the court had found that there were four circuit judges in Williamson County which were available to issue warrants on application from law enforcement. In sum, the court found that there were numerous officers at the crash site, Metro Police Department was available to assist if requested, and a magistrate was only an approximate ten-minute drive from the hospital with several magistrates and judges available to allow for the search warrant.

The court also noted that the burden is on the state to prove that a warrantless seizure was constitutionally permissible and that the state failed to show that exigent circumstances justified a warrantless seizure in the case.

The court concluded that "the circumstances were not exigent, as the record demonstrates that police could have reasonably obtained a warrant without significantly undermining the efficacy of the search."

State v. Andrews (Tenn. Cr. App. 12/27/23)

DUI SENTENCING: WHEN SENTENCING A DEFENDANT FOR DUI, THE TRIAL COURT CAN SENTENCE THE DEFENDANT TO THE STATUTORY MINIMUM OR TO THE MAXIMUM OF ELEVEN MONTHS AND TWENTY-NINE DAYS AT ONE HUNDRED PERCENT, AND THE TRIAL COURT'S FAILURE TO EXPRESS THE LENGTH OF

CONFINEMENT IN A PERCENTAGE BASIS IS NOT FATAL WHERE THE INTENDED TERM OF CONFINEMENT IS OTHERWISE EXPRESSED IN DAYS

FACTS: The defendant was convicted of DUI second offense, following which the defendant was sentenced to a term of eleven months and twenty-nine days, with three hundred days to be served in confinement followed by the remainder on probation.

The defendant maintained that the trial court failed to note in the judgment the minimal percentage of service "prior to eligibility for work release, furlough, trusty status or rehabilitative programs" in accordance with TCA 40-35-302(d). Defendant maintains that the sentence of three hundred days in confinement conflicts with the requirements of the statute which sets forth a maximum service of seventy-five percent before a defendant is eligible for other release. The defendant maintained that since it was a second offense conviction that the court could sentence him to forty-five days in confinement at one hundred percent and that any term of confinement in excess of the mandatory minimum must be served at the normal seventy-five percent calculation for a misdemeanor sentence. The defendant also asserted that the trial court erred in an undue emphasis on his previous criminal behavior and in failure to allow for a mitigating factor in the sentencing process.

HELD: The Court of Criminal Appeals held that the trial court did not err in sentencing the defendant to serve three hundred days of his sentence in confinement followed by the remainder on supervised probation.

The Court of Criminal Appeals made the following points in regard to DUI sentencing, as follows:

1. The Tennessee Supreme Court has adopted an abuse of discretion standard of review for sentencing and has prescribed a "presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our sentencing act State v. Bise (Tenn. 2012). Under the Bise case, a sentence should be upheld so long as it is within the appropriate range and the record demonstrates that the

sentence is otherwise in compliance with the purposes and principles listed by statute.

2. Under the sentencing provisions, the court noted that in the present case, since the defendant was convicted of second offense DUI, the defendant was subject to punishment under the provisions governing second DUI convictions, requiring that he be sentenced to serve in the county jail or workhouse not less than forty-five consecutive days nor more than eleven months and twenty-nine days.

3. The Court of Criminal Appeals noted that the Tennessee Supreme Court addressed the effect of the statutory provisions on sentences for DUI convictions in the case of State v. Palmer (Tenn. 1995) and held as follows:

"While DUI offenders must also be sentenced in accordance with the Tennessee Criminal Sentencing Reform Act, the legislature has specifically excluded DUI offenders from the provisions of the Act when the application of the Act would serve to either alter, amend, or decrease the specific penalties provided for DUI offenders. A trial judge may designate a service percentage in a DUI case under TCA 40-35-302(d) but that percentage may not operate to reduce the mandatory minimum sentencing provisions of the DUI statute. Consequently, a DUI offender can be sentenced to serve the entire eleven month and twenty-nine-day sentence imposed as the maximum punishment for DUI so long as the imposition of that sentence is in accordance with the principles and purposes of the Criminal Sentencing Reform Act of 1989."

4. The court noted that the Tennessee Supreme Court concluded that a trial court was "legally authorized" to require the defendant to serve his entire eleven month and twenty-nine-day sentence in confinement and therefore it

is clear that a trial court has authority to so order a defendant to serve one hundred percent of the eleven month and twenty-nine-day sentence in confinement.

Based on that, the trial court in the present case could order the defendant to serve three hundred days actual confinement in jail. The court noted that although the trial court expressed the length of confinement in the judgment in days rather than in percentage terms, the Court of Criminal Appeals recognized that with regard to sentences for misdemeanor DUI convictions, "the trial court's failure to express the length of confinement in a percentage basis is not fatal where the intended term of confinement is otherwise expressed in days."

5. In Tennessee, the trial court is granted considerable latitude in imposing a sentencing for a misdemeanor conviction. A separate sentencing hearing is not required in misdemeanor cases, but the trial court must provide the parties with a reasonable opportunity to be heard on the question of the length of any sentence and the manner in which the sentence is to be served.

6. A defendant convicted of a misdemeanor has no presumption of entitlement to a minimum sentence.

7. Furthermore, a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute.

8. These principles require that sentences involving confinement should be based on the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

The Court of Criminal Appeals in the present case noted the review of the propriety of the defendant's sentence is impeded in this case by the limited information provided by the defendant in the appeal. The defendant

had the obligation to provide a good record on appeal and so the defendant is bound by the same.

The court did note that Sheriff Brewer testified that school was letting out when the stop occurred and the defendant was operating a vehicle in close proximity to the school. The Court of Criminal Appeals also noted that the defendant had previous history of DUI and the record provided by the defendant was not complete and therefore the court must presume that the trial court's findings were correct.

State v. Shults (Tenn. Cr. App. 1/30/24)

EXIGENCY FOR BLOOD DRAW: UNDER A "TOTALITY OF CIRCUMSTANCES" EXAMINATION, CIRCUMSTANCES ARTICULATED BY LAW ENFORCEMENT GAVE RISE TO AN OBJECTIVELY REASONABLE RELIEF THAT THERE WAS A COMPELLING NEED TO ACT AND INSUFFICIENT TIME TO OBTAIN A SEARCH WARRANT FOR THE BLOOD DRAW

FACTS: Monroe County Sheriff's Office Deputy Millsaps was assigned to be on the lookout for a reckless driver on 3/1/19, at 4:26 a.m., and a few minutes later he observed a vehicle matching the vehicle's description ("red vehicle traveling on 411 North") near Vonore Industrial Park. When Officer Millsaps observed the vehicle, it was going in reverse partially on the shoulder and partially in the lane of traffic on a "fairly busy road" at a time when there was heavy traffic due to a shift change at the Carlex Plant. Officer Millsaps used his patrol lights to pull the defendant over. The defendant could not provide any of his requested documents and he advised that he had the paperwork to reinstate his license but had not gotten it done. Officer Millsaps smelled alcohol and asked the defendant to step out of the vehicle, then observing that the defendant was unsteady on his feet, had difficulty focusing, and used profanity as he spoke. The defendant became more "hostile" as the officer made requests of him. The defendant was asked to perform on the HGN and walk and turn test, and the officer

concluded that he could not pass either test and placed him under arrest for DUI. The arrest took place about eighteen minutes after Millsaps pulled in behind the defendant's vehicle.

Officer Millsaps could not transport the defendant to the jail immediately because he was responsible for securing the defendant's vehicle. Millsaps called for a tow truck and also took a written inventory while waiting for the truck to arrive. An officer from the Vonore Police Department arrived on the scene and offered to wait on the tow truck so that Officer Millsaps could proceed to transport the defendant to the sheriff's office. Millsaps left the scene with the defendant at 5:14 a.m. about forty-five minutes after the stop had begun. The defendant was booked into the jail at 5:35 a.m. The intoximeter was not working and the defendant refused to consent to a blood draw, so Officer Millsaps immediately began drafting an application to obtain a warrant to draw defendant's blood. Millsaps called the general sessions judge "at least five times" but the judge did not answer. Millsaps explained that in seeking warrants, when the general session judge is unavailable, protocol is for him to call one of the two criminal courts in the district. He was not certain but believed that both criminal court judges lived in Bradley County, roughly one hour each way. Millsaps was not an expert in serology but understood basically that people "sober up" over time and that he thought that waiting another two to three hours to draw the defendant's blood would result in the evidence being tainted or lost. Knowing that it would be difficult to timely get a criminal court judge to sign the search warrant, Millsaps called the on-call district attorney who advised him to proceed with the blood draw based on exigent circumstances.

On cross-examination, Officer Millsaps testified (1) that he knew where the general sessions judge lived in Sweetwater but he had not contacted another officer to determine whether they were patrolling near the general sessions judge's residence; (2) the officer agreed that it was 15-20 minute drive to the general sessions judge's residence from the county jail; (3) the officer did not reach out to any Bradley County officers to determine whether either criminal court judge could be located nor did he personally contact either criminal court judge; and (4) the officer confirmed during his testimony that he had the technology to draft the warrant in his patrol vehicle but he had no means to print the application from there.

The trial court denied the defendant's motion to suppress the results of the blood alcohol, and the defendant was convicted by a jury of DUI.

HELD: The Court of Criminal Appeals concluded from all of the circumstances that the totality of the circumstances "gave rise to an objectively reasonable belief that there was a compelling need to act and insufficient time to obtain a warrant."

The Court of Criminal Appeals noted the following key principles in regard to cases involving "exigent circumstances" and foregoing a search warrant for seizure blood evidence:

1. Both the 4th Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect citizens from unreasonable searches and seizures.

2. The taking of a blood sample is a search and therefore invokes constitutional protections.

3. A warrantless search of the person is reasonable only if it falls within recognized exception.

4. One well recognized exception is the exigent circumstances exception. This exception applies when the exigencies of the situation make the needs of law enforcement so compelling that warrantless search is subjectively reasonable under the 4th Amendment.

5. Exigency is determined based on the totality of the circumstances "known to the governmental actor at the time of the entry."

6. A non-exhaustive list of frequently-arising situations found to be sufficiently exigent to render a warrantless search reasonable include: (i) when officers are in hot pursuit of a fleeing suspect; (ii) when officers thwart the escape of known criminals; (iii) when a suspect presents an immediate threat to the arresting officers or the public; or (iv) when immediate police action is necessary to prevent the eminent destruction of vital evidence.

7. The United States Supreme Court held that the natural metabolization of alcohol in the bloodstream is "not a per se exigency" that justifies an exception to the warrant requirement for consensual blood testing in all drunk-driving cases. Rather, consistent with the totality of the circumstances test, the Supreme Court clarified that "the metabolization of

alcohol in the bloodstream and the ensuring loss of evidence are among the factors that must be considered in deciding whether a warrant is required."

8. The Supreme Court acknowledged the importance of obtaining a blood draw in determining the BAC at the time of the offense "while experts can work backwards from the BAC at the time the sample is taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process."

9. Since the key McNeely case of the Supreme Court, Tennessee courts have addressed the issue of whether a warrantless blood draw was justified based on exigent circumstances in numerous DUI cases. Some of the cases are as follows: (a) no exigent circumstances to justify warrantless blood draw where nothing prevented one of the three officers from obtaining a warrant while the other officers transported the defendant to the hospital; (b) no exigent circumstances where none of the five officers investigating the case obtained a warrant where a magistrate was on duty in a building ten minutes from where the defendant was apprehended and it only took the magistrate an average of ten minutes to review a warrant; (c) no exigent circumstances where the supervisor, the arresting state trooper, and five responding police officers could have helped obtain a warrant prior to the blood draw an hour after the traffic stop; (d) no exigent circumstances where none of the three responding deputies sought a warrant prior to the blood draw performed 45 minutes after the traffic stop; (e) warrantless blood draw justified based on exigent circumstances where the lone responding officer was responsible for clearing the motorcycle accident scene and conducting the investigation; and (f) warrantless blood draw justified based on exigent circumstances when the lone responding officer was responsible for clearing the single car accident scene and conducting the investigation.

The court noted that in the present case the trial court made detailed findings of fact relating to the time from the officer's traffic stop of the blood draw.

1. The case involved a pre-coronavirus pandemic, and the officers involved had never heard of the opportunity to video conference by zoom or other means;

2. Officer Millsaps's testimony included that he was delayed in obtaining the warrant because he was solely responsible for the defendant's vehicle as an arresting officer and before he could leave the scene, he had to call a tow truck, inventory the vehicle, and other perfunctory functions. The officer's duties at the scene continued until he was relieved of these duties at approximately 5:14 a.m. when a second officer arrived allowing Millsaps to leave the scene and transport the defendant to the jail.

3. The officer took the defendant to the jail and booked him into the jail and then learned that the intoximeter was out of service and that he would have to draft a search warrant to get a blood reading since the defendant refused to consent to the same.

4. The officer called the general sessions judge five times and received no answer so that the reasonable conclusion was that the judge was out of town or unavailable.

5. At that point in time, the officer called the district attorney's office for advice and the DA's office agreed that the drive to get a judge to sign the search warrant would take an hour or so each way resulting in two to two and one-half hours to accomplish that task.

6. Based on the advice of the district attorney's office, Officer Millsaps aborted the possibility of getting a search warrant and therefore relied upon exigent circumstances to justify the blood draw.

The Court of Criminal Appeals noted that the trial court had determined that the warrantless blood draw was justified based on the totality of the circumstances, and the court determined that the evidence did not preponderate against the trial court's factual findings.

Based on the totality of these circumstances, the facts established that the circumstances articulated by the officer "gave rise to an objectively reasonable belief that there was a compelling need to act and insufficient time to obtain a warrant."

State v. Davis (Tenn. Cr. App. 11/6/23)

HGN TEST: THE TRIAL COURT'S RULING THAT THE STATE CANNOT ELICIT TESTIMONY FROM THE ARRESTING OFFICER ABOUT THE "MEDICAL INTERPRETATION OF THE HGN," WHILE PERMITTING TESTIMONY ABOUT THE DEFENDANT'S FAILURE TO FOLLOW THE OFFICER'S INSTRUCTIONS NOT TO MOVE HIS HEAD DURING THE TEST, WAS FOUND TO BE PROPER AND NOT AN ABUSE OF DISCRETION IN ADMITTING SUCH EVIDENCE, AS THE SAME WAS RELEVANT AS TO THE DEFENDANT'S FAILURE TO FOLLOW INSTRUCTIONS

FACTS: The defendant contended that the trial court erred in permitting the arresting officer in a DUI case, the officer not qualified as an expert, to testify in a limited fashion about the defendant's performance on a horizontal gaze nystagmus (HGN) field sobriety test. The state argued that the trial court did not err because the officer's testimony was limited to non-expert matters and did not include information about the results of the test.

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in admitting the evidence of the defendant's failure to follow instructions during the HGN test, as the Court of Criminal Appeals held that the same was relevant because, as the officer testified, the defendant's failure to follow instructions was an impairment clue. The court noted that the officer did not testify about his observations of nystagmus or smooth pursuit or their significance to the issue of impairment.

The trial court ruled that the state cannot illicit testimony from the arresting officer about the "medical interpretation of the HGN," but permitted testimony about the defendant's failure to follow the officer's instructions that the defendant should move his eyes but not move his head during the test. The officer testified that a subject's failing to follow instructions not to move his head when watching the officer's finger move across the subject's field of vision was a "clue" of impairment. The officer

had also inquired whether he could testify about "lack of smooth pursuit," and the court instructed the witness he could not. The court had then instructed the jury, "the jury will not consider anything relative to the pursuit. The defendant's eye ----- the interpretation of the eyes is ------ this witness is not qualified to give those opinions."

The court had allowed the video recordings of the investigation and arrest to be played to the jury which showed that the defendant moved his head at times during the HGN test and that he did not move his eyes at times during the test. As one of the videos played, the officers said, "So at this time, he was not following my finger at all with his eyes, nor with his head." The trial court then overruled the defense objection stating, "He can't interpret the movement of the eyes." The officer testified that the defendant said, "left, right, left, right," which was not an instruction the officer had given the defendant. The officer then indicated a portion of the recording in which the defendant had moved his head to follow the officer's moving finger.

The Court of Criminal Appeals noted that the evidence of the defendant's failure to follow instructions during the HGN test was relevant because, as the officer testified, the defendant's failure to follow instructions was an impairment clue. The officer did not testify about his observations of nystagmus or smooth pursuit or their significance to the issue of impairment.

The court did note that "to the extent that the defendant's argument relies on the officer's statement, after testifying about the HGN test, that the defendant did not perform satisfactorily on the walk --- and --- turn test "as well," that the defendant had failed to object to the testimony. The court noted that the defendant failed to object and the testimony was brief, indicating that would not have been appropriate testimony if objected to by the defendant.

State v. Dale (Tenn. Cr. App. 1/12/24)

EVIDENCE

ACCOMPLICE TESTIMONY: TENNESSEE SUPREME COURT ABOLISHES THE COMMON LAW RULE THAT TESTIMONY OF AN ACCOMPLICE MUST BE CORROBORATED TO SUPPORT A CONVICTION

HELD: The Tennessee Supreme Court abolished the common law rule that testimony of an accomplice must be corroborated to support a conviction. The Supreme Court issued a lengthy opinion that recounted the history and justification of the accomplice testimony rule and considered the fact that a majority of other state courts had abandoned the rule.

The Tennessee Supreme Court made the following conclusions:

1. It has long been a common law rule in our state that evidence is insufficient to sustain a conviction when the conviction is solely based upon the uncorroborated testimony of one or more accomplices.

2. An accomplice is one who knowingly, voluntarily, and with common intent participates with a principal offender in the commission of crime.

3. A witness qualifies as an accomplice if that witness could be indicted for the same offense charged against the defendant.

4. Tennessee's accomplice-corroboration rule, like comparable rules in other jurisdictions, is justified by the theory that accomplice testimony is unique and must be considered with a different degree of scrutiny than other testimony. Because accomplices often have an incentive to shape their testimony in a manner than can help them curry favor with the prosecution and the police, and because an accomplice's status as a guilty party with knowledge of the situation can make the jury more susceptible to believe his testimony, proponents of accomplice-corroboration rules see such rules as a necessary safe guard for criminal defendants.

5. The contrary view is that, while valid concerns regarding the credibility of accomplice testimony certainly exist, accomplice corroboration rules unduly interfere with the jury's factfinding role and the role of a jury to evaluate witness credibility. The overwhelming majority of jurisdictions, including

thirty-three state jurisdictions plus other federal jurisdictions, have either declined to adopt an accomplice-corroboration rule or have repealed such a rule.

"Today, we abolish Tennessee's court-made accomplice-corroboration rule in its entirety." The court noted that the Supreme Court of Maryland had concluded that "a blanket rule requiring corroboration for accomplices intrudes too far into the jury's constitutional role as fact finder and unnecessarily and arbitrarily deprives the jury of the opportunity to access and decide the credibility of potentially highly relevant evidence." The Tennessee Supreme Court noted that there is no valid basis to uphold the minority view, as most courts had come to describe the rule as outmoded, obsolete, and an anachronism.

The court noted that the general assembly is better suited to decide whether such a rule needs to be effectuated in the State of Tennessee.

State v. Thomas and Turner (Tenn. Supreme Court 3/7/24)

ADMISSIONS OF ORDERS OF PROTECTION: THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING EVIDENCE IN THE FORM OF ORDERS OF PROTECTION WHICH HAD BEEN OBTAINED BY THE MURDER VICTIM AGAINST THE DEFENDANT AS SUCH EVIDENCE MAY SHOW A DEFENDANT'S MOTIVE AND INTENT IN THE SUBSEQUENT KILLING OF A VICTIM

FACTS: In a case in which the defendant was charged with and convicted of first-degree premeditated murder among other charges, the defendant contended that the trial court had erred by admitting the exparte and amended orders of protection that the victim had obtained against the defendant, the defendant arguing that they were not admissible to show his motive and intent and in the alternative that any probative value they held was outweighed by the danger of unfair prejudice to the defendant. The state disagreed, arguing that the trial court properly admitted the orders to

show the defendant's motive and intent, premeditation, and settled purpose to harm the victim.

HELD: The Court of Criminal Appeals concluded that the trial court acted within its discretion in admitting the evidence as the orders of protection obtained by the victim against the defendant provided a motive for the defendant to kill the victim and helped to show that the killing was done after the exercise of reflection and judgment.

The Court of Criminal Appeals noted the following principles that are important in a case of admitting orders of protection into evidence:

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

2. The court noted that cases in which other "bad act" evidence of an accused will be admissible include those in which the evidence is introduced to show motive, intent, guilty knowledge, identity, absence of mistake or accident, a common scheme or plan, completion of the story, opportunity, and preparation.

In the present case, the court considered the evidence at a jury-out hearing and found that both the original and the amended order of protection met the requirements for admissibility under TRE 404(b). The trial court did find the petition itself inadmissible due to the fact that it contained inadmissible hearsay.

The Court of Criminal Appeals held that by finding that the orders met the requirements for admissibility under Rule 404(b), the trial court

implicitly found that the bad act evidence was clear and convincing and that its probative value outweighed the danger of unfair prejudice.

The court noted the Tennessee Supreme Court has concluded that "violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show the defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim."

The Court of Criminal Appeals noted that it rejected the defendant's argument that there was no causal connection or chain of logic inferences between the other act of violence and the defendant's intent and motive in his killing of the victim. The Court of Criminal Appeals noted that it disagreed since "a relatively short period of time elapsed between the original September 26 exparte order of protection, the October 9 amended order of protection, and shortly thereafter the killing of the victim on October 19.

The court noted that the order of protection obtained by the victim provided a motive for the defendant to kill the victim and helped to show that the killing was done after the exercise of reflection and judgment.

State v. Houbbadi (Tenn. Cr. App. 12/8/23)

AUTHENTICATION OF TEXT MESSAGES: TRIAL COURT DID NOT ABUSE DISCRETION IN ADMITTING CELLEBRITE DATA REPORTS EXTRACTED FROM DEFENDANT'S CELL PHONE AS THE INVESTIGATOR TESTIFIED THAT HE WAS CERTIFIED TO USE A PROGRAM AND TO EXTRACT DATA FROM CELL PHONES AND TRANSLATE IT INTO A "NAVIGABLE, READABLE FORMAT"

FACTS: In a case which the defendant was convicted of conspiracy to possess cocaine among other charges, the defendant argued that the trial court abused its discretion by admitting the text messages in the case

because the state had failed to establish that Investigator Jinks had the requisite personal knowledge to testify as to the contents of the cell phones and authenticate the messages.

HELD: The Court of Criminal Appeals held that the trial court did not abuse its discretion in admitting the Cellebrite date reports containing the text messages extracted from defendant's cell phone due to the following facts:

1. Investigator Jinks testified that he was certified by Cellebrite to use a program called "Physical Analyzer" to extract data from the cell phones and translate it into an "easily navigable, readable format."

2. Investigator Jinks had received multiple trainings and through his experience had learned that a lot of the data that had to be analyzed by understanding the language of drug distributors and drug traffic organizations who utilized "coded language."

3. Investigator Jinks testified that he obtained a search warrant and downloaded information from three cell phones taken from the defendant during traffic stops on three different dates in 2018.

4. He testified concerning the content of text messages exchanged between the defendant, certain co-defendants, and other individuals concerning the sale of drugs.

5. Investigator Jinks also testified that the coded language specific to the Tree Top Pirus gang was prevalent throughout certain text messages extracted from the phones.

The Tennessee Court of Criminal Appeals noted the following principles in regard to authentication of evidence:

1. The authentication of evidence is governed by Tennessee Rule of Evidence 901 which provides that the requirement of authentication or identification as a condition precedent to the admissibility 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. Both Rule 901 and the common law designate that the trial court is the "arbiter of authentication issues," and thus the trial court's ruling would not be disturbed on appeal.

3. Rule 901 provides in pertinent part that authentication or identification conforming with the requirements of the rule include the following:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with other circumstances.

(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

The court also noted that the advisory commission comments to the rule state, "All that the lawyer need do is introduce evidence satisfying the court that the computer system produces accurate information."

The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in admitting the reports of the expert witness, as Investigator Jinks' testimony was sufficient to show that the Cellebrite data extraction reports contained defendant's text messages and were what the state purported them to be.

State v. Cody (Tenn. Cr. App. 12/28/23)

CHARACTER EVIDENCE: DEFENDANT OPENED DOOR TO CHARACTER EVIDENCE WHEN DEFENSE COUNSEL IN CROSS-EXAMINATION OF AGENT CLARK DREW ATTENTION TO THE DEFENDANT'S PASSING AN ATF BACKGROUND CHECK WHICH THE TRIAL COURT INTERPRETED AS OPENING THE DOOR TO QUESTIONS OF CHARACTER EVIDENCE ON REBUTTAL

FACTS: In a case involving first degree murder, the defense counsel while questioning the state witness, Agent Clark, asked Agent Clark about whether the gun was legally purchased at George's Pawn Shop, to which Agent Clark

responded that was correct. Defense counsel then questioned Agent Clark by saying, "It's reason to believe that she would have passed that background check if she legally purchased a gun, and we have an ATF receipt to that, correct?" Agent Clark responded in the affirmative.

Based on that questioning, the trial court ruled that line of questioning opened the door to rebuttal character evidence. The defense argued that the state had introduced the ATF report as an exhibit and defense counsel had simply reiterated the content of the state's exhibit.

HELD: The Court of Criminal Appeals concluded that it could not "conclude that the trial court abused its discretion by finding the defendant opened the door to character evidence by drawing attention to her previously passing the background check during Agent Clark's cross-examination." The court noted that even though the defendant had correctly stated that the Firearms Transaction Record contains her assertions that at the time of the purchase she had not been convicted of a felony and had not been indicted for a felony offense, the court noted that neither the transaction record or the ATF report explicitly stated that the defendant had passed an ATF background check. The court found that "accordingly, the state did not introduce the concept that defendant successfully passed a background check, and the trial court was in its discretion to find that the line of question opened the door to rebuttal character evidence."

State v. Clausell (Tenn. Cr. App. 2/16/24)

EXCITED UTTERANCE EXCEPTION: THE FOCUS IS NOT ON A SPECIFIC TIME FRAME BUT UPON WHETHER THE EXCITEMENT OF THE ASSAULT IS STILL DOMINANT OVER THE CHILD DECLARANT'S THOUGHT PROCESSES AND WHETHER THE CHILD'S STATEMENTS WERE UNREFLECTIVE EXPRESSIONS OF HER BELIEF

FACTS: The defendant was convicted at a jury trial of two counts of rape of a child, one count of attempted rape of a child and one count of

aggravated sexual battery, for which the defendant received a total effective sentence of 42 years.

On 9/2/19, the eleven-year-old victim was sleeping in her bedroom and she was awakened by the defendant coming into her room. Eventually, the defendant removed the victim's clothes and penetrated the victim. Thereafter, the defendant continued to perform other acts of sexual aggression, following which the defendant told the victim not to tell anyone or that he would hurt her mother. The threat frightened the victim.

Later that evening, the victim spoke with her best friend through a video chat application on her cell phone, at a time when the victim was crying, distraught, and "breaking down really bad." She told her friend that the defendant had raped her. The victim's friend told her that she needed to tell someone, following which the victim told her older sister that the defendant had raped her. The statements made by the victim to her friend and her sister occurred approximately twelve hours after the sexual misconduct of the defendant.

The defendant maintained that the trial court erred by allowing the state to introduce the victim's statements to her friend and her sister pursuant to the excited utterance exception to the prohibition against hearsay. The defendant claimed that the victim could not have been operating under the stress of the startling events when she made the statements due to the fact that so much time had elapsed. The trial court admitted the statements into evidence as excited utterances.

HELD: The Court of Criminal Appeals held that the trial court's finding that the statement of the victim to her friend and the statement made to her sister fell within the excited utterance exception to the hearsay rule based upon the fact that even though the statements made to the witnesses were approximately twelve hours after the event took place, the victim's statements were made while "under the stress and excitement of the event that had occurred the previous evening."

The court noted that "the heart of the defendant's complaint is that admitting the victim's statement to her friend violated the 'temporal limits' of the excited utterance exception." The court noted that "while the time elapsed between the statement and the startling event is important, it is

not dispositive. Indeed, the time interval is material only as a circumstance bearing on the issue of continuing stress."

The Court of Criminal Appeals noted that the Tennessee Supreme Court recognized that a spontaneous response can occur as much as twelve hours after an event, particularly when the defendant is still in a state of shock (pursuant to State v. Stout, Tenn. 2001). Quoting other sources, the court noted that an excited utterance from a minor made twenty-four hours after a rape was supported in an Ohio case with the court stating that "the focus is not on a specific time frame but upon whether the excitement of the assault is still dominant over the child declarant's thought processes and whether the child's statements were unreflective expressions of her belief." The CCA noted that the time interval does not preclude the possibility that the victim was still under the continuing stress of the rape.

Likewise, the court made the specific finding that the statement made to her sister, even though also a close question, reflected that the victim was upset, breaking down, crying, and scared even though her sister asked her what was bothering her. The court noted that "statements made in response to questions may still be admissible if the declarant is under the excitement or stress of the event." The court further stated that "the fact that a question prompted the excited answer is a circumstance relevant to stress, but it does not automatically bar the statement's admission under Rule 803(2)."

In regard to both statements the court reviewed the key principles that courts face when ruling on the excited utterance exception in such cases. Such principles are as follows:

1. Despite the general prohibition on receiving hearsay evidence at trial, some hearsay statements are nevertheless admissible if they fall within one of the evidentiary exceptions or if some other law renders them admissible.

2. One exception to the hearsay rule allows the admission of a statement relating to "a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This is known as the "excited utterance exception." The theory behind this hearsay exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."

3. Three requirements must be satisfied before the hearsay evidence may be admitted under this exception:

(i) there must be a startling event or condition that suspends the normal reflective thought processes of the declarant.

(ii) the statement must relate to the startling event or condition.

(iii) the statement must be made while the declarant is under the stress or excitement from the event or condition. The third element looks at factors that suggest "spontaneity" in the statement and have a "logical relation" to the event.

(iv) a court may reflect upon the following considerations in assessing the applicability of the third element, including the following:

A. The interval or time elapsed between the startling event and the statement;

B. The nature and seriousness of the startling event or condition;

C. The appearance, behavior, outlook, and circumstances of the declarant, including such characteristics as age and physical or mental conditions; and

D. The contents and substance of the statement, which may indicate the presence or absence of stress.

In the present case, the court noted that the first two elements were extremely clear, as

1. Rape is an occurrence or an event sufficiently startling to render inoperative the normal reflective thought processes of an observer.

2. The victim's statements clearly related to the startling event including the statement made to the friend and to the sister.

3. The question of whether the victim made a statement while under the stress or excitement of the startling event or condition is a question of fact.

The court noted that in the present case the trial court made a specific factual finding that the victim "was in fact under the stress and excitement of the event that occurred the previous evening when she uttered the statement to her friend and shortly thereafter to her sister." The court also noted that, as to the victim's appearance, behavior, outlook, and

circumstances, the friend could see the victim over the video chat and she specifically noted that the victim was in tears and crying throughout the conversation, which was unusual for the victim. The friend testified that she could see that the victim was "breaking down really bad" and was "scared" to tell her friend what was wrong. The friend could tell that she was terrified to tell someone about the rape.

After considering all the principles, the Court of Criminal Appeals did conclude that the trial court's finding was supported by a preponderance of the evidence.

PRACTICE POINT: Sometimes it is difficult to understand why prosecutors appear to be reluctant to utilize excited utterances either in sex abuse cases or in domestic violence cases due to the fact that there are so many appellate court decisions in the state of Tennessee which strongly support the utilization of the excited utterance exception. This applies to serious cases involving jury trials and bench trials.

State v. Sullivan (Tenn. Cr. App. 1/24/24

FAIR TRIAL RIGHTS OF DEFENDANT: THE DEFENDANT WAS NOT DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT THE MEDICAL EXAMINER, DR. HARLAN, HAD LOST HIS MEDICAL LICENSE YEARS AFTER PERFORMING THE AUTOPSY IN THE CASE BEFORE THE COURT AS SUCH EVIDENCE WAS RELEVANT TO THE DOCTOR'S CREDIBILITY

FACTS: In a case in which the defendant was convicted of felony murder, the defendant maintained that the trial court violated his right to a fair trial when it overruled the defense's objection and allowed the state to present evidence that Dr. Charles Harlan, the medical examiner who performed the victim's first autopsy, had lost his medical license. The defendant argued

that the state being allowed to present the doctor's loss of medical license prevented the defendant from presenting a defense because Dr. Harlan had determined that the death of the victim was "accidental."

HELD: The Court of Criminal Appeals concluded that the loss of Dr. Harlan's medical license was relevant evidence for the jury to consider when evaluating the credibility of Dr. Harlan's opinion that the victim's manner of death was accidental against the testimony of five other physicians, who all disagreed with Dr. Harlan and concluded that the victim's manner of death was homicide.

The defendant had maintained that the revocation of the doctor's license was well after he had conducted the victim's autopsy and therefore had questionable relevance. The defendant also argued that the evidence would only serve to confuse the jury and discount the defense theory that the victim's death was an accident and that the value of said proof was substantially outweighed by the danger of unfair prejudice to the defendant.

The Court of Criminal Appeals held that the trial court properly concluded that the evidence was extremely relevant regarding the qualifications and credibility of Dr. Harlan and that any balancing test was in favor of the admission of the evidence.

State v. Goodwin (Tenn. Cr. App. 11/7/23)

INCRIMINATING TEXT MESSAGES: TEXT MESSAGES BETWEEN THE DEFENDANT AND THE MOTHER OF AN ELEVEN-YEAR-OLD VICTIM WERE FOUND TO BE VERY RELEVANT AND INCRIMINATING AND THE MESSAGES HELD TO BE ADMISSIBLE

FACTS: The defendant was convicted in Knox County Criminal Court for two counts of aggravated sexual battery and violating the sexual offender registration act. The incident of the sexual misconduct occurred inside the kitchen of the victim's family home while the defendant and the victim, who is age eleven, were the only two individuals present in the room. The victim's mother was in the living room working on her computer and was

unable to observe the incident, and the victim's sisters were in other rooms and did not observe the incident. The victim testified that she and the defendant were alone in the kitchen at the time of the improper touching.

Specifically, the defendant contended that the trial court erred by admitting a text message from the defendant to the victim's mother in which the defendant stated after a discussion about the incident and about his being a registered sex offender as follows: "I admit t. I'm sorry." The defendant argued that he had no way to contest the state's interpretation of the incident that the defendant was admitting to an inappropriate touching without his having to admit and discuss that he was a registered sex offender. The state responded that the trial court did not abuse its discretion by admitting the message and by the court's redacting certain parts of the text between the defendant and the mother to remove references that the defendant was a registered sex offender.

The text between the mother and the defendant including substantial references that the defendant made about having been convicted of sexual misconduct while he was in the Army and that while he was completely innocent, "the Army convicts everybody who is even accused, regardless." The defendant maintained that he was completely innocent and therefore made comments that he was "not a sex offender," even though he had been convicted of the same.

The trial court concluded that the redactions made regarding the text messages "would prevent any prejudicial information from being presented to the jury during the first portion of the bifurcated trial" and that the charge regarding violation of the sex offender act would only be allowed after the jury had reached a conclusion about the alleged misconduct with the eleven-year-old.

The court also ordered the state to "have a specific conversation with every single witness that they called to the stand to make sure that this testimony (that the defendant was a registered sex offender) is not put before the jury in any way." The end result was the court redacted the text messages containing any reference to the defendant having been placed on the sex offender registry before the incident in the case.

The specific text message that was admitted was where the victim's mother stated, "We can do this the hard way or the easy way it's up to you,"

and the defendant replied, “Please don’t threaten me. I’m physically sick over all this. Whether you think I deserve it or not, please have some mercy, and don’t ruin my life. I will be homeless.” The victim’s mother responded, “ADMIT IT,” following which the defendant stated, “I admit t Im sorry.” The victim’s mother then stated, “So you did touch my daughter inappropriately? Two options: admit it and turn yourself in OR deny and my counsel will fight harder.”

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion by redacting the text messages in connection with the defendant’s placement on the sexual offender registry and by admitting the text messages in which the defendant stated, I admit t Im sorry.”

The court noted that in reaching the conclusion, the court had distinguished the McCaleb case on which the defendant relied in seeking to have the text messages redacted in their entirety. The court noted that in the McCaleb case, the court held that certain messages and confession of the defendant should not have been admitted because the defendant’s confession was “inextricably connected to the polygraph examination,” in which the police officer had told the defendant that the polygraph proved that he was lying and which resulted in a confession based upon the officer’s “referring to the power of the polygraph.”

The court noted in the present case, the text message began as a discussion about the defendant’s inappropriate touching of the victim, not the defendant’s placement on the sexual offender registry. The discussion resulting in the defendant’s admission was clearly about the incident of the sexual abuse conduct in the case. The court noted that the proper redaction (of the messages related to the sexual offender’s status) removed the possibility the jury would learn of the defendant’s sexual offender status in the first part of the trial. Specifically, the Court of Criminal Appeals held that the trial court did not abuse its discretion in the way it handled the case, including the partial redaction of the text messages.

The information was extremely relevant, the context reflected that the defendant was confessing to the incident itself, and the redaction of the other portions was an appropriate exercise of discretion on the part of the trial court to address the situation.

PRACTICE POINT: The case reflects a good discussion by the appellate court in considering the actions of the trial court in making its best determination and then redacting certain information which harm the defendant about the sexual offender status while at the same time recognizing that the defendant's confession was extremely relevant and thereby admissible. This resulted in the trial court's ruling that the statement was admissible but subject to redaction to keep the jury from being aware of the defendant's sexual offender status at that point in the jury trial.

State v. Spencer (Tenn. Cr. App. 1/22/24)

"INVOCATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS": THE TRIAL COURT ERRED IN ADMITTING CERTAIN STATEMENTS MADE BY THE DEFENDANT INTO EVIDENCE WHEREBY THE DEFENDANT WAS ASSERTING HIS CONSTITUTIONAL RIGHTS AS FOLLOWS: (1) THAT THE OFFICERS NEEDED A WARRANT TO ENTER HIS HOUSE AS HE REFUSED TO CONSENT TO A SEARCH OF HIS HOME; (2) THAT THE DEFENDANT WAS HEADED TO HIS LAWYER'S OFFICE AND THEREBY ASSERTING HIS RIGHT TO HAVE A LAWYER REPRESENT HIM

FACTS: The defendant was convicted by a Knox County jury of two counts of rape of a child, one count of attempted rape of a child and one count of aggravated sexual battery.

The defendant challenged the court's rulings which (1) allowed the state to introduce statements the defendant made to law enforcement officers that they needed a warrant to enter his residence based upon his refusal to give consent for the search; and (2) the trial court abused its discretion by allowing the state to admit the statement by the defendant that he was on his way to his attorney's office.

As background for these issues, officers were dispatched to the victim's house while the victim and her mother were still at the hospital. The officers were sent to collect possible evidence and to contact the defendant about the reported rape of the minor child. When the officers arrived at 11:00 p.m. they encountered the defendant's son during a time when the defendant and his son were on a video chat. Through this medium, the defendant told the police, "You have to have a warrant" to enter the house. The officers interrupted the conversation between the defendant and his son to ask about the defendant's location, to which the defendant responded, "I'm headed to my lawyer's office. What's going on?" An officer's body camera captured both statements.

The defendant objected at trial, arguing that it was irrelevant that somebody had exercised a constitutional right and improper for the state to offer such evidence in order to draw an inference of guilt on the part of the defendant for (1) requiring a warrant to enter the residence and (2) in regard to his desire to speak to a lawyer. The defendant maintained that these issues were irrelevant but also were improperly used to draw an inference of guilt to the fact finder based upon the defendant's insistence of the officers obtaining a warrant and his insistence on being able to communicate with his lawyer.

After taking the matter under advisement, the trial court allowed the state to introduce the unredacted body camera footage with both statements by the defendant.

HELD: In regard to the defendant's refusal to consent to the search and his requiring a search warrant for any search, the Court of Criminal Appeals held that the trial court erred in admitting his statement that the officers needed a warrant to enter his house.

The Court of Criminal Appeals noted that the courts in Tennessee have not directly addressed this issue. The court did note the following principles of law in regard to the case:

1. The Supreme Court of Tennessee has recognized that "there is authority that the refusal of an accused to consent to a search without a warrant may not be used against him to imply guilt." Tennessee courts have only allowed this type of evidence when it was offered for other "relevant and admissible"

purposes, such as refuting the notion that the defendant was "cooperating voluntarily with investigating authorities."

In other words, when the defendant had testified that he had cooperated voluntarily with the authorities, the previous court found that it was appropriate to bring out the fact the defendant had insisted on having a search warrant.

2. Other courts in other jurisdictions have held that a defendant's "exercise of a constitutional right, whether to refuse to consent to a search, to refuse to waive Miranda rights or to decline to testify at trial, is not evidence of guilt." Other courts have also stated that there was little, if any, valid distinction between the privilege against self-incrimination and the privilege against unreasonable searches and seizures when addressing issues of constitutional rights.

3. Courts have noted that asking a fact finder (such as a jury) to draw adverse inferences from a refusal to consent to a search may be impermissible if the testimony is not admitted as a fair response to a claim by the defendant or for some other purpose.

4. Courts have noted that while refusing to consent to a warrantless search is equally available to the innocent and the guilty, a prosecutor's introduction of the refusal can't have but one objective: to induce the jury to infer guilt.

In considering those factors, the Court of Criminal Appeals noted that the state did not have any purported argument that there was any other reason to admit the fact that the defendant insisted upon a search warrant for any other purpose than to establish or infer the defendant's guilt.

The Court of Criminal Appeals therefore concluded that the evidence of the defendant's statement that he required a search warrant should not have been admitted. The court did conclude that the entry of the evidence was harmless beyond a reasonable doubt based upon the strength of the state's evidence.

5. In regard to the defendant's statement of his intent to consult with a lawyer, the Court of Criminal Appeals also held that the trial court abused its discretion by allowing the state to admit the statement that he was on his way to his attorney's office. The state had maintained that the statement of the defendant that he was headed to his lawyer's office was not an

invocation of his right to counsel and also that the statement was not credible because it was made at 11:00 p.m. when most lawyers' offices were closed. The state also argued that the statement was circumstantial evidence of the defendant's flight when combined with his leaving the house after the victim disclosed the rape and his abandoning the victim's mother's car in an unfamiliar neighborhood, and his staying with a friend.

In regard to principles related to this issue, the Court of Criminal Appeals noted the following:

1. Although the issue has not been directly addressed in Tennessee, other courts have held that a prosecutor may not refer to a defendant's decision to meet with counsel, at least to imply that the defendant is guilty.

2. "A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to the criminal indictment, implies guilt." When a defendant seeks a meeting with legal counsel before the initiation of formal charges or custodial interrogation, courts have recognized that the due process clause of the 14th Amendment prohibits the state's discussion of this fact at trial (the court referring to a Massachusetts case in 2007).

3. The reason for this prohibition is simple: this evidence is likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty because he had done something for which he needed a lawyer to defend him.

4. Evidence of a criminal defendant's consultation with an attorney is highly prejudicial, as it is likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty.

The Tennessee Court of Criminal Appeals quoted these authorities from other states and then concluded: "For these reasons, the State must tread carefully before seeking admission of any evidence that the accused sought legal advice or tried to meet with a lawyer before charges are brought. However, the prohibition is not absolute. Where evidence of a legal consultation is relevant to a material issue at trial, and where the jury is properly instructed on how to consider the evidence, rare cases may exist where the evidence is admissible." The CCA referred to cases in other jurisdictions when there was an issue regarding motive of the defendant

which made the choice of counsel of the defendant relevant and another case where there was an issue bearing on sanity.

The court noted that the present case was not one of those rare cases. The court noted that even if it was true that the defendant lied to the police officers about why he could not meet with them, the fact could be brought up by establishing false information that was given to officers by the fact that he was going to be having a meeting with someone without ever mentioning that the defendant had stated his desire to meet with a lawyer. The court noted that in other words, in a circumstance of that nature, the defendant's falsely representing that he was on his way to meet with someone could be pointed out but with the fact that it was a lawyer being redacted. The court found that the defendant's statement about meeting a lawyer specifically was simply irrelevant. The court noted that the state did not even attempt to go into any specific acts that would make the statement relevant as the state was only seeking to prejudice the defendant in the eyes of the fact finder about the inference of guilt of someone seeking to obtain a lawyer.

The court then made the following statement:

"We remain mindful that [m]ost jurors . . . are not schooled in the law and that from such evidence and arguments, a juror might easily draw the inference . . . that it was [the defendant's] idea to seek counsel because he had done something for which he needed a lawyer to defend him. Accordingly, we view [e]vidence of a criminal defendant's consultation with an attorney [as] highly prejudicial, as it is likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty."

The court therefore concluded that the state should not have played the portion of the video in which the defendant stated he was on his way to his attorney's office.

The court also found that based upon the overwhelming proof of the defendant's guilt that this introduced proof was harmless beyond a reasonable doubt.

PRACTICE POINT: This is an important point to be aware of that the defendant's assertion of exercising his constitutional rights is not something that should be lightly taken and should not be allowed into proof. It is important for us to make proper rulings in General Sessions Court about this issue even if the evidence is being addressed to us as judges without a jury, as we should note that we can take no negative inference from such a point, just like a jury cannot take a negative inference, and then we can make appropriate rulings about such evidence not being relevant or admissible as it addresses constitutional rights of which the defendant has a right to invoke.

State v. Sullivan (Tenn. Cr. App. 1/24/24)

PROOF OF VICTIM'S PRIOR SEXUAL BEHAVIOR: TRIAL COURT DID NOT ERR IN FINDING THAT EVIDENCE OF THE VICTIM'S PREVIOUS SEXUAL CONDUCT WHICH OCCURRED TWO YEARS PRIOR TO THE ALLEGED RAPE IN THE PRESENT CASE WAS IRRELEVANT

FACTS: The defendant was convicted of aggravated rape and sentenced to seventeen years in prison. The defendant maintained that the trial court erred in its denial of the defendant's motion to present proof of the victim's prior sexual behavior pursuant to Tennessee Rule of Evidence 412 and in denying the defendant the opportunity of cross-examining the victim of the same.

HELD: The trial court did not abuse its discretion when it ruled that the 2012 incident, two years prior to the alleged rape in the present case in 2014, was irrelevant due to time difference and therefore inadmissible.

The Court of Criminal Appeals noted that the trial court found the evidence to be irrelevant because it had occurred two years prior to the

alleged rape and because there was no penetration during the 2012 incident as there was in the 2014 incident. The court found that due to the temporal disparity and the lack of penetration, the defendant's desired evidence was irrelevant to the rape charge of 2014. The Court of Criminal Appeals also noted that the trial court found that the 2012 incident would not impeach any statement by the victim that she had not been engaged in sexual activity at or near the time of the alleged rape in 2014.

The Court of Criminal Appeals also found that the defendant's claim that the state had "opened the door" to the admission of the evidence was not well taken. The court noted that the defendant argued that the state opened the door to testimony about the 2012 incident by asking the question, "At this point in time, were you engaged in sexual activities with anybody," to which the victim responded "no." The court noted that the trial court had properly found that the state's questioning during the trial was clearly limited to sexual activity that was contemporaneous to the time the alleged rape in 2014 and the question had not addressed any prior sexual activity. The court noted that the evidence of the 2012 incident would not in any way impeach the victim's testimony that she was not engaged in sexual activities at the time of the 2014 rape.

State v. Glover (Tenn. Cr. App. 3/5/24)

STIPULATIONS FOR PROOF: IT IS NOT THE DUTY OR FUNCTION OF A TRIAL COURT TO REQUIRE A PARTY TO ENTER A STIPULATION OR TO DECIDE WHAT WILL BE STIPULATED

FACTS: In a case in which the Knox County jury convicted the defendant of unlawful possession of a firearm by a convicted felon, the defendant argued that the trial court had erred by forcing him to stipulate that his prior convictions were felony crimes of violence.

The records show that "the trial court provided the defendant with three options: plead guilty to the firearm offenses, enter into a stipulation, or permit the state to introduce evidence regarding his prior violent felony convictions at trial. When the defendant declined to enter a guilty plea to the

firearm offenses and objected to a stipulation, the trial court instructed the parties to enter into a stipulation and told them the language to use. The trial court also amended the firearm counts in the indictment and modified the jury instructions for the firearm offenses to mirror the language in the stipulation."

The defendant argued that he was entitled to a new trial because he did not voluntarily agree to stipulate to his status as a convicted felon.

The transcript of the case indicated that the following exchange took place during discussions:

> Trial Court: Because you're stipulating and agreeing that he meets – his status meets the elements of that statute. And the only issue to litigate is, did he have possession of the weapon? That's what you're doing, correct?
>
> Defense Counsel: Can I have just one moment to discuss this with Mr. Hurn?

The court's opinion points out that "defense counsel then discussed the stipulation with the defendant and announced to the court that the defendant agreed to stipulate." At trial, the stipulation that was entered into and submitted to the jury was the following: "The defendant at the time of the offense on trial was a convicted felon in violation of TCA 39-17-1307(b)(1)(A)."

HELD: The Court of Criminal Appeals concluded "that the stipulation was a result of a mutual agreement reached by the parties and that the jury could have considered this stipulation with the other evidence in the case."

The Court of Criminal Appeals pointed out the following key principles of the law in regard to stipulations:

1. Generally, a stipulation is an agreement between counsel with respect to business before a court.

2. Stipulations are favored and encouraged because they "expedite the business of the courts."

3. It is noted by the Tennessee Supreme Court, Tennessee courts recognize "stipulations are a matter of mutual agreement and not a matter of right by one party or the other in an adversary proceeding."

4. Before a stipulation is binding on the parties, it must be clear from the record that both parties agree to it.

5. Once a stipulation is made, it binds the parties to the agreed facts and must be enforced by the courts.

6. Importantly, it is not the duty or function of a trial court to require a party to enter a stipulation or to decide what will be stipulated.

In regard to the defendant's claim that the trial court erred by "engaging in extensive discussions regarding whether a stipulation would be entered and what would be stipulated," in violation of previous holdings by the appellate courts, the Court of Criminal Appeals found as follows:

1. The parties themselves discussed stipulating that the defendant had a prior qualifying felony conviction, and the trial court merely offered various alternatives for consideration and attempted to assist the parties in achieving their goal.

2. Previous findings by the Tennessee appellate courts do "not prohibit a trial court from discussing the terms of a stipulation with the parties or even proposing language for the parties to consider."

3. The trial court discussed options, including the stipulation procedure, to account for the defendant's concerns. The court insisted, however, that the decision be the defendant's voluntary choice, and it permitted the defendant to speak with his lawyer about the issues.

4. The defendant agreed to the stipulation after discussing it with his lawyer, and at no time did he object to the stipulation's procedure or language.

The court therefore concluded that the stipulation was the result of mutual agreement reached by the parties.

State v. Hurn (Tenn. Cr. App. 10/24/23)

FERGUSON ISSUE

FAILURE TO PRESERVE BODY CAMERA FOOTAGE: EVEN THOUGH THE STATE HAD A DUTY TO PRESERVE THE BODY CAMERA FOOTAGE OF THE VICTIM AND THE DEFENDANT SPEAKING TO OFFICERS AFTER THE INCIDENT, THE COURT CONCLUDED THAT THE DEFENDANT RECEIVED A FUNDAMENTALLY FAIR TRIAL AND EXPERIENCED NO MEASURABLE DISADVANTAGE BECAUSE OF THE MISSING FOOTAGE

FACTS: In a case involving domestic assault, the defendant maintained that the trial court erred in failing to dismiss the case based upon the state's failure to preserve the footage from Deputy Gilliam's body camera. The missing evidence purportedly on the body camera was not of the domestic assault incident itself but was footage of the victim and the defendant speaking to officers after the incident. The footage was lost, but the victim and the investigating officer both testified and the defendant was able to cross-examine each of the witnesses.

HELD: The Court of Criminal Appeals found that the trial court did not abuse its discretion in denying the defendant's Ferguson motion to dismiss the case due to the fact that the defendant did in fact receive a fundamentally fair trial and experienced no measurable disadvantage because of the missing body camera footage.

The Court of Criminal Appeals noted the following key principles in analyzing a case involving a significant Ferguson issue:

1. The Tennessee Supreme Court in State v. Ferguson in 1999 held that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial. Fundamental fairness, an element of due process, requires a review of the entire record to evaluate the effect of the state's failure to preserve the evidence.

2. The first issue that a trial court must determine in a Ferguson case is whether or not the state had a duty to preserve the evidence. To be

"constitutionally material," the evidence must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

3. If the trial court determines that the state had a duty to preserve the evidence, the court must determine that the state failed in its duty.

4. If the trial court concludes that the state lost or destroyed evidence that it had a duty to preserve, the trial court must consider three factors to determine the appropriate remedy for the state's failure: (i) the degree of negligence involved; (ii) the significance of the destroyed evidence considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (iii) the sufficiency of the other evidence used at trial to support the conviction.

The court noted that in the present case at the pretrial hearing, the trial court concluded that the state had a duty to preserve the body footage and the state's inability to access the footage violated the duty.

In looking at the factor of the degree of negligence involved and whether or not the conduct was simple negligence or gross negligence, the appellate court agreed with the trial court that the lost evidence was "slight" because the officers did everything they were supposed to do to try to upload the footage and to access and/or preserve the evidence. Secondly, in looking at the significance of the missing evidence, the court noted that the footage was not of the incident or alleged crime itself but instead was footage of the victim and the defendant speaking to officers after the incident. The court noted that the absence of the recording was not fatal to defendant's fair trial rights, as other evidence regarding the incident was still available, specifically in the testimony of the victim and the investigating officer. The court noted that defense counsel was able to cross-examine the witnesses to impeach them and to point out any weaknesses in the evidence. As to the third factor, sufficiency of the convicting evidence, the court noted that there was no proof whatsoever that anything on the tape would have been exculpatory. The court found that from the victim's testimony and the officer's testimony, as well as photographs of the victim's injuries, the evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant committed the offense of domestic assault.

State v. Webb, (Tenn. Cr. App. 11/28/23)

MISSING OR LOST BODY CAMERA RECORDINGS: EVEN THOUGH THE STATE HAD A DUTY TO PRESERVE EVIDENCE IN THE FORM OF BODYCAM FOOTAGE, THE LOSS OF THE EVIDENCE WAS NOT INTENTIONAL BUT WAS SIMPLE NEGLIGENCE, THERE WAS SOME BODY CAMERA FOOTAGE WHICH WAS PRESERVED AND SUPPORTED THE OFFICER'S TESTIMONY, AND OTHER EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS

FACTS: Officer Keller was dispatched at approximately 3:00 a.m. in regard to a defendant being asleep in a car, keys in the ignition, car on wrong side of road, and the scene where a mailbox had been hit by the car. The officer found that the defendant was at the scene and in apparently an intoxicated condition and the officer observed a handgun in the car when the defendant was exiting the car, all of which led the officer to conclude that there was a neighborhood safety concern with the conduct of the defendant. The officer had body camera but the evidence could not be located at the time of the trial other than approximately twenty-three seconds of the video preserved on the officer's cell phone.

HELD: The Court of Criminal Appeals held that the trial court had properly found that the defendant was not denied his right to a fundamentally fair trial and that the trial court had properly given a curative jury instruction regarding the missing or lost evidence.

The court noted the following principles in regard to Ferguson issues which arise at trial:

1. The state has a duty to preserve evidence that possesses exculpatory value and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

As to this factor, Officer Keller testified that he engaged his body camera and that the recording would have depicted the scene as Officer

Keller had first observed it, including the defendant's demeanor. The court found that the evidence was relevant to the case and therefore the body camera recording was potentially exculpatory, and the state had a duty to preserve it.

2. Once a Ferguson issue is determined, the first inquiry by the trial court is to whether the state had a duty to preserve the evidence, following which the state is required to consider three factors: (i) the degree of negligence involved; (ii) the significance of the destroyed evidence considered in light of the other evidence available; and (iii) the sufficiency of the other evidence used at trial to support the conviction.

In regard to these factors, the court found that the record did not establish any act on the part of the state to deliberately delete the evidence in bad faith but that it was simply negligence in failing to properly secure the evidence.

In regard to the reliability of the substitute evidence, the court noted that the portion of the body camera did support the officer's testimony, even though the court did point out that "it is curious that Officer Keller found it necessary to copy part of the recording even though he testified that he saved the recording to the police data base where it could be accessed by law enforcement." Nevertheless, the court pointed out that the missing body camera recording would have been approximately one and one-half minutes in length and that the short footage had supported the testimony of Officer Keller.

In regard to the sufficiency of the other evidence to support the convictions, the court noted that the portion that was preserved showed the defendant attempting to flee when Officer Keller was trying to detain him, and it showed the defendant's car parked partially in a yard, on the wrong side of the road, and appearing to have hit a mailbox. The officer's testimony established the finding of the handgun, all of which gave Officer Keller the necessary reasonable suspicion to detain the defendant and to investigate the case, resulting in the officer's discovering the defendant's criminal history and the fact that he was in possession of a firearm by a convicted felony.

State v. Washington (Tenn. Cr. App. 12/27/23)

PROBATION VIOLATION

HEARSAY EVIDENCE: IN ORDER FOR HEARSAY EVIDENCE TO BE ADMISSIBLE IN A PROBATION REVOCATION HEARING, A TRIAL COURT MUST FIND THAT "GOOD CAUSE" EXISTS TO JUSTIFY THE DENIAL OF THE RIGHT TO CONFRONT WITNESSES AND THAT THE HEARSAY EVIDENCE IS "RELIABLE"

FACTS: The defendant maintained that the trial court erred when it admitted hearsay evidence, being the latent fingerprint report and a DNA report, as such evidence was not reliable hearsay and that the trial court did not find there was "good cause" to justify the denial of the right to confront witnesses by the defendant.

In February 2019, the defendant pled guilty to robbery and kidnapping and ended up with a total effective sentence of twelve years to be served at thirty percent after the defendant served one year day-for-day.

At the probation revocation hearing, Officer Barber with the Colombia Police Department testified that he previously knew the defendant and that on 10/4/20, he was called to a scene of a crime where he found over twenty shell casings in the roadway including those expended from a 9mm and a forty-caliber weapon. There were over sixteen bullet impressions on the vehicle that was wrecked at the scene, along with cell phones and a gun visible in the vehicle. The defendant and his passenger were taken to the Regional Hospital with gunshot wounds. Barber learned that the vehicle at the scene was registered to the defendant's girlfriend, following which law enforcement seized the vehicle and obtained a search warrant. The search revealed fingerprints and blood on the gun in the vehicle which was found where the defendant was sitting in the vehicle. DNA testing showed that the defendant's DNA was present on the gun and his fingerprint was additionally found on the weapon. A search of the phone in the car revealed that it belonged to the defendant. On the phone's camera roll was a "selfie" of the defendant and what appeared to be the weapon on which his DNA

was found. The photograph was time stamped four days before the shooting. Officer Barber interviewed the defendant about the shooting and the defendant told him that the handgun belonged to the passenger in the vehicle, but he admitted that he had held the weapon at one point. Barber testified that the defendant was charged with the federal offense of being a felon in possession of a handgun.

HELD: The Court of Criminal Appeals concluded that the trial court "did not abuse its discretion when it determined that the state had proven by a preponderance of the evidence that the defendant violated his probation by possessing a firearm, even without considering the TBI crime lab report.

The Court of Criminal Appeals made the following determinations:

1. The Court of Criminal Appeals held that the trial court did not make a finding of "good cause" that would justify the absence of the TBI crime lab technician who authored the report at the probation revocation hearing. The CCA noted that the trial court simply noted the lab report was "reliable hearsay," and thereby denied the defendant his right to confront and cross-examine the adverse witness. The court found that it need not determine whether or not a specific finding of "good cause" was "implicitly" found by the trial court or whether or not the defendant's confrontation rights were violated, because the court found specifically that any such error would be harmless given the weight of the other evidence admitted.

2. The Court of Criminal Appeals concluded specifically "that the trial court did not abuse its discretion when it determined the state had proven by preponderance of the evidence that the defendant violated his probation by possessing a firearm, even without considering the TBI crime lab report."

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

1. Probation revocation is a two-step consideration requiring trial courts to make two distinct determinations as to (i) whether to revoke probation and (ii) what consequences will apply upon revocation.

2. The probation statute provides for two categories of probation violations, technical and non-technical, with different penalties for both. TCA 40-35-310.

3. The following are classified as non-technical violations: a defendant's commission of a new felony or a new Class A misdemeanor, a zero-tolerance violation as defined by the department of correction community supervision matrix, absconding, or contacting the victim in violation of a condition of probation.

4. Once a trial court determines that a defendant has committed a non-technical violation of probation the trial court may: (1) order confinement for some period of time; (2) cause execution of the sentence as it was originally entered; (3) extend the defendant's probationary period not exceeding one year; (4) return the defendant to probation on appropriate modified conditions; or (5) resentence the defendant for the remainder of the unexpired term to a sentence of probation.

5. In general, hearsay statements are inadmissible pursuant to Tennessee Rule of Evidence 802.

6. Strict rules of evidence do not apply at revocation hearings.

7. Reliable hearsay has been held admissible in a probation revocation hearing so long as the defendant had a fair opportunity to rebut the evidence.

8. In order for hearsay evidence to be deemed admissible, a trial court must find that "good cause" exists to justify the denial of the right to confront witnesses and that the hearsay evidence is reliable.

In analyzing the case, the court did find that any admission of the TBI crime lab report, or the defendant's DNA is harmless error under the facts of the case as such testimony was harmless beyond a reasonable doubt.

Under the facts of the case, the defendant's cell phone, which was legally searched, shows that he exchanged messages referencing his need for a magazine for a weapon days before the shooting. The court noted that the picture was a self-taken photograph on his cell phone with a weapon that appeared to match the one used in the shooting. The court also noted that at the scene of the shooting, the weapon was found near where the defendant was sitting. The court also noted that when confronted with the TBI report,

the defendant admitted that he had held the weapon but said his passenger was the owner of the weapon.

The court therefore concluded that the defendant clearly possessed the weapon and there was sufficient evidence to prove that by preponderance of the evidence even without consideration of the TBI report.

The court noted that a person "constructively possesses" an item when he or she has the power and intention at a given time to exercise dominion and control over the contraband either directly or through others. Constructive possession has also been described as the ability to reduce an object to actual possession. The court noted that previous cases had found that a probation violation exists when the defendant had the ability to reduce a handgun to his actual possession. The court noted that, in the present case, even if the defendant did not have actual possession, he clearly had constructive possession of the weapon on multiple occasions.

The court noted that thereby the state had proven that the defendant violated the terms of his probation by possessing a weapon, which was "a non-technical violation" for which the defendant currently faced a federal gun charge. The court held that it was within the trial court's authority to order the defendant to serve his original sentence upon revoking the defendant's probation sentence.

State v. Miller (Tenn. Cr. App. 10/30/23)

VIOLATION OF DUE PROCESS: DEFENDANT'S ARGUMENT THAT HIS DUE PROCESS RIGHTS WERE VIOLATED BY TRIAL COURT REVOKING HIS PROBATION BY RELYING ON GROUNDS NOT ALLEGED IN PROBATION VIOLATION WARRANT IS HELD NOT TO BE WELL TAKEN SINCE TRIAL COURT, AT LEAST IN PART, RELIED UPON A GROUND ALLEGED IN THE WARRANT AND THE COURT ALSO FOUND THAT SUFFICIENT ACTUAL NOTICE HAD BEEN GIVEN TO THE DEFENDANT ABOUT THE COURT'S INTEREST IN THE

DEFENDANT'S VIOLATING THE NO-CONTACT PROVISIONS OF HIS BOND CONDITIONS

FACTS: On 4/18/23, a probation violation warrant was issued against the defendant due to the fact that the defendant had been arrested for violating a no-contact order. The probation violation warrant alleged the defendant had violated "rule number one" of the terms of his probation, which required him to obey the law. Specifically, the warrant alleged the defendant was arrested for violating the no-contact provision of his Davidson County bond conditions. The officer who made the arrest testified at the revocation hearing about the events giving rise to defendant's arrest for violating the no-contact provision. Defense counsel suggested that the trial court had gone outside of the bounds alleged in the warrant, at which time the trial court recalled that the warrant alleges that "defendant violated his probation by violating a no-contact order, to wit the testimony that we heard from the officer from Nashville."

The probation revocation hearing took place on two days, including the first day on June 5, and continued to develop further information to June 8, 2023. The case was continued because the trial court was interested in recordings of the defendant's phone calls from the Knox County Jail and the prosecutor advised that he could get a copy of the recordings of the calls within a few days. The case resumed on 6/8/23, and the records reflected that the defendant had called the victim 269 times since he was taken into custody with the Knox County Jail. The prosecutor also obtained a copy of the no-contact order which was introduced as an exhibit.

HELD: The Court of Criminal Appeals held that the defendant's due process rights were not violated by the actions of the trial court because the trial court had "relied, at least in part, on the grounds alleged in the violation warrant in revoking defendant's probation." The court noted that the state had proven and the court had found that the defendant violated "rule number one" of the terms of his probation which required him to obey the law, which was specifically to obey the no-contact provision of the bond conditions.

Secondly, to the extent the trial court relied on grounds not alleged in the warrant, the Court of Criminal Appeals held that the defendant had

"actual notice" of the grounds regarding the no-contact order. The no-contact order had been referenced in the original violation of probation warrant but additionally the court had pointed specifically to the no-contact order and had continued the case for a few days in order to have specific records of the phone calls and to have the specific record of the no-contact order. The court noted that at this point in time the defendant had received actual notice of the court's interest in those violations and therefore that the defendant had actual notice of the issues facing the defendant pertaining to the no-contact order violations.

In support of its conclusions, the Court of Criminal Appeals pointed out the following specific principles of law in these type matters:

1. Defendants are entitled to "minimum due process rights" in probation revocation proceedings. This includes written notice of the alleged violations.

2. However, "actual notice suffices in the relaxed due process context of probation revocation proceedings." Generally, revoking a defendant's probation based on grounds not alleged and noticed to the defendant is a violation of due process. That said, "a trial court's partial reliance on a ground for revocation not noticed to the defendant is harmless if the trial court also relied upon properly noticed grounds supported by the evidence."

PRACTICE POINT: Three key rules are stated in this case pertaining to violation of probation:

1. Due process rights are relaxed somewhat in the context of probation revocation proceedings.

2. It is sufficient for a court to find the violation of probation if based, "at least in part," on the grounds alleged in the violation warrant.

3. To the extent that a trial court relies on grounds not alleged in the warrant, it is sufficient if the defendant had "actual notice of such grounds," and had the opportunity based on that notice to prepare for the violation of probation hearing.

State v. Dooley (Tenn. Cr. App. 12/26/23)

RECUSAL MOTIONS

MOTION TO RECUSE: IN AN ACTION TO SET ASIDE A FINAL FORFEITURE OF THE BOND OF A DEFENDANT, THE BONDING COMPANY FAILED TO INCLUDE AN AFFIRMATIVE STATEMENT THAT THE MOTION WAS NOT BEING PRESENTED FOR ANY IMPROPER PURPOSE AND THEREFORE THE ISSUE OF RECUSAL WAS WAIVED

FACTS: The appellant, A Close Bonding Company, LLC, acted as the bail bond surety in a criminal case. The bonding company filed a motion to recuse claiming that the record demonstrated that the trial court was biased against the bonding company. The trial court denied the motion.

HELD: The Court of Criminal Appeals held that the motion to recuse filed by the bonding company did not include an affirmative statement that the motion was not being filed or presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The Court of Criminal Appeals noted that the affirmative statement was mandatory under Tennessee Supreme Court Rule 10B, and that a defective motion could result in the waiver of the recusal issue.

State v. Loredo (Tenn. Cr. App. 3/04/24)

RULE OF SEQUESTRATION

EXPERT WITNESS: EVEN THOUGH THE WITNESS WAS BOTH A FACT WITNESS AND AN EXPERT WITNESS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING INVESTIGATOR JINKS TO REMAIN IN THE COURTROOM DURING THE TESTIMONY OF ONE OF THE WITNESSES IN THE CASE SINCE HIS TESTIMONY AS AN EXPERT WITNESS WAS SHOWN TO BE "ESSENTIAL TO THE PRESENTATION OF THE STATE'S CAUSE"

FACTS: In a case in which the defendant was convicted of conspiracy to possess twenty-six grams or more of cocaine with the intent to sell among other charges, the defendant asserted that the trial court erred by exempting Investigator Jinks from the rule of sequestration during the testimony of a state witness. The state argued that the trial court did not abuse its discretion in finding Investigator Jinks needed to hear Ms. Garrett's testimony as such was necessary for the expert to "form an expert opinion that was essential to the state's case."

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in allowing Investigator Jinks to remain in the courtroom during Garrett's testimony, as the expert's testimony as an expert witness was shown to be "essential to the presentation of the state's cause," and Investigator Jinks was therefore exempt from the rule of sequestration.

The Court of Criminal Appeals noted the following important principles in regard to issues involved in the sequestration of witnesses:

1. The trial court has broad discretion in controlling the course and conduct of a trial.

2. Tennessee Rule of Evidence 615, often referred to as the rule of sequestration, provides:

> "At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by 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. This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness."

3. The purpose of the rule is to prevent a witness from changing or altering his or her testimony based on testimony heard or facts learned from other testifying witnesses.

4. The Supreme Court has recognized that "the dangers Rule 615 is intended to prevent generally do not arise with regard to expert witnesses in any proceeding. In fact, the rules of evidence provide that an expert witness may testify and base an opinion on evidence or facts made known to the expert at or before a hearing and the facts need not be admissible at trial. Moreover, an expert witness often may need to hear the substance of the testimony of other witnesses in order to formulate an opinion or respond to the opinions of other expert witnesses. In short, allowing an expert witness to remain in the courtroom as an essential person generally does not create the risk that

the expert will alter or change factual testimony based on what is heard in the courtroom."

The Court of Criminal Appeals noted that in the present case the defendant invoked the rule of sequestration at the beginning of trial and the trial court ordered sequestration of the witnesses. The trial court had rejected any argument of the defendant in regard to the need to sequester the witness because he was a fact witness, noting the importance of an expert witness being able to hear certain testimony at a trial.

The Court of Criminal Appeals therefore concluded the trial court did not abuse discretion in allowing Investigator Jinks to remain in the courtroom during Ms. Garrett's testimony.

The court also noted the defendant had not identified any prejudice that he suffered due to Investigator Jink's presence during the testimony and there was no showing by the defendant that Investigator Jinks improperly changed any testimony after hearing the testimony of Ms. Garrett.

State v. Cody (Tenn. Crim. App. 12/28/23)

SEARCH AND SEIZURE

CONSENT TO SEARCH MOTEL ROOM: MAN WHO ANSWERED DOOR AT A MOTEL ROOM WHEN OFFICERS ARRIVED TO INVESTIGATE POSSIBLE DOMESTIC DISPUTE HAD ACTUAL AUTHORITY TO GRANT CONSENT TO SEARCH THE ROOM BASED UPON THE FACTS, WHICH INCLUDED HIS ANSWERING THE DOOR, HIS HAVING A KEY CARD WHICH HE USED TO GO IN AND OUT OF THE ROOM SEVERAL TIMES DURING THE OFFICERS' INVESTIGATION, AND THE OFFICERS FOUND HIM IN POSSESSION OF A KEY CARD

FACTS: The defendant was found guilty of assault, kidnapping, felonious possession of drugs, and other charges. The defendant maintained that the

trial court erred when it denied his motion to suppress evidence found during the search of the motel room as the defendant asserted that Mr. Ingraham was at the motel room only to get his rental car but had no authority to consent to law enforcement searching the motel room.

HELD: The Court of Criminal Appeals concluded that Ingraham had actual authority to grant consent to search the room based upon his answering the door and speaking with law enforcement officers when they arrived at the motel room and his telling officers it was a simple dispute between the defendant and his girlfriend. The court also noted that Ingraham had used a key card to go into and out of the room several times during the investigation and that the officers had found him in possession of a key card. The court also noted that the person to whom the motel room was registered (Mr. Henries) had also told police that he rented the room for "Chris," which had presumably referred to Chris Ingraham.

The court noted the following key principles when evaluating a case of this nature:

1. Tennessee courts have previously concluded that valid consent to search exists if (a) the third party in fact has common authority or (b) a reasonable person, given the facts and circumstances available to the police, would have concluded that the consenting party had authority over the premises.

2. Courts consider the reasonableness of an officer's belief under the totality of the circumstances, and no single fact is determinative.

3. The consent doctrine applies to hotel rooms, and under the Fourth Amendment, an occupant of a hotel room has a reasonable expectation of privacy there, even though he is just a guest, not an owner, of the room.

4. Thus, a warrantless search of a hotel room is unreasonable unless an exception applies.

5. The fact that a person is an overnight guest in a residence or an apartment, standing alone, is sufficient to clothe the guest with a legitimate expectation of privacy in the premises sufficient to challenge the search in any resulting seizure.

6. The same principles apply to hotel rooms and therefore an occupant of a hotel room has a reasonable expectation of privacy even though he is just a guest and not an owner of the room.

7. Courts in Tennessee have recognized that authority of third parties sharing hotel rooms to consent to a search of the room even if the room is not registered in their name.

8. When one occupant of a hotel room consents to a search and another does not, the question is whether the consenting occupant had actual or apparent authority. Actual authority exists when an occupant was a registered guest, placed his or her belongings in the room, spent time in the room, and intended to stay there overnight.

The Court of Criminal Appeals concluded in the present case, reviewing the evidence presented at the suppression hearing and the trial, that Ingraham had actual authority to grant consent to search the hotel room. Law enforcement officers had arrived in response to a domestic dispute, Ingraham answered the door and spoke with law enforcement officers, Ingraham showed a knowledge of what had gone on, Ingraham had used the key card to go in and out of the room, and other evidence presented that the person to whom the room was registered had rented the room for Chris (Ingraham).

State v. Gray (Tenn. Cr. App. 3/6/24)

COMMUNITY CARETAKING DOCTRINE: THE COMMUNITY CARETAKING DOCTRINE WAS PROPERLY INVOKED BY OFFICER KELLER BASED UPON FACT THAT KELLER WAS DISPATCHED TO SCENE AT 3:00 A.M. AND FOUND THE DEFENDANT ASLEEP IN A CAR ON THE WRONG SIDE OF THE ROAD HAVING APPARENTLY HIT A MAILBOX, FOLLOWING WHICH THE OFFICER OBSERVED A HANDGUN IN THE VEHICLE WHEN THE DEFENDANT WAS

GETTING OUT OF THE CAR, ALL PRESENTING ARTICULABLE FACTS REGARDING THE DEFENDANT'S POSING A NEIGHBORHOOD SAFETY CONCERN

FACTS: The defendant was convicted in Madison County for unlawful possession of a weapon by a convicted felon, resisting arrest, and driving on revoked, for which he received a 15-year sentence.

The defendant contended that the trial court erred in denying the defendant's motion to suppress the handgun, arguing that the handgun could not be seized under the plain view doctrine because the illegality of the weapon was not immediately apparent at the time the officer observed the gun and that any community caretaking exception did not extend to Officer Keller's investigation of the defendant's felony status.

The record did establish that "Officer Keller was dispatched at approximately 3:00 a.m., after which he found defendant apparently asleep in a car, the keys in the car's ignition, car on the wrong side of the road, the car partially in the road and partially in a home's front yard, and the car appearing to have hit a mailbox." Keller testified that he believed the defendant was intoxicated and he was concerned for the defendant's well-being. Officer Keller also testified that he saw the handgun when the defendant was getting out of the car.

HELD: The Court of Criminal Appeals held that the trial court did not err in denying the defendant's motion to suppress the handgun due to the fact that specific and articulable facts appropriately raised concerns regarding the defendant's ability to drive safely away from the scene and posed questions regarding whether the defendant posed a neighborhood safety concern.

The Court of Criminal Appeals noted the following principles when considering a case involving these issues:

1. Constitutions of the United States and the State of Tennessee protect individuals from unreasonable searches and seizures, and warrantless procedures are presumed unreasonable.

2. One exception to the warrant requirement is pursuant to the community caretaking doctrine, whereby police officers may, separate from any duties

of investigation of criminal activity or collection of evidence relating to criminal activity, engage in activities that are in furtherance of the general safety and welfare of citizens who may be imperiled or otherwise in need of assistance.

3. Thereby, a warrantless seizure is justified if the state establishes: (i) the officer possessed specific and articulable facts which, viewed objectively and in the totality of circumstances, reasonably warrant a conclusion that a community caretaking action was needed, such as the potential of a person in need of assistance or the existence of a potential threat to public safety; and (ii) the officer's behavior and the scope of the intrusion were reasonably restrained and tailored to the community caretaking need.

4. "Determining whether police action is objectively reasonable in light of the circumstances requires careful consideration of the facts of each case, including the nature and level of distress exhibited by the citizen, the location, the time of day, the accessibility and availability of assistance other than the officer, and the risk of danger if the officer provides no assistance."

5. The community caretaking responsibility allows for warrantless seizures where facts indicate a concern for an individual or potential threat to public safety.

Looking at all of these factors, the Court of Criminal Appeals noted that the record reflected that specific and articulable facts did raise concerns regarding a neighborhood safety concern and that Officer Keller's decision "to detain the defendant while Officer Keller briefly investigated the situation was both reasonably restrained and tailored to the community caretaking need."

The Court of Criminal Appeals also noted that the defendant contended that "the plain view doctrine does not apply to Officer Keller's seizure of the handgun because the incriminating nature of the handgun was not immediately apparent. "The court noted that the "plain view doctrine" applies when: (1) the items seized were in plain view; (2) the viewer had the right to be in position to view the items; (3) the items seized were inadvertently discovered; and (4) the incriminating nature of the items was immediately apparent. The court noted that Officer Keller did not give a Miranda warning to the defendant before asking if the defendant was a convicted felon. Officer Keller had testified that after taking the defendant

into custody, he conducted a criminal history search, which identified the defendant as a convicted felon and as having a suspended driver's license.

The Court of Criminal Appeals therefore held that "the independent source doctrine" provides that "even if the defendant's statement about being a convicted felon was improperly obtained, evidence seized as a result of that statement can still be admissible if it was discovered through an independent source." The Court of Criminal Appeals noted that the "independent source doctrine" permitted the state to utilize any evidence that would otherwise be suppressed pursuant to the exclusionary rule if that evidence is obtained through an independent lawful search.

The court held that "once Officer Keller completed the criminal history check, the incriminating nature of the handgun, located in plain view on the passenger's seat, became apparent, and Officer Keller could seize it pursuant to the plain view doctrine." Therefore, the trial court did not err in denying the defendant's motion to suppress the handgun.

State v. Washington (Tenn. Cr. App. 12/27/23)

EXIGENT CIRCUMSTANCES: THE PROTECTIVE SWEEP OF THE SHED WHERE THE DEFENDANT HAD BEEN STAYING WAS SUPPORTED BY PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES BASED UPON THE FACT THAT A SHOOTING HAD OCCURRED AND THE DEFENDANT HAD BEEN INJURED AT OR NEAR THE SCENE OF THE SEARCH AND THE MANNER AND SCOPE OF THE PROTECTIVE SWEEP WAS REASONABLY ATTUNED TO THE EXIGENT CIRCUMSTANCES

FACTS: On 5/11/18, officers responded to a shooting that occurred outside a residence in Maury County, Tennessee, at which time the officers conducted a warrantless "protective sweep" of the residence and a shed located behind the residence. Investigator Barber testified that a call reporting the shooting was received at 9:10 a.m. on 5/11/18, and that he

arrived at the scene within a few minutes. Patrol officers were the first to arrive at the scene and Investigator Barber learned that shell casings were in the middle of the street and that an injured victim was at the hospital and that the shooting was tied to the residence. The testimony revealed that the information regarding the shooting was "evolving" and that the officers did not know the identity of the shooter or shooters or whether they remained at the scene. Multiple officers and bystanders were at the scene and the officers decided to conduct a protective sweep for the safety of the officers and others at the scene. Investigator Barber testified that the protective sweep occurred within thirty minutes from the call going out and within fifteen minutes of the arrival of the officers at the scene.

While doing the protective sweep, which was for the purpose of "preservation of life," Investigator Barber immediately smelled the odor of marijuana and saw a set of digital scales in plain sight. Investigator Barber also spoke to Ms. Reynolds, the mother of the defendant, who advised that the defendant had been residing at the shed. Barber observed men's clothing and photographs of the defendant in the shed. Officers locked the shed, and Investigator Barber began preparing a search warrant which he was able to have signed by a judge within one to one and one-half hours.

Upon execution of the search warrant, officers seized a package containing approximately fifty-two grams of a white powder believed to be cocaine, additional cocaine, marijuana, digital scales, drug paraphernalia, ammunition for a twelve-gauge shotgun and a "mag filler that would be consistent with a Glock."

The defendant maintained that the trial court erred in denying his motion to suppress evidence seized from the shed as he asserted that the initial warrantless protective sweep of the shed was not supported by exigent circumstances and that the officers exceeded the scope of the protective sweep. The state responded that the protective sweep was proper to ensure the safety of the officers and others at the scene and was properly based upon evidence observed in plain view during the protective sweep to obtain a search warrant for the shed.

HELD: The Court of Criminal Appeals concluded that based on the totality of the circumstances, the officers had probable cause to believe that a shooting had occurred on the premises and an "objectively reasonable

basis" for concluding that there was an immediate need to conduct a protective sweep of the residence and the shed. The court noted that officers arrived at the scene shortly after the report of a shooting, Investigator Barber testified about shell casings being in the roadway near the residence, that witnesses reported the shooting occurred at the residence, and that there had been one victim who was being treated at the hospital and that the officers knew that the defendant was someone who lived at the residence. The officers were unaware of whether any other victims were involved or whether any shooters remained at the scene. The court noted the following principles that applied to this type of case:

1. Both the State and Federal Constitutions offer protection from unreasonable searches and seizure; the general rule that a warrantless search or seizure is presumed unreasonable and any evidence discovered is subject to suppression.

2. The most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior proof by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions.

3. The exceptions are jealously and carefully drawn, and the presence of a search warrant serves a high function.

4. The generally recognized exceptions to the Fourth Amendment warrant requirement include:

(a) Search incident to arrest;

(b) Plain view;

(c) Stop and frisk;

(d) Hot pursuit;

(e) Search under exigent circumstances; and

(d) Consent to search.

5. Looking at the exigent circumstances exception, the court noted that "given the importance of the warrant requirement and safe guarding against unreasonable search and seizures, a circumstance will be sufficiently exigent only where the state has shown that the search is imperative."

"Exigent circumstances" are those in which the urgent need for immediate action becomes too compelling to impose upon governmental actors the attendant delay that accompanies obtaining a warrant.

6. To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, the courts look to the "totality of the circumstances."

7. Where the asserted ground of the exigency is risk to the safety of the officers or others, the governmental actors must have an objectively reasonable basis for concluding that there is an immediate need to act to protect themselves and others from serious harm.

8. The manner and scope of the search must be reasonably attuned to the exigent circumstances that justify the warrantless search or the search will exceed the bounds authorized by exigency alone.

The Court of Criminal Appeals concluded that based upon the totality of the circumstances and the above factors, the officers had probable cause to believe that a shooting had occurred on the premises and an objectively reasonable basis for concluding that there was an immediate need to conduct a protective sweep of the residence and shed.

The Court of Criminal Appeals stated: "We conclude that the protective sweep of the shed was supported by probable cause and exigent circumstances and that the manner and scope of the protective sweep was reasonably attuned to the exigent circumstances that justified the warrantless search. Once Investigator Barber entered the shed, he detected the odor of marijuana, saw a set of digital scales in plain view, and properly relied upon his observations in obtaining a search warrant. The trial court properly denied the defendant's motion to suppress."

State v. Reynolds (Tenn. Cr. App. 1/31/24)

ILLEGAL ARREST: THE PROPER REMEDY FOR AN ILLEGAL ARREST IS SUPPRESSION OF THE EVIDENCE SEIZED AS A RESULT OF THE ARREST, NOT DISMISSAL OF THE INDICTMENT

FACTS: On 11/1/19, Deputy Pierce of the Sumner County Sheriff's Department arrested the defendant in her driveway for DUI first offense and possession of Schedule II and Schedule V drugs. The grand jury indicted the defendant for DUI, a Class A misdemeanor.

The defendant filed a motion to suppress evidence contending that her arrest warrant was illegal because she did not commit an offense in the officer's presence, that no exigent circumstances existed to justify his entry onto her property, and that he lacked probable cause for the arrest when the information he received was based on a citizen caller's report of a trespass.

The trial court heard the motions on 9/9/22, at which time Deputy Pierce testified he was dispatched to 114 Harsh Lane "for a possible reckless driver" call. According to the call, a person saw a green Toyota pull into the driveway at 116 Harsh Lane, sat there a couple of seconds, and then drive across the property to enter the driveway at 114 Harsh Lane. The original caller observed the vehicle had been driving in the middle of the roadway before entering the 116 address, according to the testimony of Deputy Pierce.

Deputy Pierce testified that he arrived at the address about five minutes later and a green Toyota was in the driveway with the engine running and a person sitting in the vehicle. The officer was not using his blue lights and the vehicle could have left the driveway, but the driver would have had to pull around Deputy Pierce's vehicle in order to leave.

The deputy testified he walked to the driver's door, observed the defendant texting, and after a couple of minutes knocked on the window which "startled" the defendant. The officer noticed that the defendant had slightly slurred speech, blood shot eyes and dilated pupils. He also smelled the odor of alcohol emanating from the vehicle. In response to questioning by the officer, the defendant said that she had a drink the previous night. The defendant performed a HGN test and then the officer asked if she would perform standard field sobriety tests. The defendant stated that she did not feel comfortable taking further tests due to injuries to her feet so he did not administer any other test to her. The defendant did consent to a blood test so he transported her to the Regional Hospital and collected a blood sample which resulted in her blood alcohol content being established at 0.048 grams per cent. The officer acknowledged that he did not see her driving or in

control of the motor vehicle and that she did not commit an offense or breach the peace in his presence. He also did not suspect her of committing a felony, attempting suicide, causing a traffic accident, or stalking.

At the conclusion of the hearing, defense counsel argued that the case should be dismissed because none of the exceptions listed in TCA 40-7-103(a), in which an officer can arrest a person without a warrant, applied in the case.

The trial court concluded that "the law is pretty clear," and the judge stated that: "I can't find anything anywhere to disturb the rule of law that an officer can't make an arrest without a warrant if the misdemeanor is not committed in his presence." The judge proceeded to conclude that since the offense was not committed in the presence of the officer "there is nothing that will allow this arrest without a warrant." The judge therefore granted the motion and dismissed the case. The state appealed the trial court's dismissal of the indictment arguing that the remedy for an illegal arrest is suppression of the evidence obtained as a result of the arrest.

HELD: The Court of Criminal Appeals concluded that the trial erred by dismissing the indictment. The court concluded as follows:

1. Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protects citizens against unreasonable searches and seizures.

2. Generally, a warrantless search is presumptively unreasonable and thus violates constitutional protection.

3. Evidence derived from such a search is subject to suppression unless the state demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement.

4. The court noted that there were eleven exceptions pursuant to TCA 40-7-103(a) and that one such exception occurred for a public offense committed or a breach of the peace threatening the officer's presence. The court noted that the proper remedy for an illegal arrest is suppression of the evidence seized as a result of the arrest, not dismissal of the indictment.

The Court of Criminal Appeals therefore ruled that the trial court abused its discretion when it granted the defendant's motion to dismiss the

indictment, and the case was remanded to the trial court for further proceedings.

State v. Childs (Tenn. Cr. App. 11/7/23)

SUFFICIENCY FOR PROBABLE CAUSE TO ISSUE A SEARCH WARRANT: EVALUATING THE CREDIBILITY OF WITNESSES PROVIDING INFORMATION FOR THE SEARCH WARRANT DEPENDS UPON WHETHER OR NOT SUCH WITNESSES ARE CITIZEN INFORMANTS OR NOT, MEMBERS OF THE "CRIMINAL MILIEU" OR NOT, AND WHETHER OR NOT THERE IS INDEPENDENT POLICE CORROBORATION OR OTHER INFORMATION CONTRIBUTING TO THE CREDIBILITY OF THE ENTIRE SEARCH WARRANT

FACTS: The defendant was convicted of multiple counts of drug charges and received an effective sentence of twenty-eight years in confinement. The defendant contended that the search warrant affidavit did not establish probable cause that a crime was occurring based upon a Crime Stoppers tip which misrepresented the informant's credibility by deeming his information as coming from a "citizen informant. "The defendant further argued that information provided by witness Greenwood had no indicia of liability because it was wrongly suggested that he made statements against his own penal interest and that he was a known police informant. The defendant further argued that the officer had incorrectly stated in the warrant affidavit that the defendant had a substantial amount of cash which was misleading due to the fact that the amount of cash was only two-hundred and twenty dollars, among other factors indicating that the information for the search warrant was not reliable.

HELD: The Court of Criminal Appeals held that despite the fact that there were several factors of improper information provided in the search warrant which may have been misleading, the "totality of the evidence" supported

the issuance of the search warrant due to the fact that it was supported by probable cause.

The Court of Criminal Appeals pointed to several factors that Tennessee courts consider when considering the sufficiency of the search warrant, as follows:

1.The United States and Tennessee Constitutions protect citizens from unreasonable search and seizures, and both constitutions note that a search warrant may not be issued "unless a neutral and detached magistrate determines that probable cause exists for its issuance." The most significant case for the current status of Tennessee law in regard to probable cause for a search warrant is probably State v. Tuttle (Tenn. 2017).

2. Probable cause is more than a mere suspicion but less than absolute certainty, and the burden of proof is "significantly less than the strength of evidence necessary to find a defendant guilty beyond a reasonable doubt."

3. A determination of probable cause is "extremely fact-dependent."

4. Upon review, appellate courts give "great deference" to a magistrate's determination that probable cause exists.

5. A sworn and written affidavit containing allegations from which a magistrate may determine whether probable cause exists is an indispensable pre-requisite to the issuance of a search warrant.

6. In determining probable cause for the issuance of a search warrant, our Supreme Court explained that a magistrate must exercise independent judgment, and the affidavit must contain more than mere conclusory allegations by the affiant but must have facts upon which the magistrate may make its commonsense probable cause determination. State v. Tuttle

7. The magistrate must be able to draw a reasonable conclusion from these facts that the evidence is in the place to be searched. In other words, the affidavit must demonstrate a nexus between the criminal activity, the place to be searched, and the items to be seized.

8. An issuing magistrate cannot base its determination of probable cause on the "bare conclusions of others." An affidavit must provide the magistrate with substantial basis for determining the existence of probable cause.

9. Only the information contained within the four corners of the affidavit may be considered in determining whether probable cause supported the issuance of the search warrant.

10. Under Tennessee law, a presumption of reliability attaches to police officers and citizen informants, so long as the affidavit identifies the source of the information as coming from citizen informants and police officers.

11. A "citizen informant" is a witness to criminal activity who acts with intent to aid the police in law enforcement because of his concern for society or for his own safety and does not expect any gain or concession in exchange for his information. As such, citizen informants have no motive to exaggerate, falsify, or distort the facts to serve their own ends.

12. In contrast, information provided by anonymous informants or members of the "criminal milieu" are afforded no presumption of reliability. A search warrant affidavit relying upon an anonymous or criminal informant has to establish both the informant's basis of knowledge and veracity or credibility.

13. Independent police corroboration of the information provided by the informant could make up the deficit in either basis of knowledge or credibility. Corroboration of more than a few minor elements to the informant's information is necessary, especially if the elements relate to non-suspect behavior.

14. The Tennessee Supreme Court has stated that, "Corroboration of only innocent aspects of the story may suffice."

15. In the important case of State v. Tuttle, the Tuttle court stated:

> "We reiterate that, under the totality-of-the-circumstances analysis, the informant's basis of knowledge and veracity or credibility remain highly relevant considerations. Rather than separate and independent considerations, they should [now] be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question

whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."

In the present case, the Court of Criminal Appeals made the following significant findings:

1. The CCA found that the search warrant affidavit was "devoid of information establishing the basis of knowledge of the Crime Stoppers tipster and that it mischaracterized the credibility of such information by deeming the information to come from a "citizen informant." The CCA noted that Officer McNeil admitted at the suppression hearing that he could not establish that the witness was a citizen informant and acknowledged that he knew nothing about the Crime Stoppers caller. The court noted that although the officer maintained that he had no intent to mislead the magistrate, his training and experience were such that his use of the term "citizen informant" was reckless at best.

2. The court also noted that the above mischaracterization was "tempered" by the officer's admission that the informant was a Crime Stoppers caller which would lead the magistrate to understand that the caller could have been an anonymous reporter of criminal activity, and the court did appropriately consider this to be an anonymous informant rather than a citizen informant.

3. In regard to Mr. Greenwood's "basis of knowledge" which was set out as being first hand observation, Greenwood's credibility as a member of the criminal milieu was not evident. The court also noted that Greenwood's statement was technically against his penal interest but Mr. Greenwood would have been admitting to a lesser crime than that of which he accused the defendant, and as a result, his confession did not serve to meaningfully enhance the credibility of the information.

4. The court further observed that even though the reliability of the Crime Stoppers tip and Mr. Greenwood were not without issue, "the applicable standard is whether the totality of the circumstances supports the magistrate's probable cause determination."

5. The CCA then stated that based upon Tennessee and federal jurisprudence, the two sources taken together plus independent police corroboration were sufficient to give the magistrate probable cause to believe that a crime was occurring. Officers McNeil and Wheeler confirmed that the defendant, with whose nickname they were already familiar, was in Room 45 at the Sunrise Inn, as reported by witnesses, and as corroborated by the information set out in the affidavit by the officers. The information provided by Mr. Greenwood included that he had purchased meth from the defendant in Room 45 several times in the past month, including the previous week, which was consistent with the Crime Stoppers tip that the defendant was actively selling heroin and meth from Room 45. Greenwood had also stated that he saw scales and marijuana in the room that day. The court noted that although marijuana and meth are distinct substances, the presence of illegal drugs and scales was generally consistent with the Crime Stoppers tipster's description of an ongoing drug sales scheme.

6. In regard to the defendant's arguing that the two-hundred twenty dollars was not a substantial amount as claimed by the officer in the search warrant, and the actual amount was not in the search warrant, any error in regard to the cash was harmless because it was not essential to the probable cause determination.

The Court of Criminal Appeals therefore concluded that the issuance of the search warrant was supported by probable cause.

State v. Locust (Tenn. Cr. App. 12/28/23)

TOTALITY OF THE CIRCUMSTANCES: IN FINALLY ADDRESSING THE ISSUE OF HOW THE LEGALIZATION OF HEMP AFFECTS A PROBABLE CAUSE ANALYSIS WHEN LAW ENFORCEMENT RELIES, IN PART, ON A POSITIVE ALERT FROM A DRUG-SNIFFING CANINE INCAPABLE OF DIFFERENTIATING BETWEEN THE SMELL OF LEGAL HEMP AND ILLEGAL MARIJUANA,

THE TENNESSEE SUPREME COURT HOLDS THAT A POSITIVE INDICATION FROM A DRUG-SNIFFING CANINE MAY CONTINUE TO CONTRIBUTE TO A FINDING OF PROBABLE CAUSE WHEN EXAMINING THE TOTALITY OF THE CIRCUMSTANCES, NOT WITHSTANDING THE LEGALIZATION OF HEMP.

FACTS: On 2/16/20, Officer Trescott completed a traffic stop on a vehicle driven by Julio Chavez for operating his vehicle on high beams in Clarksville, TN. The defendant in the case, Andre Green, was a passenger in the vehicle. After approaching the vehicle, Officer Trescott could smell a strong odor of a fragrance coming from the vehicle. Chavez told Trescott that it was from three fragrance pine trees that he had hanging on the mirror. Chavez denied consent to search the vehicle, following which Trescott ordered both Chavez and Green out of the vehicle and made the decision to call a police service dog to conduct an open-air sniff of the vehicle.

Prior to searching the vehicle, Trescott observed a black backpack, and both occupants initially stated that the bag did not belong to them. Trescott had the K-9 "Arlow" conduct an open-air sniff at which time the dog indicated on the vehicle. At that time, Trescott asked each occupant if there was anything in the vehicle and both said no. Upon being told that he too could be charged with anything in the vehicle, Chavez looked at Green and prodded him to talk. Green stated that he had picked up the backpack from his brother but he did not know what was in it. A search of the backpack was completed, and Officer Trescott found just below one ounce of marijuana, a loaded Smith & Wesson 9mm, Ziploc bags, and a working scale.

The defendant (Green) was indicted for possession of marijuana with intent to manufacture, sell or deliver, possession of a firearm with intent to go armed, and possession of drug paraphernalia. Following the indictment, the defendant filed a motion to suppress arguing that "a canine sweep is no longer valid to establish probable cause since a canine cannot distinguish between the smell of hemp, which is legal, and marijuana, which is illegal."

The trial court granted the motion to suppress basing the granting of the motion on the fact that the canine could not distinguish between legal hemp and

illegal marijuana and therefore the reliability of the drug detection canine had not been established.

The State appealed to the Court of Criminal Appeals, arguing that "the trial court erred in granting the defendant's motion to suppress because the scent of marijuana provided probable cause for the search regardless of the possibility that legal hemp could be the source of the odor."

The Court of Criminal Appeals agreed with the State and reversed the trial court's ruling and concluded that "at this juncture the binding precedent from the Tennessee Supreme Court allows the smell of illegal marijuana to provide probable cause for a search." The Court of Criminal Appeals in its ruling noted that "the alert of a trained drug detection canine is alone sufficient" to establish probable cause, and the Court alternatively held that the finding of probable cause was even more evident when reviewing the totality of the circumstances, including the fact that Officer Trescott smelled a strong odor and both occupants of the vehicle denied ownership of the backpack between the defendant's feet.

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

ISSUE: Whether law enforcement possessed probable cause under the automobile exception to the warrant requirement to search the vehicle in which the defendant was a passenger.

HELD: The Supreme Court held "that a positive indication from a drug-sniffing canine may continue to contribute to a finding of probable cause when examining the totality of the circumstances, notwithstanding the legalization of hemp." The Supreme Court noted that "after examining the totality of the circumstances in this case, we conclude that law enforcement possessed probable cause to search the vehicle pursuant to the automobile exception of the warrant requirement." The Court thereby affirmed the judgment of the Court of Criminal Appeals and reinstated the indictments against the defendant and remanded for further proceedings.

The Tennessee Supreme Court noted the following key principles when considering an issue of this nature:

1) The "automobile exception" to the warrant requirement permits an officer to search an automobile if the officer has probable cause to believe that the automobile contains contraband.
2) The Court noted that the United States Supreme Court provided two primary justifications for the automobile exception: (a) vehicles are regularly mobile by the turn of an ignition key; and (b) there is a reduced expectation of privacy involving automobiles. Therefore, "if the officer has probable cause to believe that the automobile contains contraband, the officer may seize the automobile and then obtain a warrant or search the automobile immediately."
3) As a third principle, the Supreme Court clarified its previous opinion in State v. England (Tenn. 2000), in which case the defendant was stopped due to his driving without a light to illuminate his rear license plate. The Court noted that since England had caused some confusion, the Supreme Court now clarified that "England did not establish a per se rule of probable cause based on a positive alert from a drug sniffing dog; rather, the case based its overall probable cause determination on the totality of the circumstances." The Court noted that England stood for the principle that "coupled with the deputy's testimony with regard to the defendant's demeanor, the canine's positive alert provided probable cause." The Court therefore stated: "To the extent any prior opinions of the Court of Criminal Appeals or this Court imply or provide a per se rule of probable cause based on a positive alert in this context, they are overruled."
4) "Probable cause involves non-technical probabilities relating to factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."
5) A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.
6) Each case must stand on its own facts. As noted by the United States Supreme Court in Florida v. Harris (2013), "The question – similar to every inquiry into probable cause – is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test."

The Tennessee Supreme Court therefore concluded and held that "a positive alert from a drug-sniffing canine may continue to be considered in a totality-of-the-circumstances analysis and may continue to contribute to a probable cause determination. This is because probable cause does not require absolute certainty."

The Supreme Court did note that "while it was true that the legalization of hemp may add a level of ambiguity to a dog sniff's probative value in a probable cause determination, it does not destroy the fact's usefulness outright and require it to be disregarded."

The Court noted that the ultimate question is still "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." The Court added that "the possibility of a dog alerting to hemp rather than an illegal substance merely affects a fact's weight and persuasiveness in the probable cause analysis and not its inclusion in the analysis altogether." The Supreme Court noted that "a positive alert from a canine trained to detect" multiple illegal substances is still probative of whether or not illegal substances are located inside of an automobile and should therefore still be considered in a "totality-of-the-circumstances analysis."

Having made that determination, the Supreme Court proceeded to analyze the facts of the present case, including the following:

1) Officer Trescott smelled a strong odor of a fragrance coming from the vehicle.
2) Chavez informed Officer Trescott that the smell came from the three fragrance pine trees hanging from the mirror.
3) Trescott also observed a backpack in between the defendant's feet, and when asked about the backpack both Chavez and the defendant stated that the bag did not belong to them, creating greater suspicion.
4) The two men were ordered to exit the vehicle, following which the officer deployed a drug-sniffing canine to conduct an open-air sniff, the canine being trained to detect cannabis, heroin, methamphetamine, and cocaine.
5) The dog indicated on the vehicle following which the officer asked the two occupants if there was anything in the vehicle to which both replied no.
6) After being informed that either party could be charged with anything found in the vehicle, Chavez looked at the defendant and prodded him to talk, the

defendant indicating that he had picked up the backpack from his brother but did not know what was inside.

7) The officer searched the backpack and discovered the contraband and evidence of crimes.

The Supreme Court specifically found that based on the totality of the circumstances, all the facts available to Officer Trescott would warrant a person of reasonable caution in the belief that contraband or evidence of a crime was present. The Court noted that the responses of Chavez and the defendant were both suspicious in their nature, the Court emphasizing that responses to questions by police officers are a common source of probable cause determinations. The Court noted that each of the occupants denied owning the backpack, a fact which was unlikely since they were the only occupants of the vehicle.

The Supreme Court stated, "Lastly, while Officer Trescott smelling an unspecified strong odor would not be sufficient to establish probable cause alone, it is another notable fact when considering the totality of the circumstances."

Practice Point: General Sessions Judges and other judges who are called upon to act upon proof in this type of case are entitled to make an analysis of the facts under the law and come to a decision after reviewing the credibility of the witnesses, and considering all evidence in an appropriate manner based upon the law and the facts. Importantly, the Court in the present case noted that the smelling of an unspecified strong odor in and of itself would not be sufficient to establish probable cause alone, but when considering the totality of all of the circumstances, it was a factor which could be considered.

Very significantly, the Supreme Court notes that there were other issues raised by the defendant which the Court was not considering in this opinion. The Court stated, "The most notable additional issue that the defendant raises is whether a dog sniff now constitutes a search in light of the legalization of hemp. See generally State v. Major (Tenn. Crim. Appeals 10/31/23) (McMullen, P.J., concurring) where Judge McMullen stated, "I write separately, however, to highlight how the legalization of hemp has fractured the foundation underlying the rule that a drug detection dog sniff is not a search subject to Fourth Amendment protections." The Supreme Court noted that that question was not raised in the courts below and was not properly before the Court. The Court

also noted that the qualities and training of the canine were not properly raised as an issue in the trial and therefore were not going to be considered by the Supreme Court.

In another footnote to its decision the Court noted that the Colorado Supreme Court has reclassified dog sniffs as searches under the Colorado constitution and the court noted that its citation to the Colorado case "does not provide any implicit stance on the distinct legal question of whether a dog sniff is a search."

At a recent conference, I noted that this argument by Judge McMullen was an exciting development and that in my opinion it would be an excellent development for our courts to reconsider the issue of whether a dog sniff is a search, as developments in the law present strong reasons for our courts to reclassify a dog sniff as a search since canine searches have taken on such a strong role in our jurisprudence.

State v. Green (Tenn. Sup. Ct. 8/27/24)

SENTENCING

RESTITUTION: TRIAL COURT'S ORDERING RESTITUTION TO THE HENDERSON COUNTY SHERIFF'S DEPARTMENT BREACHES A CLEAR AND UNEQUIVOCAL RULE OF LAW DUE TO THE FACT THAT THE HCSD WAS NOT A VICTIM AS CONTEMPLATED BY THE RESTITUION STATUTE

HELD: The Court of Criminal Appeals found that HCSD had not been referenced in indictments, was not the direct object of the defendant's crimes, or the entity against whom the offenses were actually committed. The court also noted that HCSD did not suffer any unexpected harm as a result of the defendant's criminal conduct.

The court also held that "because a law enforcement agency is not a victim when it spends funds to pursue a drug buy through an informant,

those expended funds cannot constitute a victim's pecuniary loss under the statute. The order of restitution was therefore vacated.

State v. Mahaffey (Tenn. Cr. App. 2/5/24)

TAMPERING WITH EVIDENCE

THROWING ITEMS OUT OF A CAR WINDOW: EVIDENCE WAS SUFFICIENT THAT DEFENDANT TAMPERED WITH EVIDENCE AS OFFICERS OBSERVED DEFENDANT THROW ITEMS OUT OF A CAR WINDOW DURING AN ATTEMPTED TRAFFIC STOP AND THE ITEMS WERE NEVER RECOVERED BY LAW ENFORCEMENT

FACTS: On 2/18/19, THP Trooper Anthony Jackson was on routine patrol in Lake County, Tennessee when he observed a black Dodge Charger drive by speeding. Trooper Jackson turned around to pursue the vehicle and radar confirmed traveling at 69 miles-per-hour in a 55 mile-per-hour zone. Trooper activated his blue lights and siren to initiate a traffic stop, at which time Trooper Jackson made eye contact with the defendant in the defendant's rear-view mirror and motioned for the defendant to pull over. Rather than stop, the defendant slowed down, and Trooper Jackson saw the defendant throw a small object in a plastic baggie out of the window. The defendant proceeded down Route 78 for another three miles before stopping and being apprehended by the trooper.

Upon stopping the vehicle, Trooper Jackson detected the smell of marijuana, following which Trooper Jackson discovered the defendant's driver's license was suspended. Trooper Montgomery arrived on the scene and administered Miranda warnings to the defendant following which he asked the defendant whether he had thrown anything out the window, to which the defendant stated that he had thrown a little bit of marijuana and a blunt out of the window. Upon search of the area, the troopers found neither

the baggie nor the small object. The defendant was found guilty for tampering with evidence.

The defendant argued on appeal that the evidence was insufficient to support his conviction for tampering with evidence because the evidence at trial demonstrated he merely abandoned the items he threw out the window rather than concealing or destroying them for purposes of the tampering with the evidence statute.

HELD: The Court of Criminal Appeals noted that taking the proof in the light most favorable to the state, a rational jury "could find beyond a reasonable doubt that defendant, while knowing that an investigation was ongoing, destroyed or concealed the items he threw out of the window with the intent to impair their availability in a subsequent investigation or proceeding." The evidence was therefore sufficient to support the defendant's conviction for tampering with evidence.

The court noted the following principles for cases involving tampering with evidence:

1. State must prove beyond a reasonable doubt that the defendant "altered, destroyed, or concealed a piece of evidence in the form of a record, document or thing with intent to impair its verity, legibility, or availability as evidence."

2. Tennessee Supreme Court has held that a defendant did not tamper with evidence when he threw a gun over a fence because the evidence was not altered or destroyed, its discoverability was delayed minimally, if at all, and it retained its full evidentiary value.

3. The Courts of Tennessee have noted a "consensus" among jurisdictions that "when a person committing a possessory offense drops evidence in the presence of police officers, and the officers are able to recover the evidence with minimal effort, discarding the evidence amounts to mere abandonment, not tampering."

The Court of Criminal Appeals noted that the proof presented at trial showed that Trooper Jackson saw the defendant speeding and activated his blue lights to initiate a traffic stop. Trooper Jackson made eye contact with the defendant and motioned for him to pull over, following which the defendant did not stop but he slowed down, following which Trooper

Jackson saw a plastic baggie and a small object thrown out of the window. After being administered Miranda warnings, defendant told Trooper Montgomery that he had thrown some marijuana and a blunt out of the window. When the troopers looked for the items, defendant described the location where he threw them out, the troopers could not find them, and the items were never recovered.

Therefore, the proof at trial did support the jury's conclusion that the defendant was guilty beyond a reasonable doubt as the defendant threw the items out of the window with the intent to impair their availability in a subsequent proceeding and the evidence was never recovered.

State v. Carter (Tenn. Cr. App. 1/5/24)

ETHICS

THE ETHICAL CONSIDERATIONS OF POVERTY IN GENERAL SESSIONS COURT

1. Everyday Justice: A Legal Aid Story by Ashley Wiltshire (2023)

The book, Everyday Justice: A Legal Aid Story, is an inspiring story of courageous and incredible work by legal aid warriors accomplishing amazing victories for their impoverished clientele even in a climate when many leaders in the executive, legislative, and judicial branches of government were opposed to accommodating the poor as they sought fair and reasonable access to the courts. Even many judges opposed carving out any type of reasonable accommodations for the poor in issues of housing, health care, financial issues, domestic violence, and in dealing with government agencies originally designed to help the poor.

Exhilarating class action victories which gave access to justice to millions were ultimately undone by legislative actions which terminated the ability of legal aid organizations to file class action law suits on behalf of their clients. This mentality, which continues today, results in case by case, one party at a time, battles, which greatly reduces the abilities of legal aid organizations to be effective for the masses.

The heroes of the stories are many but primarily involve legal aid attorneys and their dedicated staffs, many working with low salaries, and some courageous judges and citizen advocates who also took on the challenges of reforming the system.

The book ends with the reminder of the fact that the Tennessee Supreme Court and the Access to Justice Commission have taken lead roles in advocating for reform and in securing significant accomplishments along the way, while the book also recognizes the enormous barriers which continue to exist against equal justice for all.

In his book, author Ashley Wiltshire, makes a challenging statement for all of us, which is as follows:

> Despite positive notes and the progress we have seen, access to justice stills faces many hurdles. The legal ethicist Deborah Rhode described the irony of our situation: "'Equal justice under law' is one of America's most proudly proclaimed and widely violated legal principles." We violate

that precious principle by insufficient government funding. We violate it every time an understaffed legal aid office turns away an eligible client with a legitimate problem. We violate equal justice by cynical congressional restrictions that exclude whole groups of people from representation and limit the tools available to lawyers. We can and must do better.

When Congress in 1974 adopted the Legal Services Corporation Act, it found that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." As we have seen, a much different Congress in 1996 eviscerated that inspiring declaration of purpose. Lawyers employed by an LSC-funded organization today no longer have that "full freedom to protect the best interest of their clients." They are bravely laboring under multiple handicaps. That continues as a blot on our systems of law and justice every day.

Nevertheless, regardless of the limitations or other frustrations today, the duty of the legal aid attorney, in whatever setting, is still the same as it was for that Legal Services attorney many years ago. First, it is to stand by one's client, listen attentively and speaking respectfully, appreciating her plight and in according to her the dignities so often denied to the poor and dispossessed. Second, following the admonition of Judge William Wayne Justice, the lawyer must, in whatever forum, tell the stories, present the revealing facts, convey the realities of poverty, advance the interest of the client, and prod the system toward justice. In that regard follows the third imperative: to devise creative legal solutions, challenge the way things are, and when necessary, be that burr under the saddle.

2. Faith Traditions and leaders of nations – Essentially every faith tradition, and key leaders within every nation, recognize that poverty is an evil in which all of humanity should unite in order to improve the outcomes of health and safety for all of mankind. Consider the following biblical verses and statements by key leaders of various movements or nations:

"Whoever oppresses the poor shows contempt for their Maker, but whoever is kind to the needy honors God." Proverbs 14:31

"Open your mouths for the mute, for the rights of all who are destitute. Open your mouth, judge righteously, defend the rights of the poor and needy." Proverbs 31:8-9.

"Blessed are they who maintain justice, who constantly do what is right." Psalm 106:3.

"Act justly and love mercy and walk humbly with your God". Micah 6:8.

"The spirit of the Lord is on me, because he has anointed me to preach good news to the poor. He has sent me to proclaim freedom for the prisoners and recovery of sight for the blind, to set the oppressed free, to proclaim the year of the Lord's favor." – Jesus - Luke 4:18-19.

"Poverty is the parent of revolution and crime." Aristotle

"Poverty is the worst form of violence." Gandhi

"In a country well governed, poverty is something to be ashamed of. In a country badly governed, wealth is something to be ashamed of." Confucious

"Our lives begin to end the day we become silent about things that matter." Martin Luther King, Jr.

"The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing." Albert Einstein

"As long as poverty, injustice and gross inequality exist in our world, none of us can truly rest." Nelson Mandela

3. Poverty, By America, a book by Matthew Desmond, Pulitzer Prize-winner: "Poverty is the loss of liberty, the feeling that your government is against you, not for you"

Matthew Desmond, in his challenging and devastating indictment of poverty in America, delivers the following information on poverty:

"Poverty is the loss of liberty. The American prison system has no equal in any other country or any other epoch. Almost 2 million people sit in our prisons and jails each day. Another 3.7 million are on probation or parole. Hidden behind the system's vague abstractions---justice, law, and order--- is the fact that the overwhelming majority of America's current and former prisoners are very poor.

"…The United States doesn't just tuck its poor under overpasses and into mobile home parks far removed from central business districts. It disappears them into jails and prisons, effectively erasing them.

"Poverty is the feeling that your government is against you, not for you; that your country was designed to serve other people and that you are fated to be managed and processed, roughed up and handcuffed.

"The poor are subjected to takings by the state in the form of misdemeanor charges and citations: the price paid for missing a child support payment, jumping a subway turnstile, getting caught with a joint. One minor infraction can lead to another, then another---you might forget a court date or fail to make a payment and get lapped with another sanction, penalties on top of penalties--- until you are embroiled in judgment and debt. Criminal justice agencies levy steep fines and fees on the poor, often making them pay for their own prosecution and incarceration. When payments are missed, courts issue warrants, mobilize bill collectors, and even incarcerate as retribution. Today, scores languish in jail, not because they've been convicted of a crime, but because they missed a payment or can't make bail. Even light brushes with law enforcement can leave people feeling reduced in stature…

"Poverty is diminished life and personhood. It changes how you think and prevents you from realizing your full potential. It shrinks the mental energy you can dedicate to decisions, forcing you to focus on the latest stressor—an overdue gas bill, a lost job—at the expense of everything else…Poverty can cause anyone to make decisions that look ill-advised and even down-right stupid to those of us unbothered by scarcity. Have you ever sat in a hospital waiting room, watching the clock and praying for good news? You are there, locked on the present emergency, next to which all other concerns and responsibilities feel, and are, trivial. That experience is something like living in poverty. "Being poor," according to behavioral scientists, "reduces a person's cognitive capacity more than going a full

night without sleep." When we are preoccupied by poverty, "we have less mind to give the rest of life." Poverty does not just deprive people of security and comfort; it siphons off their brainpower, too.

"Poverty is often material scarcity piled on chronic pain piled on incarceration piled on depression piled on addiction---on and on it goes. Poverty isn't a line. It's a tight knot of social maladies. It is connected to every social problem we care about---crime, health, education, housing---and its persistence in American life means that millions of families are denied safety and security and dignity in one of the richest nations in the history of the world."

Practice Point: As judges serving a critical role in our communities, it is one of our biggest responsibilities to let all of that sink in. We must take note of how each decision we make, no matter how small or big to us, may give a fresh breath of hope or suck the life out of a person and their family.

4. The Poverty Penalty in our "systems of justice"

In Profit and Punishment: How America Criminalizes the Poor In The Name Of Justice, Pulitzer Prize Winner Tony Messenger describes the devastating impact on people who get drawn into the criminal justice system. He gives this illuminating illustration:

"Brooke Bergen had $60 in her pocket.

"It was November 2018, and the cash was for her court appearance the next day. She hoped to scrounge up another $40 before her morning hearing. She asked me if that was enough.

"Three figures seem more substantial to me, she said. "I'm freaking out. I really am afraid she's going to put me back in jail." Bergen was referring to Dent County Associate Circuit Judge Brandi Baird.

"Almost every state in America has the statutory authority to charge defendants for a stint in jail. Some jurisdictions make allowances for those who can't afford to pay. Many don't. For roughly a year spent in the Dent County Jail, Bergen's bill was $15,900. It was a sum she could never escape. There was no specific payment plan. She was scheduled to see the judge once a month and pay what she could. If that meant $100 a month, it would take her 159 payments, or more than 13 years, to pay off the debt.

"The worst part, though, wasn't even the debt--- a large sum, of course, more than she would make in a year--- but the requirement to show up in court

every month or face the consequences. In other words, every four weeks, Bergen would have to spend half a day in the courtroom, answer to the judge, and agree to pay down her debt little by little. If she didn't show up, a warrant would be issued for her arrest."

Messenger states: "It's hard not to call this what it is: the criminalization of poverty. The process starts with a powerful punch---the trampling of due process rights as guaranteed in the U.S. Constitution. What follows is a right hook that takes a defendant to the canvas, a bill of court costs that will bury them in debt."

"All over the country, in cities and rural enclaves, in blue states and red states, people charged with minor offenses find themselves paying what criminal justice reform advocate Joanna Weiss calls the 'poverty penalty.' The connection between the courts and people living in poverty---an entanglement that can continue for decades---is an intentional one. Too often, the victims of this scheme are not viewed through an empathetic lens--- as people simply lacking financial resources. Instead, the system brands them as criminals and uses them as a means to an end, a more politically palatable way to pad sheriff's salaries, for instance, than asking the taxpayers to vote for a tax hike. The problem of backdoor taxation involves all three branches of government. Lawmakers who pass these laws end up financially squeezing the poor while publicly telling their constituents that they aren't raising taxes.

"The system, as it currently operates, ruins vulnerable people at nearly every stage."

5. Why worry about the "poverty penalty" and its impact on vulnerable people? Didn't these people violate the law and therefore subject themselves to the full consequences of their wrongful conduct? "Hmmm. Well let's take a look."

In an article by Jordan Smith entitled, "How Misdemeanors Turn Innocent People Into Criminals," Smith reminds readers just how easy it becomes for even a well-respected citizen to draw the ire of the law, and particularly poorly trained officers with a possible axe to grind or a strong and abiding bias which drives their desire to pull over drivers. Smith points to the stunning case of Atwater v. City of Lago Vista (4/24/2001), in which the U.S. Supreme Court addressed the soccer mom who violated the seatbelt law of the state of Texas.

In this huge case, Gail Atwater and her two young children were heading

home from soccer practice in March 1997 “when they realized that a rubber bat that was usually affixed to the window of their pickup truck was missing. It was a favorite toy of Atwater’s 3-year-old, Mac, so the trio turned around, retracing their route to see if they could find it. Atwater slowed to a speed of roughly 15 miles per hour as she cruised through Lago Vista, the lakeside bedroom community just northwest of Austin, Texas. And although state law required passengers in the front seat of a truck to wear a seatbelt, Atwater told her kids they could unbuckle themselves so they could look outside for the toy. There was no one else on the road, and she was driving very slowly.” THEN, their lives changed forever, and the law, as many thought they knew it, changed, too.

As Officer Turek pulled her over, Atwater knew she was rightfully facing a fine, the maximum being $50. She immediately apologized to the officer, who then “jabbed his finger at her and began yelling.” She asked him to lower his voice as he was scaring the children, but Turek was just getting warmed up.

He told her she was going to jail. (The penalty carried only a fine and no jail.)

He cuffed her and put her in the back of his squad car.
A neighbor came by and was allowed to take her kids.
Whew! A close call. No DCS!
She was booked into jail.
Later released on $310 bond.
Her car was towed. She paid $110 to get her car back.
She pled no contest and was fined $50, the maximum.
Her kids were greatly traumatized by seeing their mother arrested.

Back to Smith’s article: “Atwater was incensed by the arrest. Under state law, the seatbelt violation was a fine-only misdemeanor offense, meaning it was not punishable by jail time. Yet she’d been taken to jail for the violation, Atwater sued the city, claiming Turek had violated her constitutional protection against unlawful seizure. The case went all the way to the U.S. Supreme Court, and in 2001, Atwater lost.” Justice Souter wrote the opinion joined by C.J. Rehnquist, Scalia, Kennedy and Thomas. O’Connor wrote a scathing dissent which was joined by Stevens, Ginsburg and Breyer.

Amazingly, Souter wrote: “If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she almost certainly would have buckled up as a condition of driving off with a citation. In her case, the physical incidents of her arrest were merely gratuitous humiliations imposed by a police officer who

was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case. But…."

1) The Supreme Court does not like setting standards which are "case by case determinations", "lest every discretionary judgment be converted into an occasion for constitutional review";
2) So, the Supreme Court holds that the 4th amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. (Note: It is too difficult to require an officer to know that a seatbelt offense is only punishable by a fine.)
3) An officer may arrest an individual without violating the 4th amendment if there is probable cause to believe that the offender has committed even a very minor criminal offense in the officer's presence.
4) Souter: In support of his conclusion, Souter and his four colleagues concluded that while there may be other such examples of bad officer conduct, "just as surely the country is not confronting anything like an epidemic of unnecessary minor offense arrests."

Smith: "What Souter wrote was wrong then and remains so today. The misdemeanor criminal justice system makes up the vast majority of the nation's criminal court dockets; it is wide-ranging, encompassing not only violent crimes like domestic violence, but also myriad offenses where there is little, if any meaningful criminal activity...It has criminalized millions of people and jailed countless, even when the ultimate punishment for the crime carries no threat of jail time, a practice which the Supreme Court's ruling endorsed."

"The consequences of even the most minor encounter with the misdemeanor system are serious – they can lead to lost jobs and benefits, including food stamps, housing, or educational support – and yet in many respects, the system has avoided much scrutiny."

Alexandra Natapoff, the author of Punishment without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal, states:

"One of the things that was stunning to me is how much a normal part of life being charged with, and convicted of, a misdemeanor has become. How many millions of people just encounter this experience as a matter of course and then have to cope with it the rest of their lives. I think what it means for the country is that we need to grapple more profoundly with how much we rely on our criminal

institutions to do the work of government.

"We know that approximately a quarter of the American adult population has a criminal record. That's a terrible public policy. It impedes people's lives, their livelihood, their education, their work, their families. It's a wasteful and costly and harsh way of engaging in government, and I think the commonness of misdemeanors and just how cavalierly we rely on the misdemeanor system to do so much work should give us pause."

Natapoff goes on to explain how the whole system of justice really "incentivizes the guilty plea," as she explains as follows:

"Every official player in the misdemeanor system has its own influential role. Misdemeanor policing is its own special phenomenon. Misdemeanor prosecution has its own key challenges and failings. Public defenders, with their enormous misdemeanor caseloads, pose a special challenge. Misdemeanor courts and judges themselves often do not play the judicial, supervisory role we expect them to play.

"The confluence of pressures incentivizes guilty pleas for every single player in the system. It puts pressure on prosecutors to manipulate the system in order to get guilty pleas quickly. It puts pressure on public defenders to cede to guilty pleas on behalf of their client. It puts pressure on judges to validate those hundreds of thousands of guilty pleas that pass before them without checking the factual bases, without checking whether the law has been followed."

"Of course, defendants are under the most extraordinary pressure to plead guilty. I think it is becoming increasingly well-known that bail is often out of reach for low income and poor individuals, which means they will languish in jail until their cases are resolved, which means they are under more pressure than their wealthy counterparts to plead guilty, and often do."

Finally, Natapoff concludes: "Maybe the most important insight from thinking about misdemeanors is its invitation to empathy. It's a reminder that nearly everyone can commit a misdemeanor. It shouldn't take you very long to think of someone you know and care about who's committed a misdemeanor. Between speeding, loitering, spitting, jaywalking, trespassing, these are not difficult crimes to commit. The past few decades of mass incarceration have also been an exercise in revision and dehumanization. We could not have grown our prison population to this enormous and terrifying scale if our society had not essentially dehumanized people we put into that system. It is saying that the people in the criminal system are not like us, and that's very hard to say with misdemeanors, because the people in the misdemeanor system are so clearly like us – like our children, like our neighbors, like our friends.

"I think that we should imagine and understand that the people in the

misdemeanor system are not a 'they'; they are an 'us.' And that insight, to me, is the heart of the most important kind of criminal justice reform."

Returning to the Atwater case, Justice Sandra O'Connor writes a blistering dissent, in which she states the following:

"In light of the availability of citations to promote a state's interest when a fine-only offense has been committed, I cannot concur in a rule which deems a full custodial arrest to be reasonable in every circumstance. Giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable."

After reviewing the outrageous conduct of Officer Turek as he arrested and handcuffed Ms. Atwater in front of her children, Justice O'Connor noted the following: "The *per se* rule that the Court creates has potentially serious consequences for the everyday lives of Americans. A broad range of conduct falls into the category of fine-only misdemeanors. In Texas alone, for example, disobeying any sort of traffic warning sign is a misdemeanor punishable only by fine. …under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way. Or, if a traffic violation, the officer may stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents. Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate.

"Such unbounded discretion carries with it grave potential for abuse. The majority takes comfort in the lack of evidence of an epidemic of unnecessary minor-offense arrests. But the relatively small number of published cases dealing with such arrests proves little and should provide little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' post-stop actions – which are properly within our reach – comport with the Fourth Amendment's guarantee of reasonableness.

"The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness. I respectfully dissent."

6. The impact on Tennessee of the Atwater rule and its progeny

In the Tennessee Supreme Court case of State v. Linzey Danielle Smith (Tenn. 2/11/16), Justice Bivens in a footnote to the case acknowledges the impact of the Court's ruling in Smith which approves the officer's actions in making a traffic stop in the case: "We recognize our Court of Criminal Appeals' concern that our holding in this case 'will likely mean that all drivers (including law enforcement officers, prosecutors and judges) who briefly cross a fog line on the highways in Tennessee can be pulled over on the basis that the otherwise 'innocent' driver has established reasonable suspicion that she or he has committed a Class C misdemeanor criminal offense.'"

In the article "Street legal: The Court Affords Police Constitutional Carte Blanche," written by Wayne A. Logan, an associate professor of law at William Mitchell College of Law, written for the Indiana Law Journal Vol. 77, page 419, Professor Logan points out that "if people feel unfairly treated when they deal with legal authorities, they then view the authorities as less legitimate and as a consequence obey the law less frequently in their everyday lives." Logan goes on to state, "That the Court was not sensitive to the personal consequences of 'being needlessly arrested and booked,' and subjected to 'pointless indignity' and 'gratuitous humiliations,' should give pause to all Americans, who, in contrast to members of the Atwater majority, themselves unlikely targets of aggressive policing, will suffer the brunt of the Court's cavalier sentiment. But the consequences do not stop with the immediate personal consequences of arrest – with arrest comes the power to search, ratchetting up considerably the intrusiveness of police-citizen encounters.

"In announcing its bright line rule – that any and all legal violations can justify warrantless custodial arrest – the Court underscored its determination to withdraw from its oversight of the daily work of police."

7. Ability to pay

A recent study by the National Center for Access to Justice (NCAJ) at Fordham Law School, entitled "Ability to Pay: Closing the Access to Justice Gap with Policy Solutions for Unaffordable Fines and Fees," by Lauren Jones, in the spring of 2024, noted that "there has been only modest progress in ensuring that ability to pay will be considered meaningfully when government pursues revenue from individuals."

The study by the National Center for Access to Justice lists the organization's top recommendations for Policy Models for courts to consider:

1) Court has power to waive or reduce all fines and fees.
2) Court has duty to make ability to pay determinations at critical times.
3) Ensures procedural protections during ability to pay hearings.
4) Waive fines and fees when a person is indigent.
5) Use statutory guidelines for determining how much a person can afford to pay.
6) Implement state-created tools to help judges determine ability to pay.
7) Create practitioners' tools that illuminate ability to pay.
8) Set fines based upon a person's ability to pay.
9) Consider community service, education, and activities as alternatives to payment.
10) Utilize payment plans as an alternative to payment in full up front.

The study noted that the findings of the organization underscored that "across the country, fines and fees are inflicting years-long and sometimes lifelong burdens on people, harming them simply because of their poverty." The study noted that policies adopted by states which eliminate fees, assess right-size fines, and make meaningful determinations of ability to pay provide "rays of hope" to fix a broken justice system.

The study concluded that "millions of Americans are burdened by outstanding fines and fees that they are unable to pay. Meaningful ability to pay determinations can reduce the resulting harm and create greater equity in the criminal legal system."

8. The price of justice

In November 2020, the University of Miami Race and Social Justice Law Review published an article entitled, "The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States," by Lisa Foster.

This article quotes several people from different states, including a person they refer to as "Crystal" from Tennessee: "I think the system is set up for you to fail, because once you get on probation it's just one fee after another and if you can't pay you go to jail, and then once you're in jail and then you get out, you have more court fees and then more fees, and more, and more, and more. It never ends…"

The article goes on to state: "Throughout the United States, state and local courts impose stiff fines on people convicted of criminal and civil offenses, including minor traffic and municipal code violations, misdemeanors, and felonies. The total amount of a person's court debt can range from hundreds to thousands of dollars, and if a person cannot afford to pay their fines and fees immediately, a cascade of harsh consequences ensues. Since the late 1980's, and coincident with the rise in mass incarceration, state and local legislators in the United States have dramatically increased the number and value of fines and fees imposed through the justice system. These fines and fees, which are also assessed in juvenile proceedings against children or their parents or guardians, were initially used to fund the justice system. In the ensuing decades, as political pressure to reduce or minimize taxes increased and federal funding for criminal justice decreased, fines and fees became increasingly popular as a revenue source, not exclusively for the justice system, but also for other government services and general fund revenue."

"Fines and fees in the justice system hurt millions of Americans, entrenching them in poverty, exacerbating racial disparities, diminishing trust in courts and police, and trapping people in perpetual cycles of punishment. Millions of people who cannot afford to immediately pay the full amount charged face additional fees, license suspensions, loss of voting rights, and far too frequently, arrest and jail."

The article goes on to explain the "scope of the problem" as the article states: "Over the past 40 years, the use of monetary sanctions in the criminal legal system in the United States has metastasized, invading every aspect of an individual's encounter with the law. The increase in the number and value of fines and fees is coincident with the rise of mass incarceration; and mass incarceration, in turn, has been used by policymakers to justify the increased fines and fees. Although policy makers often characterize monetary sanctions as 'user fees,' state and local legislators have used the criminal legal system to fund a plethora of government services that have nothing to do with the justice system. The result has

been to impose monetary obligations in amounts the majority of people in the criminal legal system cannot afford to pay."

The article also notes "the implications for race and poverty" as the article also emphasizes that "racial and economic disparities pervade the criminal legal system in the United States. People who are justice-system involved are overwhelming poor and disproportionately people of color. Those two factors – race and poverty – combine to create a system of monetary sanctions that attempt to extract millions of dollars from the country's most vulnerable communities. Fines and fees perpetuate and exacerbate poverty, and they keep communities of color from accumulating wealth."

This study of the "criminalization of poverty in the United States" makes the following conclusions in its report:

1) The fines and fees regime that has come to dominate the United States criminal legal system criminalizes poverty. The assessment of fines and fees raises fundamental questions of equity, fairness, and the purpose of punishment.
2) So called "user fees" are found to be "equally indefensible." The study notes that "the justice system is charged with enforcing rights and responsibilities, resolving disputes fairly, and keeping communities safe. The system serves all of us, and it should be paid for by all of us through general revenue."
3) "Fines should be proportionate to the offense and the individual, and fines should rarely, if ever, be imposed on people who are serving time in custody or under supervision, like probation."
4) "If a person is sentenced to jail or prison, one has to ask what the additional penological purpose a fine could serve. Fines people will never be able to afford to pay don't help them to become law abiding, and imposing a punishment that an individual is unlikely ever to be able to complete, turns every sentence into a life sentence. Fines that serve as the primary punishment for a minor offense need to be set at an amount the individual has the present ability to pay without causing economic hardship. And people need to be allowed access to reasonable payment plans that allow them to make small payments easily for limited periods of time."

"Though these policies are easy to articulate, they will likely prove difficult to implement. Still, they are essential steps on the path to ensuring that government stops extracting billions of dollars from low-income communities of color by criminalizing poverty."

9. "Beyond Payment Plans: Breaking the Cycle of Court Debt in Tennessee"

In December 2021, "Think Tennessee" recommended that Tennessee adopt key policy recommendations as follows:

1) Streamline the payment plan process, by increasing access to payment plans.
2) Create more avenues for waiving fines and fees for indigent Tennesseans by incentivizing judges to use their discretion to grant indigency waivers; encourage additional discretion in the waiving or suspension of fines and fees; and allowing indigency waivers for traffic debts.
3) Eliminate counterproductive economic punishments by ending the revocation of driver's license for unpaid court debt.
4) Reduce government reliance on revenues on fines and fees and lessen budgetary pressure by reducing government reliance on revenues from fines and fees.

10. The Steep Costs of Criminal Justice Fees and Fines

The Brennan Center for Justice sponsored an in-depth study analyzing the wide spread practice of "imposing crippling fines on criminal-case defendants to fund courts and even local governments. As a result of the study, the Brennan Center for Justice of the New York University School of Law called for an end to the unfair, unreliable, stigmatizing, and as the report shows, inefficient practice." In the article, "The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties," by Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison, produced with research assistance form the Texas Public Policy Foundation and Right on Crime (November 21, 2019), concluded as follows:

"The past decade has seen a troubling and well-documented increase in fees and fines imposed on defendants by criminal courts. Today, many states and localities rely on these fees and fines to fund their court systems or even basic government operations.

A wealth of evidence has already shown that this system works against the

goal of rehabilitation and creates a major barrier to people reentering society after a conviction. They are often unable to pay hundreds or thousands of dollars in accumulated court debt. When debt leads to incarceration or license suspension, it becomes even harder to find a job or housing or to pay child support. There's also little evidence that imposing onerous fees and fines improves public safety. Now, this first-of-its-kind analysis shows that in addition to thwarting rehabilitation and failing to improve public safety, criminal-court fees and fines also fail at efficiently raising revenue."

The key findings of this study were as follows:

1) Fees and fines are inefficient for raising revenue.

The costs of fee and fine enforcement are huge.

2) Collecting fees and fines detracts from public safety efforts.

Fees and fines are most often evaluated by courts and criminal justice agencies, legislators, and policy makers on the basis of the revenue they generate, but they come at a great cost to the criminal justice system. When criminal courts impose fees and fines and then spend much of their resources collecting them, this leaves less to spend on true public safety needs. For example:

A) When police and sheriff's deputies are serving warrants for failure to pay fees and fines, they are less readily available to respond to 911 calls.

B) When courts schedule appearances for failure to pay, proceedings for more serious crimes can be delayed or rushed.

C) When community corrections officers spend much of their time reminding their clients to pay unaffordable fees and fines, they have less time to work with people to help them break the cycle of repeated contact with the criminal justice system.

D) When people who can't afford to pay fees and fines are jailed, they are exposed to the many harms of incarceration, while correctional authorities are burdened with providing jail space and services to people who pose no risk to public safety.

3) Almost no time is spent in court determining whether people can afford to pay fees and fines.

4) Jailing for nonpayment is costly and irrational.

5) The amount of uncollected debt continues to grow.

The article also points out that responsibility for fees and fines "hurts those who can't pay, putting them at risk of incarceration, loss of their ability to legally drive, voter disenfranchisement, and increased difficulty in getting a job. And courts keep track of debts in perpetuity, making it all but impossible for defendants to get out from under them."

6) Jurisdictions do not track costs related to collecting fees and fines.

7) Fees and fines are a regressive tax on the poor.

The article points out that actions to collect these types of debts are "predatory and regressive policies targeting vulnerable communities." Further noting that "the fees and fines charged…may well be more than what the average defendant can afford." The article also points out that this is "particularly so where evidence exists that policing frequently has a disproportionate impact on marginalized communities."

The article relies upon extensive data supporting their conclusions. The authors of the article, in conjunction with the Brennan Center for Justice, point to several key recommendations for courts to adopt in response to these findings:

1) States and localities should eliminate court-imposed fees.

The court notes that state legislators and governments "should allocate appropriate funding to courts from their general funds and repeal legislation requiring courts to raise their own revenue by imposing fees."

2) States should require courts to assess fines based on ability to pay.

3) The courts should stop the practice of jailing for failure to pay.

4) States should eliminate driver's license suspension for non-payment of criminal fees and fines.

5) Courts and agencies should improve data automation practices.

6) States should pass laws requiring purging of old balances that are unlikely to be paid.

In an article on July 10, 2019, written by Travis Loller of the Associated Press, entitled "Fines, jail, probation, debt: Court policies punish the poor," the article addressed the plight of Johnny Gibbs of Liberty, TN. The article tells the story of how Johnny Gibbs was punished for high school truancy in 1999 and was told by the State of Tennessee that he would not be able to legally drive until he turned 21. He drove anyway and incurred two tickets and racked up more than $1,000 in fees and fines. Like many other low-income defendants, Gibbs couldn't pay and ended up serving jail time and probation, which lead him to incur another cost: a monthly supervision fee to a private probation company.

The article stated as follows: "Tennessee Supreme Court Justice Jeffery Bivens said reforming fees, fines, and bail is a priority of the Conference of Chief Justices, a non-profit organization comprising top judicial officials from each of the 50 states." "We're having situations where even with $500 or $1000 bail, these folks can't make that bail," Bivens said. "Then they lose their jobs…their families, their children. It's a never ending and increasing cycle." The article further noted that, "Just last year, a national task force of state courts, administrators, and chief justices released a list of principles stating that courts should be funded entirely by governments and should not be used as a revenue-generating arm."

This article established how the Chief Justice of the Tennessee Supreme Court recognizances the nature of "this never-ending cycle."

In an article entitled "Fines, Fees, and Fundamental Rights: How the Fifty States Measure Up, Seven Years after Ferguson," by Chris Albin-Lackey of the Fordham University National Center for Access to Justice (February 2022), Albin-Lackey points out that several states have begun to exhibit some excellent policies that are addressing some of the issues, even though such policies are not uniform or utilized by high percentage of courts. Albin-Lackey points out that "this proves that good practice is a practical reality rather than a utopian ideal. To some degree, fines and fees turns out to be an area where states really are functioning as the 'laboratories of democracy' they are often wistfully described as. No state is doing well overall, but every state could vastly improve its performance simply by replicating policies other states already have on the books."

The article concludes by saying that "The bottom line is that there is an urgent need for change, and it needs to start now, even if it can't happen all at once. National Center for Access to Justice's Fines and Fees Index shows that state governments have largely failed to adopt modest, pragmatic reforms necessary to guarantee meaningful respect for litigants' rights in fines and fees cases. Progress has been halting, uneven, and in many states simply nonexistent – despite an increase in public awareness and good reporting on fines and fees injustice."

11) Statutory tools in Tennessee in regards to fines, fees, and court costs.

TCA 55-10-403 imposes fines for DUI cases with the first offense being a minimum $350 up to $1500, a second offense $600 up to $3500, a third offense being $1100 up to $10,000, and for a fourth or subsequent offense $3000 up to $15,000.

The statute specifically notes that "unless the judge, using the applicable criteria sat out in TCA 40-14-202 (v), determines that a person convicted of violating TCA 55-10-403 is indigent, the minimum applicable fine shall be mandatory and shall not be subject to reduction or suspension."

In Steven Oberman's excellent treatise on DUI offenses entitled "DUI: The Crime and Consequences in Tennessee", Oberman notes that "TCA 55-10-403 (b) allows any court having jurisdiction over DUI offenders to suspend the fine for those determined to be indigent. Similarly, TCA 40-25-129 (2) provides that a court of record may relieve an indigent DUI offender of the court costs and associated fees. The Tennessee Supreme Court [State v. Shelton (Tenn. 1996)] has ruled that this statute extends such authority to waive court costs to courts of General Sessions."

In TCA 39-17-428, the Tennessee legislature proscribed fines for drug offenses following which, the statute states: "Unless the judge, using the applicable criteria set out in TCA 40-14-202 (c), determines that a person convicted of violating this section is indigent, or that payment of the minimum fine would result in a severe economic hardship, or such fine would otherwise not be in the interest of justice, the minimum fines imposed by this section shall be mandatory and shall not be reduced, suspended, waived, or otherwise released by the court. No plea agreement shall be accepted by a court if the agreement attempts to reduce or suspend all or any portion of the mandatory fines imposed by this section unless the judge determines that one of the conditions set out in the first sentence of this subdivision exists."

The statute also states, "If the judge of the Court of General Sessions determines that it is necessary to reduce, suspend, waive, or otherwise release the minimum fines imposed by this section, the judge shall assess the fine, and write on the warrant the amount of the fine, the fact that it is reduced, suspended, or waived or released and the reasons for the reduction, suspension, waiver or release."

12. Strategies for General Sessions Judges to Seek and Accomplish Justice While Considering the Ethical Considerations of Poverty Issues in General Sessions Court

1) As General Sessions judges, we can take a few moments to assess the actual financial status of indigent defendants and consider the abilities of the defendant before the court in paying financial obligations. We can consider the potential hopelessness of defendants as they face the implications of thousands of dollars of debt even amidst the financial landmines they face in the form of housing costs, license suspensions, inequities of achieving a profitable job, and the other hurdles of being in jail or on probation for many months to come.

2) We can create and utilize forms in our courts that make it easy for defendants to request waivers of fines, costs, and fees.

3) General Sessions judges can consider the principles of evaluating restitution issues by considering the constitutionally mandated requirements in setting restitution amounts, including considering the defendant's ability to pay.

4) General Sessions judges can consider waiving attorney fees in appointment cases and/or setting the attorney fees at lower rates in proper situations. General Sessions judges can be ever mindful of the vast amount of judicial discretion that we are given by statutes and/or case law in the waiver of fines, costs, and fees for indigent defendants.

5) General Sessions judges can consider expungement clinics to assist defendants in going from completion of jail time and probation and becoming better situated to procure reasonable employment for future expenses of themselves and their families.

6) General Sessions judges can encourage all defense counsel to follow through with expungements as a part of their regular duties in assisting their clients, including following through with immediate expungements when cases are dismissed. Creating an awareness of the availability of immediate expungement of records can help achieve expungements on the front end rather than waiting for negative circumstances to occur which then lead to late expungements after damage has already been done.

7) General Sessions courts can encourage District Attorneys to be proactive in cooperating with expungement procedures and include district attorneys in being a positive part of the expungement process whenever possible.

8) General Sessions judges can set up policies in which it is encouraged that all costs be dismissed when defendants are able to get their driver licenses restored during grace periods which may be extended by General Sessions judges. Defendants have generally expended a significant amount of money to get their licenses restored and allowing charges to be dismissed upon this accomplishment and dismissal of costs can be a valuable reward.

9) General Sessions judges can discourage inappropriate or unconstitutional targeted stops, based upon race or other biases, by dismissal of cases in the interest of justice when it clearly looks like constitutional rights have been infringed by the inappropriate actions of police officers in inappropriate profiling or targeted stops, or unconstitutional searches and seizures.

10) General Sessions judges can train themselves and read articles regarding access to justice, including stops made under suspicious circumstances, which help judges to focus on conditions and circumstances which indicated unconstitutional stops or acts of harassment or bigotry.

11) General Sessions judges can and should discourage sloppy or poor police work or persistent lack of preparation by police officers for cases which are to be heard in court, demonstrated by such reoccurring conduct as being unable to answer questions or responding to question after question with answers such as “I don’t recall.” If officers do not make the effort to prepare for cases such as by reading their reports and reviewing police cams or body cam videos, then their cases should be properly dismissed.

12) General Sessions judges are fact finders and should be diligent in recognizing:

A) A criminal charge is a big deal for anyone - everyone - as charges affect employment, families, opportunities for the future, and the fabric of their lives.

B) Preliminary hearings are critical stages and important hearings for determining whether a charge should go further, therefore it is important for officers and other witnesses to be prepared. Prosecuting attorneys and defense counsel should also face expectations by General Sessions judges requiring them to be prepared and to have policies which encourage

preparation so that cases can be properly discussed and evaluated for hearings and advancing the cause of justice.

C) The Constitution was put in place to protect the accused, including the following key principles:

i) proper screening of charges by magistrates and giving proper notice of the conduct involved;
ii) witnesses, including police officers, should be prepared to testify regarding the facts of the case;
iii) canine stops should be properly scrutinized as suggested by statutes and caselaw;
iv) DUI field sobriety tests are difficult under any circumstances, and particularly on bad terrain, with poor lighting, vehicles speeding by, occurring in public places, near flashing lights, and often without a true line to walk on. Courts should understand these facts and circumstances and make an effort to accomplish justice in each case. As judges we should be ever mindful that if this case involved members of our family, our children, our friends, and people important to us, we would want an officer to be fair, courteous, reasonable, acting according to the principles of the law, respecting each citizen and modeling proper conduct and authority for an officer of the law.

13) The burden of proof must mean something to General Sessions judges.

14) Encouraging high quality representation should be a part of each court's responsibilities.

15) Interpreters are key players in our courtrooms for seeing that justice is done.

An interpreter in my courtroom recently stated to me that the duty of an interpreter is to enable foreign language speakers be in the same position as a person who does not have to use an interpreter, including being made aware of conversations of court personnel or attorneys which is going on around them.

16) Probation officers should be properly aware of your high ethical standards and expectations, including their need to be respectful and providing appropriate instructions and clear expressions of all expectations and rules and consequences.

17) Years ago at a conference I attended in Washington D.C., a New York judge presented us all with a challenge by saying she always looked at her cases through the lens of what would it be like if her family was in the situation of the person she was judging in court.

She stated that it was her policy and practice to ask:

- If this was my child or my family, would I be satisfied with the way the court system has treated him or her?

-Would the quality and character of the prosecution be satisfactory if this case involved my child?

-Would the representation by defense counsel be satisfactory if this was my child?

-Would the attitude and preparation and attentiveness and respect that I have demonstrated in this case be satisfactory for a judge that was handling a case involving my child?

-Would the actions of the bailiff, interpreter, probation officer, and/or any other participant in the case be satisfactory if this was my family member?

-Would the way I operate and run this courtroom, including all the facets of the case, be satisfactory if somebody close to me was having to go through these experiences?

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Ann Marie Atchley has been serving as the Judicial Assistant to Judge Dwight E. Stokes and Judge Keith E. Cole since August 2024. Her assistance was very valuable in helping to finalize this outline.

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