

TENNESSEE GENERAL SESSIONS JUDGES **CONFERENCE**

FEBRUARY 2024

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

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CRIMINAL LAW UPDATE

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“ATTEMPT CRIMES”: LIABILITY IN TENNESSEE

ATTEMPTED UNLAWFUL PURCHASE OF A FIREARM: THE DEFENDANT’S ACTIONS IN NEGOTIATING THE PURCHASE OF A FIREARM FULLY CORROBORATED HIS ADMITTED ATTEMPT TO PURCHASE, AND THEREFORE POSSESS, A FIREARM

FACTS: On 6/22/18, the defendant contacted Mr. Craig Baker by text message and offered to purchase a firearm from him. The two had previously discussed the idea of Mr. Baker selling his Ruger LCP a few times at work.

The facts showed that after the defendant had “admittedly” formed an intent to acquire a firearm, he had reached out to Mr. Baker pursuant to a text message. The defendant initiated the contact himself telling Mr. Baker he would purchase the firearm for “whatever price” Mr. Baker wanted for the pistol. The defendant offered Baker the amount of \$300.00, following which Mr. Baker noted that he did not wish to sell his weapon. The defendant then increased the monetary offer to \$325.00 and proposed meeting to exchange the weapon “today.” After further discussions, Baker advised that he was not going to sell the firearm.

The defendant was convicted of the attempted unlawful purchase or possession of a firearm.

HELD: The Court of Criminal Appeals concluded that the defendant's actions in negotiating the purchase of a firearm fully corroborated his admitted intent to purchase and therefore possess a firearm. The court noted that the defendant's actions were more than just "general conversation" or "mere abstract talk," and that the court could not "perceive any non-criminal purpose that could have been the focus of defendant's actions." The Court of Criminal Appeals therefore concluded that the defendant's negotiation with Baker to purchase fireman was a substantial step toward the defendant's intended crimes of unlawful purchase and possession of a firearm.

In arriving at its conclusion, the Court of Criminal Appeals discussed several important aspects of Tennessee law and the history of Tennessee law, as follows:

1. The CCA noted that one of the purposes of the criminal law is to "proscribe and prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual, property, or public interest." Therefore, the law seeks to punish appropriately the crimes that have been committed but also to "punish crimes that are attempted but which, for one reason or another, have not been completed."
2. A recurring issue with deciding how to punish attempted crimes concerns how to define when the defendant should be held criminally liable during the time line of events leading to a crime. At one end of the continuum, "criminal liability cannot attach simply because one thinks about committing a crime," due to the fact "mere thoughts about committing a crime could never constitute a criminal attempt." The court noted "at the other end of the continuum, if the law were to wait until a completed crime is imminent before recognizing the possibility of criminal liability, the law's interest in discovering and preventing criminal activity would be undermined significantly."
3. Tennessee initially adopted the common-law structure of an attempt crime and maintained that "the defendant must have taken actions beyond mere preparation before he or she could be criminally liable for an attempted crime." If the defendant had only engaged in devising or arranging the means or measures

necessary for the commission of the offense, then he or she could not be held criminally liable for an attempted crime.

The Tennessee Supreme Court later noted that the common-law rule was subject to “persistent criticism.”

4. In 1989, the General Assembly revised the Criminal Code, stating that “a person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense, acts with intent to complete a course of action or cause or result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.”

Tennessee law from that point has held that three aspects of the “substantial step” test are significant: (i) The nature of the conduct that constitutes a substantial step toward committing a crime will vary from case to case, but where possession of an object is itself the intended crime, conduct seeking to possess that object may constitute a substantial step even when the same conduct would not be sufficient for attempted liability in another context. (ii) Conduct does not constitute a substantial step toward commission of the offense unless the person’s entire course of action is corroborative of the intent to commit the offense. (iii) Most importantly, the law no longer asks how close (or how far away) one was to completing a crime. Instead, the offense of criminal attempt “is basically one of criminal intent coupled with acts that clearly demonstrate the offender’s proclivity toward criminality.” (iv) The change in focus is significant in that attempt liability under the current statute may arise “in preparing and planning the commission of the offense,” even when the defendant has not done all that he intends to do.

5. While Tennessee has not addressed the extent of which negotiations can constitute a “substantial step” in the context of attempted possession crimes, other courts have done so and have recognized that when conversations were “more than general conversation or mere abstract talk” the conduct could more readily amount to substantial steps toward committing the offense.

6. The Sixth Circuit has held that “when a defendant engages in active negotiations to purchase drugs, he has committed the substantial step towards the crime of possession required to convict him of attempted possession.”

Based upon all of the above principles, the Court of Criminal Appeals concluded that the defendant’s actions in negotiating the purchase of a firearm in this case did in fact fully corroborate his admitted attempt to purchase and therefore possess a firearm.

State v. Haymer (Tenn. Cr. App. 4/28/23)

BURGLARY

“WITH INTENT TO COMMIT A THEFT”: EVIDENCE WAS SUFFICIENT FOR FACT FINDER TO REASONABLY CONCLUDE THAT THE DEFENDANT ENTERED THE HOME WITH THE INTENT TO COMMIT A THEFT, AS A PERSON IS NOT REQUIRED TO ACTUALLY COMMIT THEFT ONCE INSIDE THE BUILDING AND THE DEFENDANT’S “SPECIFIC INTENT MAY BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE”

FACTS: The defendant was convicted of one count of aggravated burglary for unlawfully entering the home of the victims without their consent.

When the victims returned to their home after attending Thanksgiving dinner, they discovered the defendant in their home and every light in the house was on, a purse had been dumped on the bed, the drawers in the bedside tables, the closet door, and the door to the medicine cabinet were also open in the main bedroom. It turned out that nothing was missing and

nothing had been taken nor had anything been moved from one room to another. The testimony was clear that the occupants of the home had not given permission to the defendant to enter their home or to look through their personal belongings.

The defendant testified that he was on County Road 135 when a truck passed him, turned around, and came back at him at a high rate of speed. He states that he was afraid and ultimately abandoned his vehicle, ran into the yard of the victims, “hopped the porch railing,” and found the door to be unlocked. Defendant maintained he only went into the kitchen and the bathroom and did not look through any of the personal belongings. The defendant explained that he was under the influence of methamphetamine and sometimes had hallucinations. He acknowledged that it was wrong for him to be in the home without permission and that his conduct probably was aggravated criminal trespass but not burglary as he did not intend to steal anything.

HELD: The Court of Criminal Appeals found that there was sufficient evidence for the jury to reasonably find that the defendant entered the home with the intent to commit a theft. The court noted that the records show that there were personal belongings strewn about, drawers and doors left open, and various items out of place, including the contents of the purse of one of the victims. The defendant was the only person at the home when the victims returned to their home. The court noted that the defendant did not contact law enforcement regarding the incident, and there was no proof to corroborate his testimony that he entered the home because of a truck chasing him.

The court noted the following principles in regard to burglary and aggravated burglary that applied in the case:

1. TCA 39-14-403 (later replaced by 39-13-1003) provided that “a person commits burglary who, without the effective consent of the property owner enters a building other than habitation with intent to commit a felony, theft, or assault.”
2. A habitation is “any structure designed or adapted for the overnight accommodation of persons.”

3. A person is not required to actually commit the intended crime once inside the building; burglary occurs once the person enters the building without consent of the owner with the requisite intent.
4. A defendant's specific intent may be established by circumstantial evidence.
5. A person commits aggravated criminal trespass who enters or remains on property when the person knows the person does not have the property owner's effective consent to do so and the person intends, knows, or is reckless about whether such person's presence will cause fear for the safety of another.

Based on consideration of the proof and all of the above principles, the court concluded that the fact finder had properly weighed the evidence, resolved conflicts in the evidence, and found the defendant guilty of aggravated burglary, which when viewed in the light most favorable to the state was a reasonable conclusion based on the facts.

State v. Peters (Tenn. Cr. App. 9/29/2023)

CLOSING ARGUMENT

IMPROPER CLOSING ARGUMENT: “WHERE DO YOU DRAW THE LINE? WHERE DO YOU DRAW THE LINE? MAYBE THAT’S THE GUY THAT FORGETS YOU’RE IN THE OTHER LANE”

FACTS: At the conclusion of a trial for DUI, in a case in which the prosecutor even admitted he had seen people “do a whole lot worse” on DUI tests, the prosecutor made the following argument:

[PROSECUTOR]: “Frankly, honestly, I see people do a whole lot worse on those tests. A whole lot worse than what the defendant did. But

where do you draw that line? Where do you draw the line? Where are you going to draw the line? That line's got to be drawn close. You - - okay, why?

Well, it's - - how close - - it's simple. How close are the lines on the highway? Nothing separating those lanes but that little strip of yellow or white. That's how much space there is between somebody driving down the road smoking dope and someone who's not. Someone maybe like you, maybe like your child or your grandchild.

[DEFENSE COUNSEL]: Objection, Your Honor, I have to say that's an improper argument for the state.

THE COURT: Okay. I'll overrule the objection. Continue on.

[PROSECUTOR]: So, these tests, these determinations of these tests, these judgment calls that that man has to make, sometimes people take issue with how closely we judge them. But we, we have no other choice. He has no other choice. He had no other choice. Those mistakes on the field sobriety tests, they're magnified behind the wheel of a speeding automobile. Maybe the guy that forgets what Trooper Shelton told him, the guy that forgets how Trooper Shelton told him to do something, maybe that's the guy that forgets you're in the other lane. The guy that didn't notice Trooper Shelton's instruction, maybe that's the guy that don't notice the red light. And why doesn't he notice? Why does he forget? You think that rolling that blunt, smoking that blunt had anything to do with it? It had everything to do with it. That's why we've got to draw the line close. We do that so that five miles down the road that line in the middle of the road is not the only thing between you and someone driving high. What we cannot do, we cannot wait until it's obvious beyond all doubt. We do that we're here on a different trial. You can't wait 'til he hurts himself or hurts someday else.

DEFENSE COUNSEL: Your Honor, may we approach?

[DEFENSE COUNSEL]: All this parenthetical what's going to happen, if you don't find him guilty, will it be your family the next one is absolutely out of line in terms of my objection. I'm trying to be respectful about it and not talk about it in front of the jury, and I hate to interrupt him but I've got to get on the record objecting to it.

THE COURT: Yeah, I understand. Let's, let's - - let's take just a brief - -we're going to take just a brief recess. I want to see the lawyers in chambers just a second.

After the prosecutor completed his closing argument, the trial court issued what he considered a curative instruction to the jury, as follows:

THE COURT: All right. In just a moment [defense counsel's] going to present his argument. The jury heard [defense counsel] make an objection and all the Court's going to do at this time is instruct you that you will decide solely based on the evidence that was presented from the jury [sic] box and the law as I give it to [you]. The arguments of the, the arguments of both attorneys are merely to assist you in understanding the evidence, but you're to decide it on the evidence that came from the witness stand, as well as the law as I instruct.

The jury convicted the defendant of driving under the influence, simple possession of marijuana, driving on suspended license, and speeding.

On appeal, the defendant complained that the state had made an improper closing argument which appealed to the emotions of the jury.

HELD: The Court of Criminal Appeals held that the state's argument was improper due to the fact that "the prosecutor should not have appealed to the emotions of the jurors by arguing that they or their loved ones might become victims of the defendant's impaired driving," but held that the "complained-of comments" did not impact the verdict of the jury and did not warrant reversal of the conviction or the granting of a new trial.

The Court of Criminal Appeals noted in its opinion that "improper closing argument" occurs when the prosecutor.

1. Intentionally misstates the evidence or misleads the fact-finder on the inferences it may draw from the evidence;
2. Expresses his or her personal opinion on the evidence of defendant's guilt;
3. Uses arguments calculated to inflame the passions or prejudices of the fact-finder;
4. Diverts the fact-finder from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the

controlling law or by making predictions on the consequences of the decision; and

5. Intentionally refers to or argues facts outside the record, other than those which are matters of common public knowledge.”

The court further noted that Tennessee courts have traditionally provided counsel with a wide latitude of discretion in the content of their final argument and give trial judges wide discretion in control of the argument. The court did note that a party’s closing argument should be, however, “temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law.”

The Court of Criminal Appeals concluded by stating that it agreed “with the state that the prosecutor’s reference to the defendant’s passing of a blunt to his passenger was a reasonable inference to be drawn from his admission to Trooper Shelton that he had just smoked a blunt, combined with the fact that a bag containing marijuana and marijuana roaches was found on his passenger, and his passenger can be heard on the video telling the officers that he rolled the blunt in the vehicle.” The court concluded with its comment that the “complained of comments” did not affect the verdict of the jury and did not warrant reversal.

DISSENTING OPINION: Judge Greenholtz of the Tennessee Court of Criminal Appeals wrote a dissenting opinion stating he agreed with the majority that the state’s closing argument was a clearly improper “golden-rule” or safer-streets” argument which appealed to the emotion and passion of the jury by asking its members to envision being a driver with children on the same road as the defendant.

Greenholtz stated that he respectively disagreed with the state’s argument that the improper closing argument likely did not impact the verdict. Greenholtz stated the following:

Firstly, he disagreed that the curative measures taken by the trial judge effectively mitigated the risk of harm caused by the golden-rule argument. Greenholtz noted that the record did not show that the trial court had admonished the prosecutor and that the later jury instructions were not contemporaneous with the improper argument and therefore the final

instruction lacked the context necessary for the jury to understand the issue and that it was in fact improperly argued.

Secondly, Greenholtz stated that the intent of the prosecutor in making the improper statement is important and to him the conclusion that the prosecutor did not act intentionally was not obvious. Greenholtz pointed out that in making the argument, “Where do you draw the line?”, he noted that the prosecutor kept returning to the same thing even over the multiple objections of the defense attorney, and the jury got the message that that argument was ok.

Finally, Judge Greenholtz reflected on the relative weakness of the state’s case, which included that the only violation of the rules of the road seen by the trooper was speeding and did not include weaving, swerving, or crossing over lines; the trooper admitted he identified no clues of impairment before administering the field sobriety test; the trooper did not note any problem with the defendant’s motor skills or fumbling with the license or swaying or any problems with balance; the trooper indicated that the level of impairment was “slight,”; and Judge Greenholtz also noted that even the prosecutor said that “frankly, honestly, I see people do a whole lot worse on these test. A whole lot worse than what Mr. Russell did.” Also, TBI Agent Michael Tiller testified that while the level of THC “could impair someone,” he could not testify whether defendant was actually impaired at the time. Tiller also testified that levels of THC in a person’s blood do not correlate to impairment in the same way that levels of alcohol would.

Based upon all of these factors, Judge Greenholtz concluded that the improper argument likely impacted the judgment of the jury and did not constitute harmless error.

PRACTICE POINT: Even though General Sessions judges do not deal with juries, it is still important to defendants and victims and families impacted by a case for a General Sessions judge to make proper rulings in regard to closing arguments or in ruling upon objections made during the course of a trial or preliminary hearing. That is our job.

State v. Russell (Tenn. Cr. App. 8/29/23)

CONFESSION

LACK OF SLEEP: THE RECORD SUPPORTS THE TRIAL COURT'S DETERMINATION THAT THE STATE ESTABLISHED BY PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT'S STATEMENT WAS KNOWING, INTELLIGENT, AND VOLUNTARY AND DID NOT SUPPORT THE DEFENDANT'S CLAIM THAT HE WAS EXHAUSTED DUE TO LACK OF SLEEP TO THE EXTENT THAT HE DID NOT VOLUNTARILY WAIVE HIS MIRANDA RIGHTS

FACTS: On October 28, 1996, the victim was raped and murdered in Montgomery County, Tennessee. The proof established that the victim was raped, suffered knife wounds to her neck and ultimately was suffocated by a pillow resulting in her death. Dr. Lewis concluded that the victim sustained homicidal violence and that the evidence was consistent with the victim having been suffocated with a pillow.

Years later, the TBI notified Sergeant Ulrey that there had been a "CODIS hit" from the victim's vaginal swab and he arranged to interview the defendant in Phoenix, Arizona, and to execute a search warrant to obtain the defendant's DNA.

Sergeant Ulrey began the interview with the defendant at approximately 4:30 p.m. on 4/16/19 after the defendant was apprehended by local law enforcement officers. The defendant signed a waiver of his Miranda rights on 4/16/19 at 4:40 p.m. The defendant did not indicate that he wanted an attorney during the interview nor did he indicate that he did not want to answer questions. Sergeant Ulrey testified that the defendant denied having sex with the victim and after being confronted with the CODIS report, the defendant continued to deny having sexual relations with the victim but later admitted to having consensual sex.

On appeal, the defendant contended that the trial court erred by denying his motion to suppress his police statement due to his lack of sleep. A video recording of the interview was received into evidence as an exhibit.

During the interview the defendant did mention his lack of sleep and twice stated that he was tired, The interview lasted for more than three hours.

HELD: The Court of Criminal Appeals held that the record supported the trial court's determination that the state established by a preponderance of the evidence that the defendant's statement was knowing, intelligent, and voluntary. The Court of Criminal Appeals found that the trial court did not err by denying the motion to suppress and relied upon the following principles in its decision:

1. A trial court's findings of fact on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. Questions regarding credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge is a matter of fact.
2. The Fifth Amendment of the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself.
3. The test of voluntariness for confessions under Article I, section 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. To be considered voluntary, a statement must not be the product of any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by exertion of any improper influence.
4. The essential inquiry is whether the behavior of the state's law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined. A confession is involuntary if it is the product of coercive state action.
5. The state has the burden of proving the voluntariness of a confessions by preponderance of the evidence.

6. In determining whether a confession is voluntary, a trial court examines the totality of the circumstances which encompasses both the characteristics of the accused and the details of the interrogation. Relevant circumstances include the following:

“The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated, or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.”

In reviewing the law as applicable to the facts of the case, the Court of Criminal Appeals noted the following key aspects of the case:

1. The defendant was properly read his Miranda rights and signed the same and did not indicate that he wanted an attorney or that he did not want to answer the questions.
2. The officer found the defendant’s demeanor to be “fine” and that the defendant talked openly and wanted to help the investigation.
3. Sergeant Ulrey testified that during his career as a police officer he had learned the characteristics of an impaired person and that the defendant did not appear impaired and that the defendant did not state during the interview that he had recently been intoxicated or used narcotics.
4. While the defendant initially denied he had sexual relations with the victim he later did admit to having consensual sex. During the 3.5 hours of the interview, the defendant answered questions clearly and did not appear impaired.
5. When the defendant asked for a drink, he was provided a drink and when he asked for a bathroom break, he was given a break.

6. The defendant appeared alert, answered and asked questions, and provided detailed information about his previous convictions in Texas and Arkansas.
7. There was no evidence that the defendant's will was so overborne as to render the statement of product of coercion.
8. The defendant had previous experience with law enforcement. The interview occurred in the afternoon hours, was not unduly lengthy, and did not extend late into the evening.
9. The defendant was not threatened and was not promised anything in exchange for the statement.
10. Although the defendant mentioned lack of sleep, he did not appear sleepy or incoherent during the interview and continued answering questions after mentioning his lack of sleep.
11. The totality of the circumstances reflected that the trial court's determination that the state established by a preponderance of the evidence that the defendant's statement was knowing, intelligent, and voluntary.

State v. Hudspeth (Tenn. Cr. App. 8/11/23)

DUI

BREATH TEST RESULTS: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE RESULTS OF THE BREATH TEST

FACTS: Officers from the Knoxville Police Department (KPD) responded to a call of an unconscious driver at 6:12 a.m. on 5/9/18 who was in the seat of a vehicle stopped at a traffic light at Kingston Pike. The defendant

reportedly had sat through several light cycles and not moved. EMTs had already arrived on the scene and performed a medical evaluation on the defendant.

Officer Cochran testified that he noticed the defendant had bloodshot watery eyes, slurred speech, and the odor of alcohol coming from him. Officer Cochran asked the defendant if he had consumed alcohol or any medications or if he had any medical conditions that would cause him to fall asleep, to which the defendant responded “no” to each question. Officers learned that the defendant’s driver’s license had been revoked. At 6:16 a.m., the defendant consented to the request for him to perform field sobriety tests, after which officers concluded that he was not sound to operate a motor vehicle. The defendant was placed under arrest for driving under the influence and was advised of his Miranda rights.

The defendant then asked if he could have an attorney present at the scene, to which Officer Cochran told him that was not possible but if he did want an attorney, he would not ask him any more questions. The officer advised the defendant of the implied consent law and the defendant agreed to provide a breath sample. The defendant was transported to KPD to conduct the test and the breathalyzer test was performed at 7:02 a.m., which revealed the defendant’s blood alcohol content was 0.155.

The trial court denied his motion to suppress the results of his breath test.

On appeal, the defendant argued (1) that the trial court abused its discretion by denying his motion to suppress the results of his breath test, since his breath test was too remote in time from his arrest to be considered incident to arrest; (2) the defendant also contended that his consent to the breath test was not constitutionally valid due to his mental health issues and he felt coerced into consenting to the testing; and (3) the defendant argued that his inability to consult with counsel prior to consenting to the breath test violated his right to due process.

HELD: The Court of Criminal Appeals concluded that the trial court had properly denied the defendant’s motion to suppress.

The court made the following rulings:

(1) The Court of Criminal Appeals pointed out that the United States Supreme Court has concluded that the 4th Amendment permits warrantless breath tests incident to arrest for drunk driving. The court noted that the defendant was arrested at 6:29 a.m., that he signed his implied consent form at 6:33 a.m., that he was transported from the scene at 6:39 a.m. to go to the KPD Safety Building and that he actually performed the breath test at 7:02 a.m. The court found that this delay was not significant and noted that the appellate courts of Tennessee have repeatedly refused to set a “bright line rule” as to what constitutes a reasonable time after the defendant has been driving. The court concluded that based on precedents in Tennessee the delay of approximately 33 minutes between the time of the arrest and the testing in this case was not significant, and the officer was not required to obtain a warrant.

(2) The Court of Criminal Appeals further found that the defendant’s claim that his consent to the breath test was not constitutionally valid due to his mental health concerns was not well taken. The court noted that Officer Cochran had testified that the defendant performed poorly on field sobriety tests and based upon that the defendant was placed under arrest and advised of his Miranda rights. The defendant was advised of the implied consent law and the defendant signed the implied consent form and agreed to provide a breath sample.

In regard to the defendant’s testimony in regard to him being stressed out and anxious, the trial court had noted in its opinion that the court did not find the defendant’s testimony credible that he was so anxious and stressed that he did not feel he had any choice but to consent to the field sobriety test. The defendant had testified that he was not intoxicated or impaired but that he had been having trouble sleeping and dealt with insomnia and anxiety, which caused him to have an elevated heartrate and trouble speaking. The defendant had testified that he had been diagnosed with anxiety at the age of seventeen and had been prescribed a couple of medications.

The CCA found that the trial court had credited the testimony of the officers and had discredited the testimony of the defendant based upon the totality of the proof and testimony.

(3) In regard to the defendant’s claim that he should have been allowed to consult with counsel prior to consenting to the breath test, the Court of

Criminal Appeals noted that the Tennessee Supreme Court has found that “a person arrested without a warrant on a reasonable suspicion of DUI does not have a due process right under the Tennessee Constitution to consult with an attorney before making the decision to provide a breath test for alcohol levels.”

The CCA therefore concluded that the trial court had properly denied the defendant’s motion to suppress the results of his breath test on the basis of these issues.

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

ILLUMINATION OF DEFENDANT’S LICENSE-PLATE LIGHT: TENNESSEE DOES REQUIRE A SINGLE VEHICLE TO HAVE A LIGHT TO ILLUMINATE THE LICENSE PLATE

FACTS: Officer Cannon testified that the sole reason he pulled over the defendant’s vehicle was because the tag light was out. The officer did not perform field sobriety tests but surmised that the defendant was intoxicated based on his slurred speech and the smell of alcohol on his person. The defendant had denied that his tag light was out and stated he had never noticed any problem with his license plate light.

HELD: The Court of Criminal Appeals concluded that the evidence did not preponderate against the trial court’s findings. The court noted that Officer Cannon specifically testified as to the reason he stopped the vehicle due to his observation that the defendant’s license plate light was not functioning. He had followed defendant’s vehicle after hearing the squealing tires of the defendant who left the intersection at a high rate of speed.

The court specifically noted that, on the date of the stop, Tennessee law required all motor vehicles with a factory-equipped license plate light to

have the license plate illuminated whenever headlights were illuminated. This is pursuant to TCA Section 55-4-110(c)(1), law in effect since 2018.

Following the appropriate stop due to violation of the statute, Officer Cannon further provided specific details for probable cause to arrest the defendant for DUI, being slurred speech, unusual behavior during the traffic stop, inability to answer basic questions, the odor of alcohol on the defendant's breath and person, and the odor of alcohol from inside the defendant's vehicle.

State v. Moss (Tenn. Cr. App. 9/5/23)

EVIDENCE

AUTHENTICATION OF A “VIDEO OF A VIDEO”: RECORDING ON AN OFFICER’S CELLULAR TELEPHONE WHICH PURPORTED TO BE A RECORDING OF A PILOT GAS STATION’S STORE SURVEILLANCE VIDEO FOUND TO BE APPROPRIATELY AUTHENTICATED BY THE OFFICER’S TESTIMONY

FACTS: In a case in which the defendant was convicted of second-degree murder and tampering with evidence, the defendant maintained that the trial court abused its discretion by admitting Investigator Markham’s unauthenticated cellular telephone video into evidence.

The trial record reflected that several days before trial, the state made an oral motion to introduce Investigator Markham’s cellular telephone video into evidence. At a hearing on the motion, Investigator Markham testified that during his investigation, he learned that the defendant had disposed of evidence in a dumpster at the Pilot gas station located at the intersection of Middlebrook Pike and Western Avenue. On 2/26/20, he went to the gas

station and employees allowed him to watch the store's surveillance video that had been recorded between 5:00 and 6:00 a.m. on February 4, 2020. The video showed an individual matching the defendant's race and clothing he was wearing at the time of the interview on February 4, the date of the crime, go towards the dumpster area and a trash can and put a bag in a trash can. Investigator Markham testified that he saw that the date stamp on the Pilot video was February 4, 2020, and that the time stamp was about 5:20 a.m. The proof established that while the relevant portion of the Pilot video was playing, Investigator Markham recorded it with his cellular telephone "just as a backup in case we could not get the whole video."

Subsequently, Investigator Markham contacted Pilot corporate and requested their surveillance video, but Markham failed to put the date for the video on his request. By the time he realized his mistake, Pilot had overridden the video. Therefore, the only video that was available was the video Investigator Markham recorded on his cellular telephone. Markham testified that his cellular telephone video captured the time stamp on the Pilot video but not the date stamp.

The facts at trial also included testimony by Dreama Moore who testified that she took the defendant to the Pilot gas station on the morning of 2/4/20, following which the trial court ruled on the state's issue of authentication of Investigator Markham's "video of a video".

The trial court found that the state properly authenticated the video pursuant to TRE 901, explaining that there was testimony of a witness with knowledge, being Investigator Markham, who went to the Pilot and had the video brought up of the date testified to by the witness Moore, basically finding that the state had connected the dots for authentication.

The trial court also ruled that it needed to give the jury a Ferguson instruction based upon the fact that all of the video was not properly preserved. The trial judge told the jury that the state had a duty to "gather, preserve, and produce at trial evidence which may possess exculpatory value." The court went on to explain that "if, after considering all of the proof, you find that the state failed to gather or preserve evidence, the contents or qualities of which are an issue, and the production of which more probably than not would be a benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant."

The court then told the jury that at this point in the trial it was going to allow the portion of the video that was preserved to be admitted as evidence and then the video was played for the jury.

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion by finding that Investigator Markham had authenticated the cellular telephone video.

1. The court noted that TRE 901 governs the authentication of evidence and provides that the requirement of authentication or identification as a condition precedent to 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. Authentication can be properly established by the testimony of a witness with knowledge that the matter is what it claimed to be.
3. Whether evidence has been sufficiently authenticated is within the trial court's sound discretion.

In evaluating all of these principles, the court found that the present case was distinguishable from prior cases because prior cases had involved the store surveillance video itself, whereas "the evidence at issue here is Investigator Markham's video of the store surveillance video." The court noted that Ms. Moore had told Investigator Markham about taking the defendant to the Pilot gas station at the exact location between 5:20 and 5:30 a.m. on 2/4/20, and that based upon her information Markham went to that location and requested to see the surveillance video for that specific period of time on that specific date. The officer testified that the date and time stamped on the Pilot video corresponded to the date and time provided by Ms. Moore. He testified that he was familiar with the particular Pilot gas station and that he recognized the gas station's dumpster area in the video. Investigator Markham testified that the race of the individual in the Pilot video matched the defendant's race and that the shoes and pants worn by the individual in the video appeared to match the shoes and pants worn by the defendant at the time of the police interview. The bag being carried by the individual in the video matched the descriptions of the bag given by witnesses in the case. Finally, the court noted that Investigator Markham identified the video he recorded with his cellular telephone and indicated

that the only differences between his video and the Pilot video were the missing date stamp and the background noise.

Based upon all of these factors, the court concluded that the trial court did not abuse its discretion by finding Investigator Markham authenticated his cellular telephone video.

State v. Atkins (Tenn. Cr. App. 8/21/23)

AUTHENTICATION OF EVIDENCE: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED SERGEANT PITTS TO AUTHENTICATE THE RECORDING OF A DRUG TRANSACTION DUE TO THE FACT PITTS MONITORED THE INTERACTION BY AN AUDIO FEED AND ALSO VISUALLY OBSERVED THE TRANSACTION

FACTS: The defendant was found guilty of the sale of a Schedule II narcotic and delivery of a Schedule II narcotic and was sentenced to serve twenty-eight years as a Range III offender.

The defendant contended that the trial court erred when it allowed Sergeant Pitts to authenticate the recording of the drug transaction, as he argued that Pitts was not a voice identification expert and Pitts had not had contact with the defendant in years, and therefore he should not have been allowed to identify the defendant's voice on the recording.

The state maintained that Sergeant Pitts's first-hand monitoring of the drug transaction in the audio feed was sufficient for him to be able to authenticate the defendant's voice on the recording.

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion when it allowed Sergeant Pitts to authenticate the recording of the drug transaction based upon his monitoring and participating in the drug transaction.

The Court of Criminal Appeals noted the following key principles in making a decision in this type of case:

1. As a prerequisite to admissibility, a witness with knowledge of the facts must verify and authenticate the evidence, and its relevance must be demonstrated.
2. Such authentication requirement 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.”
3. The party offering the evidence is required to reasonably establish the identity and integrity of the evidence even though this rule does not require that the identity be proven beyond the possibility of all doubt.

In the present case, the Court of Criminal Appeals noted that Pitts “fitted the CI with the audio recording equipment and connected the feed to his mobile phone to monitor the drug transaction while it was occurring.” Pitts then observed the defendant arrive at the scene and observe the CI get inside his vehicle with the recording equipment activated. The court pointed out that Pitts had knowledge that the audio recording was what it was purported to be, a recording of the interaction inside the defendant’s vehicle. Therefore, the court noted that Pitts was able to authenticate the recording of the transaction. With regard to his identification, the same vehicle in which the transaction occurred was stopped minutes away from the scene with the defendant and the identified funds inside. Pitts testified that he identified the defendant’s voice from prior dealings, and the court noted that it was clear from the evidence that the testimony about the defendant’s voice was not the only evidence identifying him as the seller of the drugs.

The court noted that Pitts visually observed the two men interacting and monitored their transactions via audio feed; the CI went to the arranged purchase with money and returned with drugs, which was observed first hand by Sergeant Pitts; and that Sergeant Pitts identified the defendant’s voice as well as his face with certainty. The court also noted that the monitoring of the recording was done by Pitts “in real time.”

State v. Wells (Tenn. Cr. App. 8/2/23)

AUTHENTICATION OF TEXT MESSAGES: IN A CASE IN WHICH THE DEFENDANT WAS CONVICTED OF RAPE OF A CHILD, TEXT MESSAGES RECEIVED BY THE VICTIM’S MOTHER WHICH SHE IDENTIFIED AS BEING FROM THE DEFENDANT, WERE PROPERLY INTRODUCED INTO EVIDENCE

FACTS: On 2/4/20, the grand jury of Shelby County, Tennessee, charged the defendant with raping a child less than 13 years of age between May 12, 2014 and May 12, 2015. The case began on March 14, 2022, and the proof offered by the state included testimony by the victim’s mother that she received threatening text messages related to her daughter. The text messages were a key part of the trial as the mother testified that the text messages referenced the victim by name, stated that the author of the messages told the victim not to tell and threatened to kill her. From the mother’s testimony, it was clear that the author of the text messages knew that the mother was staying at her sister’s house; that the author had driven by the mother and victim on the day of the messages; the author identified clothing that the victim wore; and stated in one of the messages that the “victim’s body was nice.”

In regard to the circumstances surrounding the messages, the mother testified that she did not know of anyone other than the defendant with a reason to threaten her daughter and that she knew of no one else who would have had a reason to say, “I told her not to tell.” From the messages, the mother affirmatively identified to the jury that “Willie Brown, Jr.” was the author of the text messages.

The defendant argued that another person could have sent the text messages, including the victim herself. The mother had not recognized the number from which the messages were sent.

HELD: The Court of Criminal Appeals held that while the issue was a close question that the court could not conclude that when the contents of the text messages and their surrounding circumstances were taken together that

the trial court had abused its discretion in finding that the text messages were sufficiently authenticated for admission. The court found that the trial court's decision was within the range of acceptable alternatives based upon the abuse of discretion standard. The court noted also the following principles in regard to authentication cases:

(1) Tennessee Rule of Evidence 901(a) provides that evidence may be authenticated 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) In the context of a writing where the author's identity is relevant, including an electronic writing, a proponent may authenticate the evidence as having come from another person in various ways. This includes that the proponent may have direct proof of the writing's authorship, such as an admission, a signature, or other proof from a knowledgeable witness.

(3) Additionally, authentication may be established solely through the use of circumstantial evidence. Through circumstantial evidence, a writing may be authenticated based on its contents and substance when taken into conjunction with the circumstances of the case. This allows authentication based on appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(4) With respect to electronic messages, the courts in Tennessee have recognized that the state is not required to affirmatively prove that the defendant was the author of the message. Instead, once the evidence is sufficiently authenticated by other means, any challenge as to the conclusive or definitive author goes to the weight of the evidence, not its admissibility.

In conclusion, the Court of Criminal Appeals found that the state had offered proof that the victim's mother received the threatening messages related to her daughter, and that the content of the messages, including the fact that the text messages referred to her by two names that the defendant used while they were dating, and other factors lent credibility to the messages and to the judge's decision to allow them into evidence.

State v. Brown (Tenn. Cr. App. 10/4/23)

FERGUSON ISSUE REGARDING PRESERVATION OF EVIDENCE: THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED THE STATE TO INTRODUCE A PHOTOGRAPH OF THE FUNDS USED TO MAKE A DRUG PURCHASE AS A SUBSTITUTE FOR THE ACTUAL MONEY, THE STATE HAVING FAILED TO PRESERVE THE ACTUAL MONEY USED, BASED UPON THE FACT THAT THE PHOTOGRAPH WAS A SUFFICIENT SUBSTITUTE FOR THE ACTUAL MONEY UNDER THE FACTS OF THE CASE

FACTS: The defendant was convicted of sale and delivery of a Schedule II narcotic.

The defendant contended that the trial court erred when it ruled that photographs taken of the prerecorded funds used in the drug transaction were admissible and that it was improper to allow Sergeant Pitts to authenticate the photographs. The defendant maintained that the state violated its duty to preserve the evidence used to support its conviction. The state responded that the trial court remedied the issue by providing a jury instruction about the state's duty to preserve the evidence while allowing the state to use the testimony including photographs of the funds.

At trial, the trial court had determined that the state had committed some degree of negligence in failing to maintain the prerecorded funds to produce at trial and in failing to keep records of those funds in an evidence locker or other appropriate storage. The trial court had also found that the dismissal of the charges was not warranted and instead opted to instruct the jury about the state's duty to preserve the evidence.

HELD: The Court of Criminal Appeals held that the trial court did not err when it allowed the state to introduce the substitute evidence of the photographs of the prerecorded funds used in the drug purchase.

The Court of Criminal Appeals noted that it must look at the Ferguson factors to determine the effect of the state's failure to preserve the evidence.

The first factor, negligence on the part of the state, was demonstrated because the state failed to maintain the evidence properly to be available at trial. In regard to the second factor, the significance of the destroyed evidence, the court noted that presenting the actual prerecorded funds that were used in the drug transaction would clearly be significant so that factor weighs heavily in favor of the defendant. The court did note that, in its opinion, a photograph of the prerecorded funds is a sufficient substitute for the actual money when the physical attributes of the same are not in question. In regard to the third factor, the sufficiency of the other evidence supporting the conviction, this factor weighs heavily in favor of the state, according to the Court of Criminal Appeals. The court noted that the defendant had been found with the prerecorded funds within minutes of the meeting with the CI. Also, the vehicle in which the sale was made was the same vehicle in which the defendant was stopped. Also, the serial numbers in the photograph taken by Sergeant Pitts prior to the transaction match the serial numbers on the funds found in the defendant's possession.

The Court of Criminal Appeals therefore concluded that there was significant evidence supporting the conviction without the production of the funds during the trial. Therefore, the court concluded that the trial court did not err when it allowed the state to introduce the substitute evidence and the defendant was not entitled to any relief on that issue.

State v. Wells (Tenn. Cr. App. 8/2/23)

FORENSIC INTERVIEW OF MINOR VICTIM: THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO COMPLY WITH THE REQUIREMENTS OF TCA 24-7-123 IN THE ADMISSION OF THE MINOR VICTIM'S FORENSIC INTERVIEW DUE TO THE FACT THAT THE VICTIM IN THIS CASE DID NOT TESTIFY AND DID NOT AUTHENTICATE THE VIDEO RECORDING OF THE FORENSIC INTERVIEW PRIOR TO THE

VIDEO'S ADMISSION AS AN EXHIBIT AND PUBLICATION TO THE JURY

FACTS: The defendant was convicted of a single count of aggravated sexual battery. Prior to the trial, the state had filed a motion in limine requesting the trial court to determine the trustworthiness of the video recording of the forensic interview conducted with the victim. At the hearing, no testimony was presented and after viewing the video recording, the trial court determined that it was admissible with some redactions.

The defendant contended that the trial court failed to make the findings necessary to admit the video recording of the forensic interview pursuant to TCA 24-7-123, the defendant specifically arguing that the state failed to have the victim testify under oath at either the pretrial hearing or at trial as to the accuracy and authenticity of the recording of the forensic interview.

The defendant conceded at the appeal that he failed to object to the admission of the recording of the forensic interview at either the pretrial hearing or at trial and the issue is not raised in his motion for new trial. On appeal, the defendant requests that the issue be reviewed under the plain error doctrine, claiming that the trial court's failure was so detrimental to his right to a fair trial that it would constitute plain error sufficient to reverse the defendant's conviction.

HELD: The Court of Criminal Appeals concluded that the defendant had established a violation of a clear and unequivocal rule of law and that a substantial right was affected and that consideration of the error was necessary to do substantial justice.

The court noted that while the trial court purported to find that the forensic interview possessed a "particularized guarantee of trustworthiness," there was no testimony or evidence presented at either of the two pretrial hearings to support the findings regarding the interviewer's qualifications.

The Court of Criminal Appeals further found that the trial court did not make any other findings required by TCA 24-7-123(b) to support its ruling that the recording was admissible, having made no findings regarding the victim or the qualifications of the entity performing the forensic interview.

Most importantly, the Court of Criminal Appeals noted that although the victim testified at trial and was subject to cross-examination, she did not testify until after the recording of the interview had already been played to the jury during the interviewer's testimony. The court noted that while the victim did testify that she told the truth at the interview, the victim did not at any time, under oath, testify before the video was played for the jury that the offered video recording was a true and correct recording of the events contained in the video as required by TCA 24-7-123(b).

The court also found that because the recording on the forensic interview was the only evidence presented at the trial to show where the defendant actually touched the victim to support his conviction for aggravated sexual battery the court found that a substantial right was adversely affected and the defendant was prejudiced by the court's error.

The court noted that pursuant to TCA 24-7-123, a video recording of a forensic interview of a child under the age of thirteen where the trial describes any act of sexual contact performed with or on the child by another may be admitted as substantive evidence if certain requirements are met. The act specifically makes it a requirement prior to the admission of the video recording that there are particularized guarantees of trustworthiness, which includes the consideration of several factors pertaining to the characteristics of the child, any apparent motive of the child to falsify or distort the event, the timing of the child's statement, the nature and duration of the alleged abuse, likelihood or not that the child is fabricating a statement, whether the statement is spontaneous or directly responsive to questions, and several other factors. The act also makes a requirement of the trial court to determine if the forensic interviewer is qualified pursuant to the statute and that the interviewer is employed by a child advocacy center that meets the requirements of the statute.

Pursuant to a separate order filed on 9/27/23, the court later noted that the record had been supplemented to include a transcript of part of the record which established that the forensic interviewer did in fact testify about her qualifications and about the accreditation of Carl Perkins Center as required by the statute and that those requirements of the statute were in fact met by the testimony.

In the order the court did confirm that the victim in the case did not testify and authenticate the video recording of the forensic interview prior to the video's admission as an exhibit and publication to the jury and therefore the trial court had in fact committed plain error for the reasons set forth in the opinion.

State v. Stegall (Tenn. Cr. App. 7/14/23)

LEADING QUESTIONS: LEADING QUESTIONS ARE PERMITTED ON DIRECT EXAMINATION IF “NECESSARY TO DEVELOP THE WITNESS’S TESTIMONY”

FACTS: In a case involving charges of first-degree murder, the defendant contended that the trial court erred by allowing the state to ask leading questions of Sgt. Evans during his testimony on cellular phone evidence. The defendant argued that the state’s leading questions “suggested answers for the witness.” The state responded that the trial court did not abuse its discretion in overruling the defendant’s objection to the questions.

The facts showed that during Sgt. Evans’ redirect examination, the state asked about what was referenced during cross-examination as “duplicate calls.” Specifically on redirect, the prosecutor directed Sgt. Evans to a specific subject by saying, “what appears to be a phone call and then maybe during the duration of that phone call, a second call between the same people.”

Sgt. Evans replied, in relevant part, “it’s not truly a duplicate call . . . sometimes, the cell phone carriers, they show duplicate records. We have one carrier that constantly shows duplicate records, so it’s with the carrier.”

The following exchange then took place:

Q: And I think on some of the duplicate records that you looked at with [defense counsel], they would show different towers. Is that correct?

A: They shouldn't, no, sir. I believe - -

Q: I think they would. I think if you look at -

A: They could have.

Q: -- some of the ones we went over earlier -

Defense Counsel: Objection, Your Honor.

Trial Court: Yes, sir.

Defense Counsel: He's leading. He's leading, and he's suggesting the answer. He said, "I don't think that they would necessarily."

Trial Court: That's the answer, and what [the prosecutor] is doing is getting a clarification because [he] remembers - and I can't comment on what was said - is that he believes there may have been instances that were asked that showed duplicate records on different towers, so he's asking [Sgt. Evans] to clarify that. And, if it isn't, he'll say there isn't.

Following the above exchange, Sgt. Evans was asked whether the record showed "any duplicate calls at the critical time of the homicide with different cell towers showing on them," to which Sgt. Evans replied, "No, sir." The trial court allowed the testimony and on appeal the defendant maintained that the exchange constituted prejudicial error against the defendant.

HELD: The Court of Criminal Appeals held that "leading questions are permitted on direct examination if necessary to develop the witness's testimony." The court cited Tennessee Rule of Evidence 611(c)(1). The court noted in the present case, "the brief leading questions from the state were used to develop Sgt. Evans' earlier testimony about duplicate phone calls." The Court of Criminal Appeals noted that at that point in time Sgt.

Evans was “then able to explain to the jury that the term represented duplicate records of a phone call as memorialized by the phone carrier rather than multiple phone calls.”

The Court of Criminal Appeals found that the state’s use of leading questions under these circumstances was proper and the trial court did not abuse its discretion in allowing the state the limited opportunity to ask leading questions.

PRACTICE POINT: Directing the attention of a witness to a particular point by either the state or the defense may be appropriate in certain circumstances, but the court should be careful in how it allows such evidence to be presented. Too much latitude allows a seasoned prosecutor or defense attorney to almost narrate the proof on behalf of the respective position instead of allowing for a natural exchange to produce the testimony that is helpful to the court.

It is certainly common after a lengthy hearing for one party to direct attention of a witness back to certain testimony and this is certainly appropriate if done in the proper way, even if it is a leading question.

State v. Turner (Tenn. Cr. App. 10/5/23)

LIMITS ON DEFENSE CROSS-EXAMINATION: THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING DEFENSE COUNSEL’S EXAMINATION OF THE VICTIM AS DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO ASK WHETHER THE VICTIM MIXED ALCOHOL WITH HER PRESCRIPTIONS THE NIGHT OF THE INCIDENT

FACTS: In a case involving aggravating kidnapping, aggravated assault and other offenses, the defendant contended that the trial court erred in preventing him from cross-examining the victim about the effects of mixing

her prescription medications, Adderall and Xanax, with alcohol, the court finding that the victim was not a medical expert.

During a pre-trial motion hearing, the state explained that it had filed a motion in limine to preclude counsel from asking any witnesses if the victim suffers from a diagnosed mental health issue of bipolar disorder or schizophrenia. The defense counsel asserted to the court that it only intended to ask the victim what medications she was taking at the time of the incident and whether she felt her medications affected her state of mind. The defense argued that because the victim was taking Adderall and Xanax and had admitted to drinking the night of the incident, his inquiry would be directed to the recollection of the victim and how the mixing of medications and drinking affected her.

The trial judge stated that he saw no relevance at all with the evidence because “medications are designed to help prevent an issue that someone may have,” and the trial court held that the victim was not qualified to testify about the effects of mixing alcohol with her prescription medications and the evidence was therefore irrelevant.

The defense counsel had emphasized that the issue was extremely important, because “up until the police arrived on scene, the only two witnesses are essentially the defendant and the victim. And the victim is taking these medications, I do believe that could possibly affect her mental state at the time and also the way that she remembers what did and didn’t happen.” The trial court ruled that there would be “no questions with regard to any medications that she’s taking, or did take that evening.”

The defense was allowed to make an offer of proof outside the presence of the jury, at which time the victim testified that at the time of the incident she was prescribed 15 to 30 grams of Adderall each day and was prescribed Xanax as needed. Though the victim could not recall whether she had taken either of the medications the day of the offenses, she asserted that she “typically, always” took Adderall. The victim stated that her physicians had not verbally advised her of the effect of combining alcohol with her medications, even though she acknowledged that her prescriptions contained a written warning about the effects of mixing alcohol with her prescriptions, but she was unable to recall specifically what this written warning stated.

HELD: The Court of Criminal Appeals concluded that the trial court abused its discretion in limiting defense counsel’s examination of the victim on this issue. The court noted that defense counsel should have been allowed to ask whether the victim mixed alcohol with her prescriptions the night of the incident, and if so, whether this affected her memory of that night because these questions would have assisted the jury in assessing the victim’s credibility. The court noted that such questions were based on the victim’s own observations and were within the range of knowledge of an ordinary layman.

The Court of Criminal Appeals also noted that such questions were “rationally based on the perception of the witness” and were “helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”

The court noted the following key principles in considering this type of issue:

1. The confrontation clause provides a criminal defendant the right to confront and cross-examine witnesses. A component part of this constitutional protection is the right to establish bias or to otherwise impeach the credibility of a witness.
2. The propriety, scope, manner, and control of cross-examination of witnesses generally remain within the discretion of the trial court.
3. When the defendant’s right to cross-examine witnesses is unreasonably restricted, the trial court abuses its discretion.
4. A lay witness may provide testimony in the form of an opinion or inference if it is rationally based on the perception of the witness and is helpful to a clear understanding of the witness’s testimony or their determination of a fact in issue.
5. Lay opinion testimony should be based on admissible facts and evidence. In order to be admissible, lay opinions should be in the range of knowledge or understanding of an ordinary layman. If an opinion is based upon a lay witness’s own observations, his or her conclusions require no expertise and are within the range of common experience.

Utilizing these principles, the Court of Criminal Appeals noted that the trial court had determined that only an expert was qualified to testify to the effects of mixing the victim's prescribed medications with alcohol, and the Court of Criminal Appeals determined that the trial court abused its discretion in limiting defense counsel's examination of the victim on this issue.

The Court of Criminal Appeals did conclude after reviewing all the evidence that the error was harmless beyond a reasonable doubt because the victim's responses during the offer of proof failed to yield any evidence that would have changed the outcome of the trial.

State v. Murphy (Tenn. Cr. App. 7/21/23)

RELEVANT EVIDENCE: IN A CASE INVOLVING AGGRAVATED SEXUAL BATTERY, ALLEGEDLY COMMITTED BY THE DEFENDANT ON HIS EIGHT-YEAR-OLD DAUGHTER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING RELEVANT TO THE CASE AND ADMITTING INTO EVIDENCE A LARGE POSTER ON THE WALL OF THE DEFENDANT'S HOUSE WHICH DEPICTED TWO NAKED WOMEN ENGAGED IN A SEX ACT

FACTS: In a case in which the defendant was convicted of aggravated sexual battery perpetrated upon his own eight-year-old daughter, the court conducted a pretrial hearing at which time the prosecutor argued that a photograph with a poster depicting a sex act provided "contextual background" of the inappropriate relationship the defendant had with the victim and that said poster would help the state meet its burden of proving that the inappropriate touching was performed for sexual gratification as required under the statute.

The defendant objected arguing that it was not only irrelevant but also highly prejudicial and should be excluded. The defendant noted that the photograph was taken over three months after the alleged incident.

The trial judge held that the poster was relevant to prove that the unlawful sexual contact was for the purpose of sexual gratification and that its probative value was not substantially outweighed by the danger of unfair prejudice. The court noted that “because part of the state’s proof and one of its elements has to be proven that the unlawful sexual contact is for sexual gratification, the court finds that the admission of this is not substantially outweighed by its prejudicial effect.”

ISSUE: Is a photograph that depicts sexual contact between two adult women relevant to the charge of aggravated sexual battery by the defendant with his eight-year-old daughter?

HELD: The Court of Criminal Appeals stated that “we agree with the state that the photograph was relevant to show that the victim was forced to walk past a ‘highly sexual poster’ each time the defendant made her take a shower in his bathroom, a fact from which the jury ‘could have reasonably inferred that the defendant was intentionally grooming the victim’ or ‘attempting to desensitize her to what he was doing to her in the shower.’” Significantly, the Court of Criminal Appeals noted that the victim testified she remembered the poster as one of the items in the defendant’s room when she was being cross-examined.

The CCA found that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. The court noted that the poster is not child pornography and the display of a poster depicting what appears to be two naked adult women having sexual intercourse does not constitute a crime or propensity evidence. The court’s emphasis was on the fact that the poster was in clear display each time the child was marched by the defendant into the shower and desensitized her to what he was doing and the poster was one that stuck in the memory of the minor child.

PRACTICE POINT: The case also significantly pointed out and reiterated the clear fact under Tennessee law that “the testimony of a minor victim, alone, is sufficient to uphold a conviction for aggravated sexual battery.”

“THE RESIDUAL EXCEPTION TO THE HEARSAY RULE”: PURSUANT TO TENNESSEE RULE OF EVIDENCE 804(b)(5), A DEFENDANT’S DUE PROCESS RIGHTS MAY OVERRIDE A HEARSAY BAR IN CASES WHERE THE EVIDENCE IS CRITICAL TO THE DEFENSE, IS RELIABLE, AND THE VALUE OF THE EVIDENCE TO THE DEFENDANT OVERRIDES THE IMPORTANCE OF THE HEARSAY RULE

FACTS: In a case involving robbery and felony murder, the defendant contended that the trial court had erred in excluding evidence that the defendant maintained was crucial to his defense. The defendant sought to introduce evidence of a statement made by Ms. Matthews to two police officers in which Ms. Matthews denied that she had planned the robbery with the defendant or participated in the execution of the robbery. The defendant’s position was that the co-defendant Greer had implicated the defendant and Ms. Matthews in planning a robbery and his position was that the statement by Ms. Matthews to the officers should have been admitted as evidence that would be helpful to the defendant. Ms. Matthews was deceased at the time of the trial, and the defendant filed a motion in limine seeking admission of her recorded statement to the two police officers. The defendant claimed that the witness was unavailable as a witness due to her death and the evidence was relevant to contradict the position of the co-defendant. The defense conceded that the evidence was hearsay and that no hearsay exception specifically provided for the admission of a statement of an unavailable witness.

Nevertheless, the defense argued that the evidence should be admitted pursuant to Tennessee Rule of Evidence 804(b)(5) as comments to the rule note that although the Tennessee Rules of Evidence contained “no residual

hearsay exception” for the admission of a statement of an unavailable witness, a court may permit a criminal defendant “to introduce trustworthy hearsay not falling within a traditional exception.” The defense argued that Ms. Matthews statement was trustworthy.

The trial court denied the defendant’s motion in limine on the basis that the co-defendant’s (Greer’s) statement was hearsay finding that Greer never himself implicated Ms. Matthews. The court held that the statement was unreliable as it involved what the co-defendant Greer had stated about what the defendant told him.

HELD: The Court of Criminal Appeals held that the trial court did not commit error in disallowing the evidence, as the court found that exclusion of hearsay evidence is a “substantially important consideration when balanced against the defendant’s competing interest of introducing unsworn, unreliable evidence of minimal probative value.” The court stated, “To the extent that the defendant relies upon constitutional considerations based in his right to due process and a fair trial to overcome the hearsay bar, we are unpersuaded that the trial court erred in excluding this evidence.”

The Court of Criminal Appeals noted that the hearsay rule is a rule of substantial importance in Tennessee law. TRE 804(b) list four types of evidence which are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) former testimony; (2) a statement under belief of impending death; (3) a statement against interest; and (4) a statement of personal or family history. The court noted that Rule 804(b)(5) contains “no substantive rule regarding a residual exception” to the hearsay rule.

The Court of Criminal Appeals noted that “the residual exception to the hearsay rule” was not adopted in the Tennessee Rules of Evidence, but “nevertheless, we recognize, consistent with the advisory commission comment to Tennessee Rule 804(b)(5) that a defendant’s due process rights may override a hearsay bar in some cases.”

The court noted that in reviewing a trial court’s exclusion of evidence that the defendant contends was an abridgement of his right to present a defense, an appellate court should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of

reliability; and (3) the interest supporting exclusion of the evidence is substantially important.

The court found that in the present case the defendant could not meet the requirements to overcome the hearsay rule, because the evidence he sought to admit was unreliable, and the record does not preponderate against this conclusion. The court noted that Ms. Matthews's statement was both unsworn and self-serving in the face of an accusation that she had been involved in conspiring to commit attempted robbery that culminated in a homicide. Under all the proof, the court found that her statement was "only marginally relevant, at best."

State v. Brown (Tenn. Cr. App. 5/15/23)

PRELIMINARY HEARING IN SESSIONS COURT

DISCOVERY RULES IN SESSIONS COURT: WHILE TRCP RULE 16 DOES NOT APPLY IN GENERAL SESSIONS COURT, FAILURE BY THE STATE TO DISCLOSE "OBVIOUSLY EXCULPATORY INFORMATION IN ITS POSSESSION" MAY HAVE ITS OWN CONSEQUENCES

FACTS: In a case involving first degree murder, the state filed a motion on 2/24/22, seeking to declare Tremon Hall as an unavailable witness at trial and to introduce his preliminary hearing testimony at the trial pursuant to Tennessee Rule of Evidence 804. The state argued that the preliminary hearing testimony was admissible under TRE 804, which exclusively authorizes the introduction of former testimony by an unavailable witness at another hearing of the same or a different proceeding if the party against whom the testimony is now offered had both an opportunity and a similar

motive to development the testimony by direct, cross, or re-direct examination.

The defendant filed a motion to exclude the preliminary hearing testimony of Hall under TRE 403 and 804 and the confrontation clauses of both the United States and Tennessee Constitutions. The defendant maintained that while Hall was now unavailable, he noted that Hall's unavailability was through no fault of the defendant and that Hall's preliminary hearing testimony should be deemed inadmissible because the defendant did not have an opportunity and similar motive to develop the testimony at the preliminary hearing, as the preliminary hearing was limited to a probable cause finding and did not require proof beyond a reasonable doubt. Specifically, the defendant (and co-defendant) cited the case of State v. Allen (Tenn. Cr. App. 12/10/20) asserting that the admission of Hall's preliminary hearing testimony would deprive him of his due process rights because Hall also gave statements to Corporal Weir, hospital staff, and the police that were inconsistent with his preliminary hearing testimony, were exculpatory, and were not disclosed by the state until after the preliminary hearing.

The trial court entered an order on 10/3/22, which denied the state's motion to introduce the preliminary hearing testimony of Mr. Hall and granted the defendant's motion to exclude the testimony. The trial court determined that Hall, because of his death, was an unavailable witness under TRE 804(a)(4) and further found that Corporal Weir's body camera footage, Hall's statement to hospital staff, Hall's police interview, and another witness's police interview constitute exculpatory evidence which had not been provided to the defendant at the time of his preliminary hearing and therefore the defendant had been deprived of a meaningful opportunity to impeach Hall's testimony with patently exculpatory evidence.

HELD: The Court of Criminal Appeals held that in the present case "the lack of discovery materials" did not significantly impede the defendant's motive and opportunity to cross-examine Mr. Hall at the preliminary hearing. The court found that in the present case the defendant had a similar motive and opportunity at the preliminary hearing to develop Mr. Hall's testimony through cross-examination.

The Court of Criminal Appeals noted the following principles which apply in cases of this nature:

(1) In Tennessee, in order to protect a defendant's right to confrontation, before the prior testimony of a witness will be admitted pursuant to the hearsay exception of Rule 804, the state must establish two pre-requisites, being (i) the state must show that the declarant is truly unavailable after good faith efforts to obtain his presence, and (ii) that the evidence carries its own indicia of reliability such as fulfilling the confrontation clause's guarantee that a defendant is able to have effective cross-examination under the circumstances of the case.

(2) A preliminary hearing is a critical stage in a criminal prosecution with the primary responsibility of the magistrate/judge at a preliminary hearing to "determine whether the accused should be bound over to the grand jury," or, to phrase another way, "whether there is evidence sufficient to justify the continued detention of the defendant."

(3) The Tennessee Supreme Court has specifically held that Rule 16 of the Tennessee Rules of Criminal Procedure, the rule governing discovery, does not apply in General Sessions Court. While a preliminary hearing is not intended to be a discovery device, there are inevitable discovery aspects to every preliminary hearing.

(4) Numerous Tennessee cases have consistently analyzed the hearsay and confrontation principles to uphold the admission of testimony from a preliminary hearing where the defendant had a similar motive and opportunity to cross-examine a witness who is subsequently deemed unavailable.

(5) Likewise, Tennessee courts have rejected the claim that cross-examination at the preliminary hearing was insufficient due to differences in the nature of the proceedings, including the burden of proof.

(6) One of the key cases under Tennessee law is State v. Allen (Tenn. Cr. App. 12/10/2020), which applied due process principles to reverse a defendant's conviction which was based, in large part, upon admission of the transcript of the victim's testimony at the preliminary hearing. The victim had testified at the defendant's preliminary hearing, identifying the defendant as the perpetrator of her rape and assault, following which the

defendant's wife was murdered in an event unrelated to the defendant. Following that, during pre-trial discovery, the defendant found out that his wife had told others that the defendant did not rape her and admitted that she had a consensual sexual encounter with an unknown man in his vehicle outside a bar. The Allen court noted that "the denial or significant diminution of the right to cross-examine a witness causing to question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." The Allen court then determined that the recantation email of the victim in that case was "obviously exculpatory" and the state was "bound to release the information whether requested or not." The Allen court then held that the state's failure to disclose an obviously exculpatory email before the witness testified at the preliminary hearing, coupled with her death before trial, deprived the defendant of the opportunity to cross-examine the witness about the veracity of the emails, violated Brady, and deprived the defendant of his constitutional rights to due process of law and a fair trial."

The Allen court went on to say significantly, "To be clear, we are not holding that obviously exculpatory information must be provided before the preliminary hearing or before a trial. However, when the state delays disclosure of obviously exculpatory information in its possession, the state risks violating Brady when the delay itself causes prejudice by preventing the defense from using the disclosed material effectively and preparing and presenting the defendant's case."

The court in the present case noted that under the Allen case, prosecutors would be well advised to fully comply with Brady prior to every preliminary hearing, "less they risk committing a Brady violation should one of their witnesses subsequently become unavailable for trial." The court noted while this would be laudable in theory, the approach is "unworkable in reality." The court noted that time constraints and having cases go to a preliminary hearing simply do not practically allow for prosecutors to be ultimately prepared in each case to give exculpatory evidence to the defense.

The court in the current case therefore held that "Brady does not apply to preliminary hearings and that a Brady analysis is therefore not the appropriate vehicle to address the situation, such as the one at bar."

The Court of Criminal Appeals then stated that the question in these cases “will be whether the defendant had a similar motive and opportunity to cross-examine the witness at the preliminary hearing given the lack of the exculpatory information.” The court concluded that in the present case, the defendant had a similar motive and opportunity at the preliminary hearing to develop Mr. Hall’s testimony through cross-examination and therefore that a complete identity of the issues was not necessary, so long as the issues are sufficiently similar to give similar motive for cross-examination. The court concluded that the requirements of confrontation were satisfied in the present case and that the trial court erred by refusing to admit Mr. Hall’s preliminary hearing testimony, and the case was remanded to the trial court for further proceedings consistent with the opinion.

PRACTICE POINT: It is important for General Sessions judges to be aware of this opinion and similar opinions as there can be issues which arise as to the exchange of exculpatory material which may go to the very heart of a case in which testimony is being presented in a General Sessions Court at a preliminary hearing. Questions or issues as to material which is clearly exculpatory may arise, and knowing about these types of cases, and the fact that a later trial may require exclusion of testimony for an unavailable witness can become an important issue.

Also, if General Sessions judges are having a trial on the merits of a case, then this issue of potentially exculpatory information may come in front of us and we may have to rule on such issues.

State v. Kibodeaux (Tenn. Cr. App. 9/29/23)

PROBATION VIOLATION

**APPLICATION OF DEFENDANT TO ENTER THE
MENTAL HEALTH COURT PROGRAM: THE TRIAL
COURT DID NOT ABUSE ITS DISCRETION IN
REVOKING THE DEFENDANT’S PROBATION
RATHER THAN PERMITTING HIM TO**

PARTICIPATE IN THE MENTAL HEALTH COURT PROGRAM BASED UPON THE TRIAL COURT'S DETERMINATION SET OUT IN DETAIL THAT THE DEFENDANT WAS NOT A GOOD CANDIDATE FOR THE MENTAL HEALTH PROGRAM

FACTS: After a hearing, the Circuit Judge revoked the defendant's probation for a fourteen-year split-confinement sentence he received for forgery, theft of property, and attempted possession of methamphetamine for resale. After the hearing, the trial court issued a lengthy written order in which the judge found the defendant had violated his probation by committing new offenses and ordered him to serve his sentence in the department of corrections. The judge found the defendant's hearing testimony not to be credible, noted that the defendant had failed to accept responsibility for his actions, noted that the defendant had a lengthy criminal history, and that the defendant had failed to comply with previous orders and conditions of release on bond. The court found that the defendant's dangerous criminal conduct while on probation for five prior felonies was especially serious, that the defendant had acted deliberately and in purposeful defiance of the law, and disregarded how his conduct impacted law enforcement officers during the incident.

The defendant's primary objection to the sentence was that he presented as a good candidate for mental health court based upon the testimony of several persons who worked with the Hamilton County Mental Health Program. The director of the program testified that the defendant had completed the assessments with a therapist on the mental health court's staff and that the assessment showed the likely presence of substance use disorder, the likely presence of a psychiatric disorder, and a moderate to high score on the risk-needs assessment. The director testified that the defendant's medical records had been submitted and that there did appear to be a co-existence of substance use and psychiatric disorders which was pretty typical and that the existence of both did not disqualify a person from participation in the mental health program. She testified that if the defendant were to come into the mental health court, collaborative community partners

would determine the treatment plan and the level of care needed. She explained that the specific treatment plan was not determined until after a participate was ordered by the court to be admitted to the program. The director also testified that a mental health court applicant's application was reviewed by attorneys from the public defender's office and the district attorney's office. She did not know the specifics of any recommendations that were made by the attorneys but she did state that the defendant had been determined to be eligible for the program after she began her employment with the program. The case manager for the mental health program testified that he did not know all the specifics but that he assumed the legal team had approved the application and that the defendant's application would not have been approved absent the legal team's approval.

The defendant and the defendant's family testified as to the conditions of the defendant and their hope that he would be admitted to the program based upon his history and the presence of certain disorders which could be addressed by the program.

The trial court specifically found that the evidence did not show that the defendant had been properly admitted to the program and that the program's staff appeared to be unaware of previous objections to the defendant's participation in the program. The court also found that the evidence failed to show the program had followed its own procedures in granting admission. The trial court also found that the evidence did not show that the defendant's claimed bipolar disorder contributed to his continued criminal conduct and that no evidence of a proposed treatment plan had been offered.

On appeal, the defendant contended that the trial court erred in revoking his probation rather than placing him in the mental health court program as an additional condition of probation.

HELD: The Court of Criminal Appeals held that, affording the trial court the presumption of reasonableness to which he is intitled in view of its having made sufficient findings on the record, "we conclude that the court acted within its discretion in ordering the defendant to serve his sentence in consequence of his probation violation." The court noted that the defendant had demonstrated by his egregious criminal behavior while on probation and by his prior criminal history and disregard for the court's authority that he

was not a suitable candidate for a return to probation for his second probation violation.

The court noted that the defendant had taken issue with the trial court's determination that no reliable evidence showed the defendant had been properly admitted to the mental health court program and that the defendant had a mental health condition which could be addressed by such a program.

In denying the defendant's appeal, the court noted that the trial court had appropriately taken into consideration the seriousness of the defendant's record, the failure of the defendant to take advantage of previous grants of probation, and the defendant's continuing serious misconduct. The court noted that in its final analysis the trial court had considered at length whether the mental health court program as an additional term of probation was an appropriate alternative based upon the court's concerns. The court noted that in the end, the trial court had concluded that the defendant was not an appropriate candidate to be placed in the program. The Court of Criminal Appeals noted that the trial court was unpersuaded that the defendant could succeed if he returned to probation conditioned upon participation of the mental health court program.

PRACTICE POINT: It is important to note a few key principles that derive from this case as considerations for General Sessions Court Judges:

1. The Court of Criminal Appeals gave great weight to the history of the trial judge who was involved in the case who had previously given opportunities for the defendant to be placed on probation as split-confinement, giving weight to the trial court's assessment that the defendant had been granted opportunities in the past and had failed to take advantage of them.
2. It is also important to note that the trend in General Sessions Courts and trial courts is to encourage the formation of specialty courts such as drug courts, mental health courts, and so on. In other words, courts are being encouraged to make such programs available to address issues such as mental health conditions and to give help to individuals outside of the context of incarceration where no help may be forthcoming.

If courts are confronted with less than excellent testimony in regard to applications for programs, acceptance to such programs, and/or whether or

not a feasible plan has been forthcoming, then the court could always use the alternative of resetting a case to give an opportunity to develop further evidence. In other words, an incarcerated person must rely a lot upon his or her attorney, including appointed counsel who may be overworked, and upon family members who may have let the defendant down in the past. A defendant can be retained in custody pending probation hearings so that if clarification can be made by continuing a case to give an opportunity for more evidence to be developed particularly by the professionals who are handling the application or formation of a plan, this can be a feasible and in fact recommended step to take in an appropriate case.

3. Clearly in the present case, the trial court had substantial history with the defendant and had given opportunities in the past, and such trial court could have felt that the defendant was not putting forth much of an effort but was again just wasting the court's time. While this certainly could have been the case in this matter, it can still be a viable solution in appropriate cases for us to continue a case to a later date to allow greater proof to be introduced to establish whether or not the defendant is a good candidate for certain programs, particularly since we will primarily be working with defendants who have a history of misdemeanors before the court.

State v. Bailes (Tenn. Cr. App. 6/6/23)

**ARE BAIL BONDSMEN “STATE ACTORS”? : BAIL
BONDSMEN WERE PRIVATE INDIVIDUALS AND
WERE NOT ACTING AS STATE ACTORS OR
AGENTS OF THE STATE FOR THE PURPOSES OF
THE FOURTH AMENDMENT’S PROHIBITION
AGAINST UNREASONABLE SEARCH AND SEIZURE**

FACTS: On 8/21/20, the defendant (Wojnarek) was convicted of a felony drug charge and sentenced to serve eight years, which was to be served consecutively to a two-year sentence. The sentences were suspended to

supervised probation. The defendant was charged with probation and a revocation hearing was held on 7/29/21.

At the probation hearing, Billy Joe Hale, a bail bondsman with 911 Bail Bonding, testified that he was searching for a 911 bail bonding client Christina Miller, who had outstanding warrants, when he received a tip from a confidential informant that she was living with the defendant at the WoodSpring Motel. Hale and another bail bondsman with him went to the motel room with an employee of the motel. The employee knocked on the door and announced herself, following which the defendant answered the door, and the two bail bondsmen entered the room. Hale testified that he immediately saw what appeared to be a crack pipe on the coffee table and that during a subsequent search of the room, he and his bonding company partner found women's clothing in a corner of the room, a white powdery substance, a set of digital scales on a table, a gun and a metal box that contained a large bag of marijuana and a large amount of either meth or crack cocaine and other evidence. The defendant advised that Ms. Miller had gone to the emergency room.

Hale testified his purpose in going to the motel was to locate Ms. Miller to return her to custody and that he did not work for any state or governmental organization. Thereafter, he testified he called the Montgomery County Sheriff's Department and the officers ended up taking all of the evidence into their custody. Hale testified that the defendant confirmed to the bail bondsmen that Ms. Miller did in fact live there. Hale testified that to his knowledge the defendant himself had never contracted with 911 Bail Bonding.

The trial court found from a preponderance of the evidence that the defendant had violated his probation by the new charges, but the trial court withheld disposition pending a second hearing to consider the defendant's motion to suppress the evidence.

The trial court denied the defendant's motion to suppress, finding that the defendant had consented as a condition of his probation to a warrantless search of his person, vehicle, property or place of residence by any probation/parole officer or law enforcement officer at any time. The trial court revoked the defendant's probation and ordered him to serve the balance of his sentence in confinement.

On appeal, the defendant argued that the trial court erred by considering evidence obtained by the bail bondsmen in violation of the Fourth Amendment and by not making adequate findings in support of its decision to order a full revocation of probation.

HELD: The trial court did not err in considering the evidence found in the motel room as a part of its revocation decision. The court noted that there was no evidence that the law enforcement officers knew anything about the search until the bail bondsmen contacted them after finding the drugs and weapons. The court found that the bail bondsmen's primary purpose of going to the motel and searching the motel was to locate Ms. Miller to return her to custody. The court also noted that the defendant acknowledged to the bail bondsmen that the items were his and that Ms. Miller had been staying in the room. The court therefore concluded the trial court had not erred in considering the evidence found in the motel room.

The court pointed out that the Tennessee Supreme Court in the case of State v. Burroughs (1996) adopted the "legitimate independent motivation" test to determine whether a private individual was acting as an agent of the state for the purposes of the Fourth Amendment's prohibition against unreasonable search and seizure. The Burroughs case noted that the critical factors in such a determination are: (1) the government's knowledge and acquiescence; and (2) the intent of the party performing the search.

Under Burroughs, "a private party acting for a reason independent of a governmental purpose does not implicate the Fourth Amendment." In this case the court noted that the proof did not establish that the government knew of the actions of the bondsmen and did not acquiesce in the actions taken by the bondsmen, and secondly that the intent of the party performing the search was to locate Ms. Miller to return her to custody and not to assist law enforcement.

State v. Wojnarek (Tenn. Cr. App. 5/10/23)

RIGHT TO CONFRONTATION OF WITNESSES

CONFRONTATIONAL RIGHTS OF CRIMINAL DEFENDANT: THE DEFENDANT’S RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS NOT VIOLATED BY THE COURT’S ALLOWING THE WITNESS TO TESTIFY VIA VIDEO RATHER THAN IN PERSON DUE TO THE FACT THAT DUE TO COVID THE SUPREME COURT RULES PREVENTED HIM FROM TESTIFYING LIVE AT TRIAL

FACTS: The defendant was convicted of a vehicular homicide by intoxication and driving under the influence. The trial judge allowed the witness, Phillip Mash, a captain in the fire department, to testify via Zoom due to the fact Mash had COVID. Mash testified that he saw the crash, and he noted that the victim was properly driving when she was struck, and that the defendant’s truck crossed over into the victim’s lane and struck her vehicle. Mash also testified that the defendant appeared to be going faster than other vehicles travelling in his direction.

The defendant argued on appeal that the Zoom two-way video conferencing at the trial violated his confrontation rights under both the Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution.

HELD: The Court of Criminal Appeals held that the procedure utilized by the trial court did not violate the defendant’s rights under the federal constitution or the state constitution and ruled that the procedure employed by the trial court fully satisfied the confrontation rights of the defendant.

The Court of Criminal Appeals discussed the following key principles in regard to a confrontation clause issue;

(1) The confrontation clause of the Sixth Amendment and of Tennessee's Constitution provides that the accused shall have the right to confront witnesses against him, which is to ensure the reliability of the evidence by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.

(2) Generally, the confrontation clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.

(3) The court noted that under Maryland v. Craig (1990), the United States Supreme Court noted that it had never held that the confrontation clause guarantees criminal defendants the "absolute right to a fact-to-face meeting with witnesses against them at trial." The court in that case allowed a child sexual assault victim to testify via one-way closed-circuit television if the trial court judge determined that testimony by the child victim in the courtroom would result in the child suffering serious emotional distress such that the child could not reasonably communicate. Maryland law allowed for the child witness, prosecutor, and defense counsel to withdraw to a separate room where the examination of the child would be transmitted to the courtroom for display to the judge, jury, and defendant. During that period of time, the witness could not see the defendant.

In the Craig case, the U.S. Supreme Court held that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only when reliability of the testimony is otherwise assured.

(4) The Craig case found that in each case the trial court must make a "case-specific finding that the relaxation of face-to-face confrontation was necessary."

The Court of Criminal Appeals found that in the present case there was no question that the defendant was denied his right to physically confront Mr. Mash face-to-face. The court noted it therefore must consider whether the deprivation was necessary to "further an important public policy and whether the reliability of Mr. Mash's testimony was otherwise assured."

As to the "necessity" factor, the court noted that during the COVID-19 pandemic, the Tennessee Supreme Court had declared a state of

emergency and put down an order stating, “Judges shall not require or allow any individual who has tested positive for COVID-19 to appear or be present in court.” Therefore, in the present case, the trial court was prohibited by order of the Supreme Court from allowing the witness to be present in the courtroom at the trial.

Based upon all the circumstances, the Court of Criminal Appeals concluded that Mr. Mash’s remote testimony “was necessary to further the important public policy of ensuring the health and safety of those present in the courtroom.”

As to the reliability factor in the Maryland v. Craig case, the court noted that it must consider “whether the reliability in Mr. Mash’s testimony was assured by means other than face-to-face confrontation.”

The Court of Criminal Appeals concluded that the reliability prong of Craig had been met in the case, noting the following: (i) the witness was placed under oath and cross-examined by the defendant; (ii) prior to his testimony, the trial court ensured that all jurors could see the screen displaying his image, thus allowing them to observe his demeanor while testifying; (iii) at the time of cross-examination, the defendant possessed a prior written statement from Mr. Mash as well as a recording of his prior testimony at the preliminary hearing. This was for the purpose of the defense being able to verify whether or not Mr. Mash testified consistently with his prior statements in the case at the preliminary hearing; (iv) the record in the present case reflects that Mr. Mash was able to see the attorneys during questioning through use of an electronic device and that it did not appear that defense counsel’s lack of physical presence during his questioning of Mr. Mash in any way hindered the effect of cross-examination of the witness.

The court concluded that the practice employed in this case “preserved the essence of effective confrontation,” and thus ensured the reliability of the testimony. The court found that both prongs of Maryland v. Craig had been satisfied and the defendant was not entitled to relief pursuant to the Sixth Amendment.

The Court of Criminal Appeals also noted that the Tennessee Supreme Court had expressly adopted and applied the same analysis to evaluate claims based upon the standards of evaluating claims under the Sixth

Amendment confrontation clause. The court found that both prongs of the Craig test were satisfied in this case and that the defendant was not denied his rights under Article I, section 9 of the Tennessee Constitution.

State v. Bowers (Tenn. Cr. App. 9/25/23)

SEARCH AND SEIZURE

MARIJUANA V. HEMP: THE NEVERENDING STORY

FACTS: On 2/16/20, Officer Trescott conducted a traffic stop of a vehicle driven by the defendant (Chavez) for operating his vehicle on high beams on a road in Clarksville. The defendant was a passenger in the vehicle. When Officer Trescott approached the vehicle, he could smell a strong odor of a distinct fragrance coming from the vehicle. Chavez asserted that the odor was from the three fragrance pine trees he had hanging from his rearview mirror. Trescott noticed a black backpack in between the defendant's feet, and when Trescott inquired about the backpack, both occupants denied owning it. Chavez denied the officer consent to search the vehicle, and Officer Trescott ordered the two occupants to exit the vehicle.

On one side of the vehicle, Trescott made the decision to conduct an open-air sniff of the vehicle with his police service dog, Arlo. Arlo indicated on the vehicle, an Officer Trescott had asked both men if there was anything inside and both responded "no." Officer Trescott informed Chavez that he could be charged with anything found in the vehicle, and Chavez looked at the defendant and encouraged him to talk. The defendant then stated that he picked up the backpack from his brother but did not know what was in it. The search of the backpack revealed a little less than an ounce of marijuana, plus a loaded handgun, Ziploc bags, and a working scale.

The trial court granted the motion to suppress because "a canine sweep of a vehicle is unreliable to provide probable cause for a search

because a canine trained to react to the scent of marijuana cannot distinguish between the smell of hemp, which is now legal, and marijuana, which is illegal.”

The state appealed to the Court of Criminal Appeals claiming 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.”

HELD: The Court of Criminal Appeals concluded the trial court erred by granting the defendant’s motion to suppress finding that the “binding precedent from the Tennessee Supreme Court allows the smell of marijuana to provide probable cause for a search.” The court noted that another panel of the Tennessee Court of Criminal Appeals had recently commented that “until our Supreme Court or our legislature determines otherwise, the smell of marijuana continues to establish probable cause for the warrantless search of an automobile.”

The court also stated that other precedents had involved an officer smelling the marijuana and not a trained canine, but the court stated that “we determined there is no practical difference for purposes of our analysis.”

For the purposes of its opinion, the Court of Criminal Appeals noted the following principles that it considered in the case:

1. A canine sweep around the perimeter of a vehicle which has been legally detained does not constitute a search, and thus, does not require probable cause or reasonable suspicion so long as the duration of the canine sweep does not exceed the time necessary for the traffic stop.
2. A positive reaction to a vehicle by a trained drug detection dog provides probable cause to search inside the vehicle if the dog’s reliability is established. This includes consideration of the dog’s training, the officer’s training and experience with the dog, and the record of false negative and false positive alerts.

In the present case, the court noted that while the alert of a trained drug detection canine is alone sufficient, a review of the totality of the circumstances surrounding the stop bolster a finding of probable cause. The court noted that Officer Trescott noticed a strong odor coming from the vehicle, and that when he inquired about the backpack, both the driver and

the defendant denied ownership. Once the dog alerted on the vehicle and Officer Trescott informed the driver he could be charged with anything in the vehicle, the driver encouraged the defendant to talk at which time he claimed that it was his brother's backpack and he was unaware of its contents. The Court of Criminal Appeals noted that the totality of the circumstances surrounding the stop in conjunction with the alert by the trained drug detection canine was sufficient to establish probable cause to search the vehicle and the defendant's backpack. The court noted that this was consistent with the United States Supreme Court case of Florida v. Harris (2013), where the court noted that the issue was "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 therefore concluded that the trial court had erred by granting the defendant's motion to suppress.

State v. Green (Tenn. Cr. App. 6/12/23)

MARIJUANA V. HEMP: THE NEVERENDING STORY, TAKE II

FACTS: An affidavit for the arrest of the defendant stated that on 9/9/19, Officer Dill initiated a traffic stop of the defendant's car for the failure to use a turn signal. The defendant, the lone occupant of the vehicle, told the officer that her name was Ana Outlaw. The defendant consented to a search of her purse, and the officer found the card reflecting the defendant's sister name, and the defendant admitted that she had lied about her identity because of an outstanding probation violation warrant which was confirmed through the police data base, which also revealed that the defendant's driver's license was revoked. The defendant was placed in custody for the probation violation warrant, driving on revoked and criminal impersonation.

During the course of the traffic stop, Officer Dill asked for the defendant's consent to search the vehicle, which she declined. Deputy

Owens arrived at the scene with the police dog, which signaled for the presence of narcotics inside the defendant's car. A search of the car revealed digital scales; substances believed to be heroin, meth, and fentanyl under the driver's seat. The defendant filed a motion to suppress the evidence found during the search of the car. During his testimony, Deputy Owens agreed that when the dog was trained it was unlawful to possess hemp. He also agreed that there had been an instance in which the dog has signaled for the presence of narcotics but that none were found upon conducting a search.

The trial court granted the defendant's motion to suppress, stating that "Deputy Owens testified that the dog had no training on the distinction between illegal marijuana and legal hemp and would not be able to know the difference. Based on evidence presented of the K-9's training and track record in this matter, the court does not find reliability of the canine to support probable cause."

The state appealed, contending that the trial court erred by granting the motion to suppress because the dog's signal for the presence of narcotics established probable cause for the warrantless search of the defendant's car.

HELD: The Court of Criminal Appeals reversed the trial court's decision which had suppressed the results of the search, concluding that "the current state of the law in Tennessee does not support the defendant's argument that a trained narcotics dog with the capability of detecting marijuana is per se unreliable because it cannot discern between marijuana and hemp." The court noted that it would "adhere to the prior decisions of our Supreme Court and other panels of this court in resolving the case before us."

The Court of Criminal Appeals noted that now that it had determined that the trial court erred in determining that the dog was unreliable that it would turn to the question of probable cause for the search. The court noted that the dog was trained and certified to signal the presence of marijuana, meth, cocaine, and heroin, and that the dog accurately signaled the presence of narcotics after a "free air sniff" of the defendant's car. The officers ultimately found heroin and methamphetamine, substances the dog was trained to detect plus fentanyl. The court noted that also the facts established that before the dog signaled for the presence of narcotics, the defendant was stopped for a traffic violation, lied to Officer Dill about her identity, and

admitted her knowledge of an outstanding violation of probation warrant for her arrest.

The court stated that “coupled with the dog’s signal for the presence of narcotics, these facts support a finding of probable cause for the search of the defendant’s car. Given the totality of the circumstances in this case, we conclude upon de novo review that the officers have probable cause to search the defendant’s car based upon the dog’s signal for the presence of narcotics, the defendant’s lying about her identity, the defendant’s driving on a revoked license, and her evasiveness in the face of her knowledge of the outstanding violation of probation warrant.”

CONCURRING OPINION: Judge Camille R. McMullen wrote a concurring opinion in which Judge Tom Greenholtz joined, which concurred with the majority opinion’s conclusion but was written separately “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.” Judge McMullen stated, “In my view, the cases before this court thus far missed the primary issue --- whether a drug detection dog sniff that no longer discloses only contraband is itself a search that must be supported by probable cause.”

In this significant opinion, Judge McMullen states as follows:

“The rule that a drug detection dog sniff is not a search subject to Fourth Amendment protections rests on the premise that the dog’s alert “discloses only the presence or absence of narcotics, a contraband item.” United States v. Place, 462 U.S. 696, 707 (1983) “Official conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment.” Illinois v. Caballes, 543 U.S. 405, 408 (2005) (quoting United states v. Jacobsen, 446 U.S. 109, 123 (1984). Any interest in possessing contraband cannot be deemed legitimate. Id. at 408-09. Therefore, “the use of a well-trained narcotics-detection dog --- one that ‘does not expose noncontraband items that otherwise would remain hidden from public view,’ --- during a lawful traffic stop, generally does not implicate legitimate privacy interests.” Id. At 409 (quoting Place, 462 U.S. at 07) (emphasis added). Drug detection dogs thus present a unique situation in which an officer can discover the presence of contraband without first establishing probable cause.”

“The legalization of hemp possession means that the premise underlying this rule is no longer true. Drug detection dogs cannot differentiate between hemp, the possession of which is now legal, and marijuana, the possession of which remains illegal. A drug detection dog sniff, therefore, no longer “discloses only the presence or absence of narcotics, a contraband item.” See Place, 462 U.S. at 707. It discloses the presence or absence of hemp, a noncontraband item that individuals now have a legitimate privacy interest in possessing. Whether this legitimate privacy interest transforms a drug detection dog sniff into a search that must be supported by probable cause remains unanswered.”

“This question has been presented in other jurisdictions where hemp, or even marijuana itself, has been legalized. The answers have varied. See People v. McKnight, 446 P.3d 397, 408-09 (Colo.2019) (holding that after Colorado’s legalization of marijuana possession, the sniff is a search that must be supported by probable cause); Joseph v. State, 530 P.3d 1071, 1077-78 (Wyo. 2023) (Holding that after Wyoming’s legalization of hemp possession, the sniff is still not a search); State v. Walters, 881 S.E..2d 73, 756-59 (N.C. Ct. App. 2022) (avoiding the question because the “[t]he legalization of hemp has no bearing on the continued illegality of methamphetamine” found in the car, which the dog was trained to alert to).

“Though this court has begun to hear cases related to a drug detection dog’s inability to distinguish between marijuana and hemp, the cases have yet to raise the question. State v. Green, No. M2022-00899-CCA-R3-CD, 2023 WL 3944057, at *2 (Tenn. Crim. App. June 12, 2023); State Bond, No. M2022-00469-CCA-R3-CD, 2023 WL 5559259, at *3 (Tenn. Crim. App. Aug. 29, 2023). Like this case, they challenged only whether the dog’s alert was sufficient to establish probable cause. Without further development of whether the sniff itself is a search that must be supported by probable cause, law enforcement is left in limbo. They must speculate whether their current practices will remain constitutional, or whether they must formulate a plan to ensure their dogs will no longer alert to hemp.”

“Because this important question has not yet been raised in this court, I write separately to highlight the fracture in the foundation underlying the exemption of drug detection dog sniffs from Fourth Amendment protections.”

PRACTICE POINT: The issue raised by Judge McMullen is a very key point. To me, it would be a tremendous addition to search and seizure law if the issues were revisited relating to “open-air sniffs” and a canine search was found to be an actual search which must be justified by probable cause. It appears that these very important issues have been minimalized by framing dog sniffs to be non-searches and allowable in almost any circumstance when it is done in a “timely manner.” The cases across the nation have become almost embarrassing in allowing decision-making by judges (who can reason about statutes and case law) to be taken over by a dog and its handler (who don’t have the same training as a judge) on these

very important constitutional rights. I am not making light of people who train dogs or the dogs themselves but merely stating that finding these searches do not require probable cause has resulted in a fiasco in constitutional law and allows incredible abuses of constitutional rights.

State v. Major (Tenn. Cr. Appeals 10/31/23)

**SIGNIFICANT ERRORS IN SEARCH WARRANT: EVEN
THOUGH THE SEARCH WARRANT LISTED AN
INCORRECT ADDRESS FOR THE DEFENDANT'S
RESIDENCE AND THE SEARCH WARRANT
OMITTED THE TIMING OF A FATAL CAR
ACCIDENT WHICH WAS THE FOUNDATION FOR
THE SEARCH WARRANT, THE AMBIGUITY
CREATED BY THE INCORRECT OR OMITTED
INFORMATION IN THE WARRANT WAS
OVERCOME BY THE TOTALITY OF
INFORMATION IN THE WARRANT**

FACTS: The defendant was charged with vehicular homicide by intoxication as a result of striking and killing Nicholas Galinger, a police officer with the Chattanooga Police Department, on the night of February 23, 2019, along with other charges. Evidence reflected that the defendant spent several hours prior to the crash drinking alcohol at Farm to Fork, a restaurant in Ringgold, Georgia. The defendant was at the restaurant with several members of her family, all of whom were there for several hours before leaving the restaurant. After the defendant left the restaurant, she drove by an area where a couple of officers were dealing with an open manhole and its displaced cover and water was pouring out of the manhole cover and onto the roadway. The officers were not using flashing blue lights or headlights or anything to illuminate the area and one of the officers was struck and killed by the defendant's car. It was determined that the officer's body rolled over the vehicle and that the officer's face struck the windshield

as he tumbled over the car. Ultimately, the defendant turned herself in the next morning to police.

The defendant was convicted of vehicular homicide by intoxication, driving under the influence, leaving the scene of an accident and other driving related offenses and received an effective sentence of eleven-years incarceration.

The defendant contended that the trial court erred in denying her motions to suppress evidence seized from her home and vehicle pursuant to search warrants. She asserted that the search warrant for home, which also authorized the seizure of her vehicle, failed to state with particularity the place to be searched and was not supported by probable cause. Specifically, the defendant complained that the search warrant authorized a search of the residence and vehicle located at 209 Port Drive whereas the defendant's correct address was 207 Port Drive. The defendant's suppression motion also pointed out the fact that the search warrant did not include the city, county, or state in which the residence was located and did not otherwise describe the residence.

The trial court overruled the motion to suppress the evidence, finding that the totality of the search warrant provided probable cause including the affidavit noting the fatal nature of the crash, the victim's status as a police officer, the description of the investigation, the recovery of the vehicle's grille at the scene, the success in locating a vehicle with front end damage consistent with the crash at a residence in the vicinity of the crash among other factors. The trial court had also noted that even if the affidavit in support of the search warrant for the defendant's residence was insufficient, the "contemporaneous application" for the search warrant for the defendant's vehicle, presented to the same judge at the same time, provided that the car crash had occurred on the day before the search warrant was sought.

HELD: (1) The trial court properly held that the particularity requirements for a search warrant were met as the search warrant provided that the residence was located on Port Drive in Hamilton, County, Tennessee, and that a 2017 Honda CR-V was located on the property. The trial court found that only one Port Drive was located in Hamilton County. The court noted that Officer Warren prepared the search warrant and supporting affidavit

while in a patrol car parked outside the residence, and other officers remained at the residence until Officer Warren returned with the search warrant signed by the judge. The court concluded the combination of this information, when considered in its totality, was sufficient to cure the ambiguity created by the inaccurate house number in the warrant and enabled the police to locate the residence “with reasonable certain.”

(2) The Court of Criminal Appeals also found that even though the search warrant for the defendant’s residence did not include the date of the crash, which was a very important factor in providing information that established that the key event was fresh in regard to the issuing of the search warrant, the affidavits supporting the search warrant for the defendant’s vehicle stated that the crash occurred on February 23, 2019. The Court of Criminal Appeals concluded that the issuance of the search warrant for the defendant’s residence was supported by probable cause because the “contemporaneous application” for the search warrant for the defendant’s vehicle which was presented to the same judge, provided that the crash occurred on the day before the search warrant was sought.

In regard to these two findings set out above, the Court of Criminal Appeals referred to several key principles of law that was considered by the court:

1. To be valid, a search warrant must comply with the provisions of United States Constitution, the Tennessee Constitution, and Tennessee statutory requirements.
2. Pursuant to Tennessee Rule of Criminal Procedure 41, “a warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and established the grounds for issuing the warrant and that the warrant must identify the property or place to be searched and name or describe the property or person to be seized.
3. The court noted that the “particularity requirement” serves two purposes in that (1) it protects the accused from being subjected to an unreasonable search and seizure and (2) prevents the office from searching the premises of one person under a warrant directed against those of another. The particularity requirement will be satisfied when the description particularly points to a definitely ascertainable place so as to exclude all others and

enables the officer to locate the place to be searched with reasonable certainty without leaving it to his discretion.

4. Inaccuracies in the address or directions provided will not invalidate the warrant when the overall description of the premises contained in the warrant enabled the police to locate the place to be searched with reasonable certainty.

In regard to the search warrant failing to state the city, county, or state in which the residence was located, the Court of Criminal Appeals noted that in the present case the words State of Tennessee and Hamilton County were stated on the warrant and the warrant was in fact issued by the judge of the Criminal Court for Hamilton County. The court noted that at the time of the issuance of this search warrant a Circuit Court judge in Tennessee lacked jurisdiction to issue search warrants for property located outside the judge's statutorily assigned judicial district. Therefore, viewing the warrant as a whole, the reasonable conclusion was that the search warrant was in regard to property located in Hamilton County, Tennessee. (On 7/1/19, the legislature changed the law and at that time granted Chancery and Circuit Court judges "statewide jurisdiction to issue search warrants.")

The Court of Criminal Appeals also pointed out that the trial court had found that there was no evidence of another Port Drive in Hamilton County so that the Port Drive location was the appropriate location of the defendant's residence.

The court also noted that the house number in the search warrant did include a typographical error but that such an inaccuracy does not necessarily invalidate the search warrant. The trial court found that the search warrant's listing a 2017 Honda CR-V at the residence assisted in identifying the residence subject to the search warrant. The court rejected the defendant's argument that relying on a vehicle at the residence was inappropriate since it could be moved from the property. The Court of Criminal Appeals stated, "Given the limited description of the vehicle included in the search warrant, we cannot conclude that the listing of a 2017 Honda CR-V alone negated the ambiguity created by the typographical error in the warrant. Rather, we conclude that the listing of the vehicle in the warrant, along with other information in the warrant and the officers'

knowledge of the place to be searched was sufficient to negate the ambiguity.”

The Court of Criminal Appeals pointed out that clearly the officers knew exactly where the residence was that had the 2017 Honda CR-V and that officers remained at the location while the search warrant was being issued. The court noted that, “Federal Courts have upheld search warrants that included inaccurate information regarding the place to be searched where the warrants included some accurate identifier and the executing officer is the affiant and just came from the home in question.” The court stated, “An officer’s prior knowledge of the location of the property subject to the warrant is a factor that may be considered in determining the validity of a search warrant that includes inaccurate information in describing the place to be searched.”

Therefore, in regard to the first issue the court concluded that the known information, “when considered in its totality, was sufficient to cure the ambiguity created by the inaccurate house number in the warrant and enabled the police to locate the residence with reasonable certainty.”

In regard to the probable cause issue, the defendant particularly complained about the fact that the affidavit in the warrant failed to include the date and time of the crash. The defendant emphasized that this was very important because the warrant for her vehicle search was issued after the warrant for her residence.

In regard to this issue, the court noted the following key principles:

1. The time of the occurrence of the facts relied upon by the affiant is also a prime element in establishing probable cause for the issuance of a search warrant.
2. To this end, the affidavit must contain information which will allow a magistrate to determine whether the facts are too stale to establish probable cause at the time issuance of the warrant is sought.
3. In determining staleness, there is no rigid rule or specific language required to establish the time element.
4. Although the absence of a specific date is not controlling, it is necessary for a finding of probable cause that the time interval between the alleged

criminal activity and the issuance of a warrant not be too great. The issuing magistrate must consider whether the criminal activity under investigation was an isolated event or of a protracted and continuance nature, the nature of the property sought, and the opportunity those involved would have had to dispose of incriminating evidence.

In applying the factors, the Court of Criminal Appeals in this case stated that “although the affidavit supporting the search warrant for the defendant’s residence did not include the day of the crash, the affidavit supports the search warrant for the defendant’s vehicles stated that the crash occurred on February 23, 2019.” The Court of Criminal Appeals noted that the trial court found that the issuance of the search warrant for the defendant’s residence was supported by probable cause because the “contemporaneous application” for the search warrant for the defendant’s vehicle, which was presented to the same judge, provided that the crash occurred on the day before the search warrant was sought.

The court noted that in a similar case in Tennessee, State v. Smith (Tenn. Cr. App. 1992), two affidavits sought two search warrants, one for the defendant’s residence and the second for the defendant’s blood. The court in that case found that the consideration of both affidavits to determine probable cause to issue the search warrant for the blood sample did not violate the Fourth Amendment to the United States Constitution or Article I, section 7 of the Tennessee Constitution. In that case, the court noted that the two affidavits were submitted simultaneously by the same officer to the same magistrate and related to the same investigation and the same defendant. The court at that time concluded that “it would defy reason and the evidence presented at the suppression hearing in this case if we were to conclude that the magistrate issued the second warrant without consideration of the affidavit submitted in support of the house warrant.”

While the defendant asserted that the judge issued the warrant for the residence approximately ten minutes before issuing the warrant for the vehicle, the Court of Criminal Appeals pointed out that cases upholding the use of multiple affidavits related to search warrants “have focused on the timing in which the affidavits were filed or submitted to the magistrate and not the order in which the warrants were signed.”

Therefore, the court concluded that the two affidavits were submitted contemporaneously to the judge who issued the warrant and that because the affidavit established that the crash occurred the day before the search warrant was sought, the information in the affidavits was not stale, and the search warrant for the defendant's residence was supported by probable cause, partially based upon the affidavit for the search of the vehicle, even though the vehicle's affidavit was signed last.

PRACTICE POINT: This very tragic case presents some fascinating issues for consideration in the issuance of search warrants and shows how the information provided in search warrant affidavits can in fact be supplemented by the knowledge of the officers who are at a particular scene and know exactly the area where they are to search. It also shows that when two search warrants are issued at the same time by the same judge the collective information provided in the same can provide justification for the total search.

State v. Hinds (Tenn. Cr. App. 8/11/23)

STANDING TO CHALLENGE UNLAWFUL SEARCH:

EVEN THOUGH THE DEFENDANT INITIALLY WAS AN INVITED OVERNIGHT GUEST IN THE HOME OF HIS PARENTS, HIS RELATIONSHIP WITH THE VICTIMS “DISINTEGRATED” ONCE HE ATTACKED AND KILLED THEM AND THEREFORE THE DEFENDANT NO LONGER HAD THEIR PERMISSION TO BE IN THEIR RESIDENCE AT GOLDENVIEW LANE

FACTS: In a dark and disturbing case, the defendant's mother, Mrs. Guy, failed to attend a preplanned function that morning at her place of work, and her absence from work without calling was unusual. Multiple attempts to contact the victim were unsuccessful, and officers were asked to go to the

home to conduct a welfare check. When Detective McCord knocked on the door and announced the officers' presence, a dog could be heard barking from inside the house. The officers attempted using a telephone number of one of the victims given to them by a neighbor but the calls kept going to voice mail. One officer looked inside the victims' residence through the decorative window at the front door, and bags of groceries were lying on the floor and seemingly abandoned by the victims.

Upon fully entering the home, officers found the two deceased victims, whose bodies had been mutilated and body parts cut off by the use of a knife. The officers also found a backpack, a knife and a Walmart receipt among many other items which they took into evidence at the time of the search.

The defendant filed a motion to suppress evidence seized from the crime scene claiming that the entry and search of the premises was illegal.

The trial court held that the motions to suppress filed by the defendant were not well taken, and the defendant was ultimately convicted of two counts of first-degree premeditated murder, two counts of felony murder, and two counts of abuse of a corpse.

HELD: The Court of Criminal Appeals made the following conclusions in regard to the appeal:

1. The Court of Criminal Appeals concluded that although the defendant initially was an invited overnight guest in the victims' home, his relationship with the victims "disintegrated" once he attacked and killed them, and the defendant no longer had their permission to be in the Goldenvue Lane residence and was no longer a "guest" at the time of the officers' entry.

The Court noted that it did not hold that the defendant lost his legitimate expectation of privacy simply by engaging in illegal conduct, but rather the focus is on the effect of the defendant's illegal activity on the relationship between the defendant and the host and the defendant's status as a welcomed guest.

The Court of Criminal Appeals held that "by attacking and killing the victims upon whose permission he relied in claiming that he was an overnight guest, the defendant no longer had a legitimate expectation of

privacy in the Goldenview Lane residence that society is willing to recognize as reasonable at the time of the officers' entry into the residence.

The Court of Criminal Appeals noted that courts have rejected a defendant's claim of a legitimate expectation of privacy in a residence as an overnight guest when the defendant has procured or maintained access to the residence through coercion or violent acts or threats. This was true in a case out of the State of Indiana. Also, in a case cited out of West Virginia, the Supreme Court of West Virginia held that a person who was initially an invited guest in a home did not have a legitimate expectation of privacy at the time of the search when the defendant had threatened to kill the owner and use the owner's dependency on drugs that the defendant was supplying to her to control the home and carry out his drug operation. Likewise, the Court of Criminal Appeals held that a case in Massachusetts had established that a defendant no longer had a legitimate expectation of privacy in the bedroom that he occupied after he had raped the host's daughter and fled the residence. The court in that case had noted that the defendant's expectation in his bedroom at that home was "dependent upon the relationship between the defendant and his host" and that as a result of the defendant's actions (the rape of the host's daughter) the relationship had "disintegrated."

2. The Court of Criminal Appeals further held that, "regardless of the effect of the defendant's violent actions against the victims on his status as an overnight guest, we further conclude that the defendant was no longer an overnight guest at the time of the officers' entry due to his prolonged absence from the Goldenview Lane residence."

The noted that although there was proof that the defendant occasionally stayed the night at the residence, in this case the defendant did not have a legitimate expectation of privacy in the residence when the defendant failed to establish that he was an overnight guest at the time of the search.

The court noted that in the present case, the defendant acknowledged that he did not stay overnight at the Goldenview Lane residence on the night prior to the officers' entry, and he was not present at the residence when the officers entered. Rather, the defendant left on Sunday and drove more than six-hundred miles to his apartment in Louisiana.

The court noted that “given the defendant’s prolonged absence from the home, he was no longer an overnight guest and did not have a legitimate expectation of privacy in the home that society is willing to view as reasonable and justifiable under the circumstances.”

3. The Court of Criminal Appeals also held that even if the defendant had standing to challenge the search of the Goldenvue Lane residence, the entrance of the officers into the residence was supported by exigent circumstances as argued by the state.

The court noted that given the importance of the warrant requirement in safeguarding against unreasonable searches and seizures, a circumstance will be sufficiently exigent “only where the state has shown that the search is imperative.” The court noted that an examination of this issue is based upon an examination of the totality of the circumstances.

In examining all of the facts of this case, the court noted that when an officer is in an area permitted by implicit license such as the front door, it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point that which is happening inside the dwelling.” The court noted that previous courts have held that an officer’s peering through an unobstructed window or by the front door of a residence is not a search within the meaning of the Fourth Amendment.

The court concluded that the officers were lawfully at the front door of the Goldenvue Lane residence to conduct a “welfare check” following two calls expressing concern for Mrs. Guy. The court noted that the officers, like any member of the general public who approached the door in the same manner, briefly observed items inside the residence that were clearly visible from the front door window.

The Court of Criminal Appeals noted that officers did not need ironclad proof of a serious life-threatening injury to invoke the “emergency aid exception” and that officers only needed an objectively reasonable basis for believing that medical assistance was needed or persons were in danger. The court concluded that “based on the totality of the circumstances, the officers in the present case had an objectively reasonable basis for believing that the victims needed medical assistance or were otherwise in danger. The court also noted that the Tennessee Supreme Court had held that “probable

cause is not a necessary element” for the application of the emergency aid exception under the Fourth Amendment.

4. In regard to the defendant’s objections to the officer’s seizure of the backpack and the knife and the Walmart receipt from the upstairs bath room, the court concluded that even if the defendant had standing to challenge the seizure of the evidence, the items were properly seized as evidence within the plain view of the officers who initially entered the residence. The court noted that in light of the information obtained from the neighbor as well as the other items in the bedroom, the officers had probable cause to believe that the backpack was evidence relevant to the identity of either the perpetrator or the victims.

With respect to the knife and the Walmart receipt, the trial court had made a general finding that all items seized were within the officer’s plain view. The court concluded that given the blood and body parts observed by the officers, the incriminating character of the knife was immediately apparent and that the Walmart bag containing the receipt was next to the knife where there was a large blood stain, a disposable glove, and a bottle of hydrogen peroxide. The court therefore concluded that the officers had probable cause to belief that the receipt had evidentiary value and that the receipt could provide a time and date on which some of the items observed by the officers inside the residence were purchased and could help the officers in regard to establishing a timeline for the events of the crime.

In regard to the seizure of the defendant’s backpack, the court found that the officers were within their legitimate functions when they seized the backpack and thereafter performed an inventory search of the contents of the backpack.

The court concluded that the inventory search of the backpack and notebook found therein were consistent with the purposes of an inventory search to protect the owner’s property and to protect officers from claims of negligence or civil rights violations in the event the property disappears or is damaged.

In regard to the issue asserted by the defendant (that the trial court erred in failing to exclude the surveillance videos and receipts from his

purchases at various stores in Louisiana as the fruit of the unlawful search of his apartment), the trial court found that such information would have been discovered by the officers pursuant to the inevitable discovery rule and therefore overruled the defendant's objection.

The Court of Criminal Appeals concluded that the state established that absence of discovery of their receipts in the defendant's apartment, the officers would have employed an investigatory procedure that would have inevitably resulted in the discovery of the receipts and surveillance videos of the defendant's purchases. The Court of Criminal Appeals therefore found that the trial court properly admitted the evidence pursuant to the doctrine of inevitable discovery.

The court also found that even if there had been any kind of error that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of the defendant's guilt.

State v. Guy (Tenn. Cr. App. 4/28/23)

SEXUAL AROUSAL OR GRATIFICATION: WHEN PRESENTED WITH EVIDENCE THAT A THIRTY-NINE-YEAR-OLD MAN TOUCHED THE PRIVATE AREA OF AN ELEVEN-YEAR-OLD VICTIM WHILE SHE WAS ASLEEP AND UNABLE TO RESIST THE JURY (OR ANY FACT-FINDER) COULD USE ITS OWN COMMON KNOWLEDGE TO "REASONABLY CONSTRUE" THAT THE DEFENDANT'S ACTIONS WERE FOR THE PURPOSE OF SEXUAL AROUSAL OR GRATIFICATION AND THEREBY SATISFIED THE ELEMENTS OF AGGRAVATED SEXUAL BATTERY

FACTS: On 10/10/20, the eleven-year-old victim spent the night at her aunt's house so that she could play with her cousins. The defendant, a family friend who was 39-years-old, was also staying at the house and slept on the floor near the victim. At about 7:00 a.m. the next morning, the victim woke up to the defendant "rubbing her private part on top of her clothes". The victim pushed his hand away and told him "no". She felt scared and texted her mother seven messages, including "Momma," "Mommy," "!!!," "Please answer," "Please," "Don't call me but text," and "Please." Charges were ultimately brought against the defendant for aggravated sexual battery for which he was convicted and sentenced to twenty years in prison.

The defendant appealed the case with the sole basis for the appeal that the state had failed to present evidence that the contact by the defendant with the victim was for the purpose of sexual arousal or gratification.

HELD: The Court of Criminal Appeals held that a reasonable jury, when presented with the evidence as stated, was able to "draw upon its common knowledge" to "reasonably construe" that the defendant's actions were for sexual arousal or gratification.

The court noted that pursuant to TCA 39-13-501 and 504, "aggravated sexual battery is unlawful sexual contact with the victim by the defendant or the defendant by a victim when the victim is less than 13 years of age. The elements of aggravated sexual battery, in relevant part, are (1) the intentional touching of the clothing covering a victim's intimate parts; (2) the intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification; and (3) the victim is less than 13 years old.

The court noted that Tennessee courts have held repeatedly that "a minor's testimony, alone, is sufficient to uphold a conviction of sexual offenses."

The Court of Criminal Appeals summarized the proof in regard to the victim testifying that she was sleeping when she woke up to the defendant committing the acts against her. The court noted that in a forensic interview, she was asked to point out where the defendant touched her and she pointed to an area on a female anatomical diagram and called it her "private part." The court noted that the proof established that the victim knew that the defendant's touching was wrong, that she reacted by pushing his hand away

and saying “no”, that she frantically texted her mother seven times, and witnesses testified that the victim was “hysterical and crying.” When confronted with his conduct, the defendant specifically denied touching the victim, and his actions established that the defendant knew his conduct was wrong also, because when the rest of the family confronted him, he fled.

State v. Reed (Tenn. Cr. App. 10/3/23)

THE PRINCIPLE OF AN OFFICER BEING WHERE HE HAS THE RIGHT TO BE: FROM COMMUNITY CARETAKING FUNCTION TO TERRY PAT-DOWN TO “PLAIN FEEL” AND ENDING WITH “PLAIN VIEW”

FACTS: Officer Bradley and Officer Hardy responded to Big Oak Apartments to a possible overdose call in an area to where there had been nine drug-related arrests and ten overdose calls. On these type calls, the 9-1-1 records specialist with Knox County testified that an ambulance is automatically dispatched as was done in this case. When the officers arrived, they located a vehicle that met the description of the call and found a male defendant in the driver’s side and a female passenger, both of whom were passed out in their seats. The officers knocked several times to get them to wake up and found them to be “very lethargic, slurred speech, eyes pinpoint.”

Officers had the defendant (driver) step out of the vehicle, at which time Officer Hardy conducted a Terry pat-down of the defendant’s person. Officer Hardy felt and removed from the defendant a clear, rock-like substance, consistent with methamphetamine, from the defendant’s front pants pocket. Officer Hardy then arrested the defendant and after conducting a more thorough search of him recovered \$2225 in cash and other paraphernalia. While standing outside of the vehicle, Officer Bradley then observed the muzzle of a firearm sticking out of the driver’s seat and then saw a clear plastic baggie in the floorboard of the driver’s seat.

Multiple suppression motions were made by the defendant which were denied by the trial court.

HELD: In looking at the total circumstances known to the officers at the time of the initial seizure of the defendant, including that a man and woman had been passed out or asleep in a vehicle in the parking lot of an apartment complex for over an hour at an area known for drug overdoses and drug offenses, the CCA found that it was appropriate on the part of the trial judge to deny the motions for suppression, including their initial seizure, their request for the defendant to step outside the vehicle, the pat-down search of the defendant, the plain feel search of the defendant's pocket, and the plain view sighting of the weapon and drugs inside the vehicle.

The court noted the following key factors in these findings regarding suppression:

1. When, as here, officers seized a defendant without a warrant, the state bears the burden of demonstrating the applicability of an exception to the warrant requirement.
2. One such exception is when an officer is acting within the community caretaking function, which has a two-prong analysis which is (a) for the officer to possess specific and articulable facts which warrant a conclusion that a community caretaking action was needed and (b) that the officer's behavior in the scope of the intrusion were reasonably restrained and tailored to the community caretaking need.
3. When the community caretaking exception is invoked to validate a search or seizure, courts must meticulously consider the facts and carefully apply the exception in a manner that mitigates the risk of abuse. Factors present in the present case were the 9-1-1 call about people in distress in a known drug area of overdoses, the arrival at the scene which found that two people were passed out, and the clear need of the officers to take actions to help the persons in distress and possibly save their lives. This was indeed the practice of the officers which included having an ambulance automatically dispatched to the scene.
4. A second exception to the warrant requirement is the brief investigatory stop and frisk authorized by the 1968 case of Terry v. Ohio. Pursuant to the Terry case, police officers are constitutionally permitted to conduct a brief

investigatory stop supported by specific and articulative facts leading to reasonable suspicion that a criminal offense has been or is about to be committed. The totality of the circumstances in the present case established the right to confront the defendant and then to perform a frisk of the defendant after the defendant was found in the driver's seat of a parked vehicle with the key in the ignition. Objective reasonable evidence justified ordering the defendant out of the vehicle (although the officers testified they did not suspect the defendant of a crime when they ordered him out of the vehicle). The court noted that the subjective reasons for the officers having him exit the vehicle are immaterial to the court's determination of whether the conduct was objectively lawful.

Because the officers were justified in removing the defendant from the vehicle under suspicion of being under the influence of narcotics, they were authorized to perform a pat-down search for weapons. The trial court had also found that needles were commonly found on suspects in overdose and drug cases and the evidence did not preponderate against that finding according to the appellate court. Because a needle is a sharp instrument that could be used to harm an officer it may be considered a weapon for the purpose of a Terry search.

5. Next, Officer Hardy was justified in removing the substance from the defendant's pocket under the plain feel doctrine. Hardy properly confined his search to patting the exterior of the defendant's clothing with the palm of his hand and then recognized the rocky substance in the defendant's pocket as a narcotic. The court found that the evidence did not preponderate against the finding of the trial court.

6. Finally, the location of the weapon and other drugs in the vehicle were substantiated under the plain view exception to the search warrant.

PRACTICE POINT: This is what I call the "officer has a right to be where he has a right to be" and that lead to a proper location of the defendant and his companion in the vehicles under the community caretaking doctrine, the removal and pat-down of the defendant under the Terry search and pat-down doctrine, followed by the plain feel discovery of the narcotics in the pocket and the plain view seizure of the additional evidence in the vehicle.

TRAFFIC STOP: “HEY, WAIT JUST A MINUTE! WAS THERE A “ONE WAY” SIGN OR NOT?”

FACTS: At the suppression hearing, Officer Mason testified that at 8:45 p.m. on 8/17/21, he was parked at a gas station performing surveillance for vehicle infractions. At that time, he saw the defendant driving a small truck proceeding the wrong way down a one-way alley. The officer testified he knew the alley was a one-way street because there was a sign posted at the end of the alley near where he was parked. He testified that the alley had been a one-way street for at least twelve years and that he had written multiple violations going back to when he began employment. He testified “there used to be a red and white do not enter sign at the other end of the alley,” but then testified that “it was no longer there.” The officer did state that he did not know when it was removed.

At the conclusion of the proof, the trial court granted the defendant’s suppression motion and dismissed the case finding that Officer Mason was very credible and that he testified there was a sign there and had been there in the past and it wasn’t there. “But I just don’t know how we can make somebody follow a rule that they’re not giving any notice of.” The trial court went on to state, “I mean, rules of the road are not like other rules in that you have to know what the speed limit is, you have to know whether you can or can’t turn right on red, you have to know whether the intersection bars a left-hand turn or if it’s a one-way street. And if there is no sign warning you of that, then it is hard – hard to follow those rules. So, I’m going to grant the motion to suppress.

HELD: The trial court erred in granting the defendant’s motion to suppress. The CCA noted that Officer Mason testified that he witnessed the defendant drive the wrong direction down a one-way alley. The CCA noted further that the trial court granted the defendant’s motion to dismiss, but further stated that “the trial court did not find that a crime did not exist,

that the defendant had not committed a traffic violation or that the officer lacked probable cause. Rather, the trial court, after specifically accrediting Officer Mason’s testimony, granted the defendant’s motion stating, “I just don’t know how we can make somebody follow a rule that they are not given notice of.”

The Court of Criminal Appeals went on to note that “Officer Mason testified there was a sign at both ends of the street, including the end of the street where Officer Mason spotted the defendant. While there was testimony that one of the signs was no longer up at the time of the hearing, no proof was presented that either sign was not up and visible at the time of the incident.”

The court therefore reversed the trial court’s grant of the defendant’s motion to suppress, reinstated the indictments against the defendant, and remanded the matter to the trial court for further proceedings.

PRACTICE POINT: It appeared to be clear from the trial judge’s ruling that he had clearly found from the proof that there was no sign present at the time of the alleged offense and the traffic stop. The CCA decision, on the other hand, stated that Mason had testified there was a sign at both ends of the street.

I guess the lesson here is to make your decisions as clear as possible so that records are clear. I would also maintain that if there is no posting of speed limits or if there is no stop sign at a location where there used to be one, and there is clear absence of signs, that a judge can use those facts as a basis for an appropriate ruling.

State v. Poe (Tenn. Cr. App. 9/29/23)

**VEHICLE STOP: OFFICER HARVEY HAD
REASONABLE SUSPICION TO STOP DEFENDANT’S
VEHICLE BASED UPON THE OBSERVATIONS OF
SERGEANT HENARD THAT WERE
COMMUNICATED TO OFFICER HARVEY THAT**

**THE DEFENDANT WAS CROSSING THE DOUBLE
YELLOW CENTER LINE, AS THOSE
OBSERVATIONS WERE IMPUTED TO OFFICER
HARVEY UNDER THE “DOCTRINE OF
COLLECTIVE KNOWLEDGE”**

FACTS: On 2/23/22, the defendant pled guilty to DUI per se, reserving a certified issue in regard to the stop of the defendant’s vehicle with the other charges being dismissed pursuant to the plea agreement. The defendant challenged the constitutionality of the stop, asserting that reasonable suspicion did not exist for Officer Harvey to stop the defendant once he observed the defendant driving appropriately within his own lane.

HELD: The Court of Criminal Appeals held that the stop was constitutional due to the fact that the officer had reasonable suspicion that the defendant was driving while intoxicated based upon observations by Officer Henard that he observed the defendant drive over the double yellow line and otherwise was driving very erratically.

The Court of Criminal Appeals noted specifically that Sergeant Henard testified that he observed the defendant driving in an erratic manner by swerving, crossing the double yellow center line, and crossing completely into the opposite lane. Henard testified that he saw the defendant’s car go “all the way across the double yellow lane in the other lane and he feared that the car would strike another vehicle. Officer Henard ultimately requested assistance from other officers because the lights on his vehicle did not work. Officer Harvey was able to enter the pursuit and ultimately activated his lights to stop the defendant. The Court of Criminal Appeals made the following key observations in regard to the justification for the stop of the vehicle;

1. Sergeant Henard’s observations and knowledge of the defendant’s driving established reasonable suspicion and that knowledge was imputed to Officer Harvey. The court noted that the Tennessee Supreme Court has recognized that when determining whether an officer has probable cause to arrest a suspect, “the court should consider the collective knowledge that

law enforcement possessed at the time of the arrest, provided that a sufficient nexus of communication existed between the arresting officer and any other officer or officers who possess relevant information. Such a nexus exists when the officers are relaying information or when one officer directs another officer to act.”

The court noted that Tennessee appellate courts have concluded that “because the doctrine of collective knowledge applies when determining whether or not arresting officer has probable cause to arrest a particular suspect, it is logical that this doctrine also applies when determining whether an officer possessed reasonable suspicion to stop an individual.”

The court also pointed out that the Court of Criminal Appeals has recognized that “an officer without knowledge of the details may conduct an investigative stop of a vehicle upon the request of another officer.”

2. The Court of Criminal Appeals also concluded Sergeant Henard had direct involvement or participation in the seizure, as he had followed behind Officer Harvey as Officer Harvey activated his lights, stopped when Officer Harvey and the defendant stopped, and approached the defendant’s car with Officer Harvey, participating in the investigation at the scene.

The court concluded that due to Sergeant Henard’s direct involvement or participation in the seizure, his observations of the defendant’s driving may be considered in determining whether the stop was supported by a reasonable suspicion.

The court noted that Sergeant Henard had reasonable suspicion that the defendant was intoxicated due to his erratic driving and that he had appropriately “directed Officer Harvey to act by stopping the defendant,” which created a sufficient nexus which imputed Sergeant Henard’s reasonable suspicion to Officer Harvey.

The CCA concluded that the stop was constitutional and that the officers had reasonable suspicion that the defendant was driving while intoxicated, and the trial court did not err by denying the defendant’s motion to suppress the evidence obtained through the stop.

State v. Hodge (Tenn. Cr. App. 8/24/23)

WARRANTLESS BLOOD DRAW: BASED ON TOTALITY OF CIRCUMSTANCES, THE TRIAL COURT PROPERLY CONCLUDED THAT THE TROOPER REASONABLY BELIEVED HE HAD A COMPELLING NEED TO DRAW THE DEFENDANT'S BLOOD AND INSUFFICIENT TIME TO OBTAIN A WARRANT TO SEIZE THE BLOOD

FACTS: A fatal crash had taken place, following which several law enforcement officers arrived on the accident scene. The defendant was not found until at least two hours had passed since the fatal crash, and he was found in a remote wooded area in rural Dickson County.

Trooper Binkley was an experienced investigator familiar with the warrant process and he testified that it would have taken him another 1 to 2 hours to drive from the crash site to the sheriff's office, compose a search warrant, find an available judicial officer to sign the warrant, and return to the site. The trooper had further concerns that once he obtained a search warrant, the defendant could have been transported to a Nashville hospital by that time, and the warrant would be invalid.

The trial court denied the motion to suppress the results of the blood test, following which the defendant was convicted by a jury of aggravated vehicular homicide, vehicular assault by driving under the influence, and several other charges. On appeal, the defendant maintained that the trial court had erred in denying his motion to suppress the results of his blood alcohol test.

HELD: The Court of Criminal Appeals held that, considering the totality of the circumstances, the court concluded that the trial court had properly found that Trooper Binkley had reasonably believed he had a compelling need to draw the defendant's blood and insufficient time to obtain a warrant to seize the blood.

The court noted the following principles which applied in the present case;

1. The Tennessee Constitution is identical in intent and purpose with the Fourth Amendment.
2. Searches and seizures conducted pursuant to valid warrants are presumptively reasonable while warrantless searches and seizures are presumptively unreasonable, and any evidence that is discovered as a result thereof is subject to suppression.
3. There are various exceptions to the search warrant requirement, including probable cause based on the presence of exigent circumstances.
4. In cases involving the issue of exigent circumstances, the Tennessee Supreme Court has stated that “the inquiry is whether the circumstances give rise to an objectively reasonable belief that there was a compelling need to act and insufficient time to obtain a warrant”.

The exigency of the circumstances is evaluated based upon the totality of the circumstances known to the governmental actor at the time of the entry. Mere speculation is inadequate; rather, the state must rely upon specific and articulable facts and the reasonable inferences drawn from them. The circumstances are viewed from an objective perspective; “the governmental actor’s subjective intent is irrelevant.”

The Court of Criminal Appeals found that considering the totality of the circumstances, exigent circumstances justified the warrantless seizure of defendant’s blood, based upon these factors:

1. While several law enforcement officers were on the accident scene, they were unable to locate the defendant quickly and the defendant was not found until at least two hours had passed since the fatal crash in the present case.
2. In the present case, most of the delay in obtaining the defendant’s blood was caused by the defendant who had fled the scene and ultimately was found in a remote wooded area.
3. The trial court accredited Trooper Binkley’s testimony that it would have taken him another 1 to 2 hours to drive from the crash site to the sheriff’s office, compose a search warrant, find an available judicial officer to sign the warrant, and return to the site.

4. Even though the defendant argued that drugs metabolize much more slowly than alcohol, the trial court accredited the testimony of Agent Bramlage, who testified that drugs, unlike alcohol, metabolized at different rates for different persons. The court noted that Trooper Binkley was faced with a more compelling need to act and a greater possibility that he had insufficient time to obtain a warrant than in the case as cited by the defendant to the court. The CCA also pointed out that the United States Supreme Court has concluded that exigent circumstances exist to justify warrantless blood draw based on an unconscious driver who is unable to give consent the intoxication of the defendant in the present case rendered him unable to communicate intelligently with law enforcement, “much less give informed consent.” The CCA found that this factor weighed in favor of the trial court’s finding that exigent circumstances existed in the present case.

State v. Reynolds (Tenn. Cr. App. 6/6/23)

SUFFICIENCY OF EVIDENCE

AGGRAVATED STALKING: FACT FINDER COULD HAVE DETERMINED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ENGAGED IN A WILLFUL COURSE OF CONDUCT INVOLVING THE REPEATED OR CONTINUING HARASSMENT OF VICTIMS UNDER EIGHTEEN WHICH WOULD CAUSE A REASONABLE PERSON TO FEEL THAT THE VICTIMS FELT TERRORIZED, FRIGHTENED, INTIMIDATED, THREATENED, HARASSED, OR MOLESTED

FACTS: Shretha W. testified that from February 2019 until the end of December 2020, she was living with six of her children, including her daughters, S.W., K.W., and C.W., all of whom were under the age of eighteen at the time of the offenses. Their home was located near a corner store and during this time, the mother called the police multiple times because the defendant walked up and down the street “stalking” her daughters. The conduct included the defendant on multiple occasions walking up and down the street in front of their house, making comments to the three daughters, walking onto the family porch and turning the doorknob to try to get into the house, telling the victims that God had sent him to talk to them or to punish them because they were bad people, including conduct of dancing around the minor children, and touching them in other ways, and also telling them that he was going to rape them, tase them, tase them in their private parts, which on multiple occasions made them all feel scared and uncomfortable. The children on many occasions had to call their mother to tell her of the conduct.

The defendant was convicted of three counts of aggravated stalking for stalking the three daughters and one count of stalking for stalking the mother.

HELD: The Court of Criminal Appeals determined that a rational jury could have determined beyond a reasonable doubt that the defendant engaged in a willful course of conduct involving the repeated or continuing harassment of the mother and her three children that would cause a reasonable person to feel, and that they actually did feel terrorized, frightened, intimidated, threatened, harassed or molested.

The Court of Criminal Appeals noted that it was an offense to intentionally engage in stalking pursuant to TCA 39-17-315, which according to the elements of the statute, the state must prove beyond a reasonable doubt that a defendant engaged in (1) a willful course of conduct; (2) involving repeated or continuing harassment of another individual, including, but not limited to, repeated or continuing unconsented contact; (3) that would cause a reasonable person to suffer emotional distress and had actually caused the victim to suffer emotional distress; and (4) that would cause a reasonable person to feel terrorized, frightened, intimidated,

threatened, harassed, or molested, and actually caused the victim to feel those emotions.

To constitute aggravated stalking, the state had to prove that each of the minor victims was less than eighteen years of age at any time during the defendant's course of conduct and that the defendant was five or more years older than the victim.

Viewed in the light most favorable to the state, the proof was sufficient to support the defendant's convictions.

State v. Durrell (Tenn. Cr. App. 7/31/23)

**ESTABLISHING THE IDENTITY OF PERPETRATOR
BEYOND A REASONABLE DOUBT: IN A CASE
INVOLVING THE CHARGE OF AGGRAVATED
ASSAULT, THE STATE PRESENTED SUFFICIENT
EVIDENCE TO ESTABLISH THE DEFENDANT'S
IDENTITY BECAUSE THE VICTIM WAS FAMILIAR
WITH THE DEFENDANT, THE TWO HAVING
KNOWN EACH OTHER FOR APPROXIMATELY SIX
MONTHS, AND THE EVIDENCE ESTABLISHED
THAT THE VICTIM IMMEDIATELY AND
CONSISTENTLY IDENTIFIED THE DEFENDANT TO
HER SONS AND TO POLICE AND BY
RECOGNIZING THE DEFENDANT THROUGH A
PHOTOGRAPHIC LINEUP**

FACTS: In a case in which the defendant was convicted following a bench trial of two counts of aggravated assault, the defendant contended that the state's evidence was inadequate to establish her identity as the perpetrator beyond a reasonable doubt. Specifically, the defendant stated that the judge had erred in relying solely on the victim's testimony.

HELD: The Court of Criminal Appeals concluded that the state presented sufficient evidence to establish the defendant's identity beyond a reasonable doubt particularly due to the fact that the victim was familiar with the defendant, having known her for approximately six months, and that the victim identified the perpetrator immediately to her sons and to the police.

The court noted the following key principles in cases involving identity of the perpetrator:

1. A person commits aggravated assault who intentionally or knowingly committed an assault and that the assault involved the use or display of a deadly weapon or resulted in serious bodily injury to another. A person commits assault, as it relates to the case, who intentionally or knowingly causes another to reasonably fear imminent bodily injury.
2. In this case the defendant had argued that the state failed to prove her identity because the court relied solely on the victim's testimony, the defendant further arguing that the victim was elderly and had a "hazy" memory.
3. In Tennessee, the identity of the perpetrator is an essential element of any crime.
4. The state has the burden of proving identity that a defendant is the perpetrator beyond a reasonable doubt.
5. Identity is a question of fact for the fact finder's determination upon consideration of all competent proof.
6. As with any sufficiency analysis, the state is entitled to the strongest legitimate view of the evidence concerning identity contained in the record, as well as all reasonable inferences which may be drawn from the evidence.

From all of the proof, the Court of Criminal Appeals concluded that the state had presented sufficient evidence to establish the defendant's identity based upon the following: (1) that the victim was familiar with the defendant having known the defendant for approximately six months and due to the fact that the defendant had previously been to the victim's apartment where the two visited and talked; (2) the victim immediately and consistently identified the defendant as "Lorie" to her sons and two police and immediately recognized the defendant when shown a photographic

lineup; (3) the testimony of the victim, by itself, is sufficient to support a conviction, if such proof is credible; (4) in this case, the court found that the victim's testimony was corroborated by her injuries, the defendant's number in her phone, and by the testimony of her sons as to the victim's condition and her surroundings that morning. The court also noted that the trial court had further accredited the victim's testimony and repeated identifications of the defendant.

State v. Gerbis (Tenn. Cr. App. 10/17/23)

EVADING ARREST/FELONY RECKLESS

ENDANGERMENT: DEFENDANT'S ACTS OF DRIVING ERRATICALLY AT HIGH RATES OF SPEED IN A RESIDENTIAL AREA CREATED A RISK OF DEATH OR INJURY TO OTHER DRIVERS ON THE ROAD AND TO THE DEFENDANT'S PASSENGER AND ALSO POSED A THREAT OF DEATH OR SERIOUS BODILY INJURY TO SUPPORT CONVICTIONS OF FELONY EVADING ARREST AND FELONY RECKLESS ENDANGERMENT

FACTS: The defendant contended that the evidence presented at trial was insufficient to support his convictions for Class D felony evading arrest and Class E felony reckless endangerment, maintaining that the state had failed to establish the defendant's conduct created a risk of death or injury to others to support the evading arrest conviction and/or that the state failed to establish that the threat of death or serious bodily injury was imminent or that the defendant used his vehicle as a deadly weapon to support the felony reckless endangerment conviction.

HELD: The Court of Criminal Appeals held that the jury could have reasonably concluded that the defendant was operating a motor vehicle on the road, that the defendant received a signal from officers to bring his

vehicle to a stop, and that the defendant fled with a conscious objective to elude the deputies. The court also found that the nature of the vehicle pursuit, including the speed and manner that the defendant fled from the deputies, established proof in which a jury could have reasonably concluded that the defendant used his vehicle as a deadly weapon and placed his passenger and other drivers on the road in imminent danger of death or serious bodily injury.

- (1) In regard to the evading arrest conviction, the court noted that a person evades arrest under the statute who while operating a motor vehicle on any street road or highway intentionally flees or attempts to elude any law enforcement officer, after having received any signal from the officer to bring the vehicle to a stop. The charge of evading arrest is elevated to a Class D felony when the flight or attempt to elude creates a risk of death or injury to innocent bystanders, pursuing law enforcement officers, or other third parties. The court noted that a person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result. The intent may be inferred from the character and nature of the act and from all the circumstances of the case in evidence.

The court concluded that viewed in the light most favorable to the state, the proof established that the defendant evaded arrest based upon testimony that established that after the deputy made a traffic stop, the defendant sped away in a vehicle on a public road and continued at high rates of speed despite both deputies pursuing the defendant in marked vehicles with emergency lights and sirens activated. The CCA stated that the fact finder could reasonably have concluded that the defendant was operating a motor vehicle on a road in the state, that the defendant received a signal to bring his vehicle to a stop, and that he fled with conscious objective to elude the deputies.

The court stated that the evidence established that the defendant's flight from the officers created a risk of death or injury to other drivers on the road as well as to the defendant's passenger. The officers had established that the conduct occurred during a busy time of the day, the defendant ran stop signs, weaved through traffic, crossed the center line into

oncoming traffic, and crashed his car in someone's yard while traveling approximately 35-mph over the speed limit.

- (2) In regard to the reckless endangerment charge, the court noted that a person commits the charge when he or she "recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." The court noted that a threat of death or serious bodily injury is "imminent" when a person is placed in a reasonable probability of danger as opposed to a mere possibility of danger.

The state may satisfy this burden by demonstrating that a person or class of persons other than the defendant was in the "zone of danger." The court also noted that a deadly weapon includes anything that in the manner of its use or intended use is capable of causing death or serious bodily injury for which a vehicle certainly qualifies.

The court concluded that the evidence presented at trial, viewed in the light most favorable to the state, established that the defendant traveled at speeds of up to 65-mph through a residential area with a passenger in his vehicle. The court also stated that during the pursuit the defendant drove erratically, weaved in and out of traffic, caused other vehicles to pull to the side of the road, and "blew through" stop signs while other vehicles were at those intersections. Ultimately, defendant crossed the centerline, hit an embankment, and crashed his vehicle into a tree, six feet above the ground, in a residential yard.

Based upon all these factors, the court found that a reasonable fact-finder could conclude that the defendant used his vehicle as a deadly weapon and placed his passenger and other drivers on the road in imminent danger of death or serious bodily injury.

The court did note that it is "irrelevant to the offense that neither the passenger or other drivers sustained serious injuries."

State v. Johnson (Tenn. Cr. App. 5/9/23)

WITHDRAWAL OF GUILTY PLEA

WITHDRAWAL OF GUILTY PLEA: THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION DENYING THE DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA, THE COURT FINDING THAT THE DEFENDANT HAD FAILED TO ESTABLISH A “FAIR AND JUST REASON” TO PERMIT THE WITHDRAWAL OF HIS GUILTY PLEA PARTICULARLY SINCE OVER FIVE MONTHS HAD ELAPSED BETWEEN HIS PLEA AND HIS MOTION TO WITHDRAW THE SAME

FACTS: The defendant was indicted on 9/19/16, by the Davidson County Grand Jury for DUI third offense and DUI per se. On January 27, 2022, the defendant pled guilty, pursuant to a guilty plea to the lesser included offense of DUI second offense and the state dismissed the charge of DUI per se. At that time the defendant approved a factual basis which was submitted to the trial court which included the officers finding the defendant asleep behind the wheel of his car with the vehicle running; indicators of possible impairment were observed, including odor of alcohol, blood shot eyes, and being unsteady on his feet and field sobriety test were administered showing indicators of impairment on each test performed. The plea agreement included receiving a sentence of eleven months and twenty-nine days with all but forty-five days of incarceration suspended to probation, including an alcohol treatment program, attending and completing the victim impact panel, losing his driving privileges for two years, a fine of \$600, complying with state laws, and forfeiting any weapons in his possession.

On July 8, 2022, the defendant filed a timely motion to withdraw guilty plea pursuant to Tennessee Rule of Criminal Procedure 32(f). In the defendant’s motion he asserted that he had learned on July 7, 2022, that Officer John Roberson, who had conducted the DUI investigation in his case including the standardized field sobriety test, had passed away on October

21, 2021, and that he had not known of the passing of the officer at the time he entered into his plea and that he would not have entered into such a plea if he had known those facts.

HELD: The Court of Criminal Appeals held that the record did not support any factors of the six factors under Tennessee law which the court was to consider for permitting the withdrawal of the defendant's guilty plea. The Court of Criminal Appeals therefore concluded that the trial court properly exercised its discretion in denying the defendant's motion to withdraw his guilty plea.

The court noted that TRCP 32(f) provided that a trial court may grant a motion to withdraw a guilty plea for "any fair and just reason" before the sentence has been imposed. The rule provides that after the sentence has been imposed but before a judgment becomes final, the court may set aside the judgment of conviction and permit the defendant to withdraw the plea to correct manifest injustice. The court also noted that a criminal defendant who has pled guilty does not have a unilateral right to later withdraw his plea either before or after sentencing.

The court noted that it was the defendant's duty to establish "a fair and just reason" to withdraw his plea. The court noted that in State v. Phelps (Tenn. 2010) the Tennessee Supreme Court had adopted a multi-factor analysis for determining what constitutes any "fair and just reason" supporting the defendant's withdrawal of a guilty plea prior to sentencing. The non-exclusive list includes: (1) the amount of time that lapsed between the plea and the motion to withdraw it; (2) the presence or absence of a valid reason for the failure to move for withdraw earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty pleas; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.

The court noted that no single factor is dispositive and the relevance of each factor varies according to the circumstances surrounding both the plea and the motion to withdraw. The court also noted that since the trial court did not consider the factors in Phelps, the Court of Criminal Appeals would proceed to consider each of the factors.

(1) Since over five months had elapsed between the defendant's plea on 1/27/22 and the motion to withdraw filed on 7/8/22, the passage of five months clearly weighs against the defendant.

(2) In regard to the second factor, the presence of a valid reason for the failure to move for withdrawal earlier in the proceedings, the trial court questioned the credibility of the defendant's testimony that he did not know about the officer's death before the time of his plea of guilty. Because the trial court did not accredit defendant's testimony regarding this factor, this factor also weighs against the defendant.

(3) The defendant has never at any time asserted that he did not commit the offense and he entered a guilty plea to a lesser included offense of DUI second offense and did not enter a no contest plea. The court therefore found that the third factor weighed against the defendant.

(4) In regard to the fourth factor, the circumstances underlying the defendant's plea, the Court of Criminal Appeals noted that it was a matter-of-fact plea and the defendant was not under the influence of drugs or alcohol and he denied that he suffered from any mental illness or learning disability and further indicated that he understood his constitutional rights and wanted to waive those rights and enter a plea of guilty. The defendant never expressed any confusion or misunderstanding under the plea submission agreement, and the fourth factor weighs against the defendant. On this fourth factor, the court also noted that the defendant did not explain any reason why the other officer would not have been able to testify as to the facts that the deceased officer could testify to since he was there to view what went on in the case.

(5) The facts showed that in regard to the defendant's nature and background that the defendant was 58 years old at the time of his plea and that while he was on bond in this case the defendant was arrested in Wisconsin for operating a vehicle while under the influence and that factor five is at best a neutral factor in the case.

(6) In regard to the sixth factor, the court noted that the record reflected the defendant had at least two prior convictions for DUI and therefore the prior experience with the criminal justice system weighs against the defendant.

The court therefore concluded that the record does not support any factors indicating a fair and just reason for permitting the withdrawal of the defendant's guilty plea and therefore the court need not weigh the seventh factor regarding the potential prejudice to the state if the motion was granted.

State v. Seidel (Tenn. Cr. App. 9/15/23)

ETHICS

COMPETENCE

COMPETENCE FOR JUDGES WITH ADVANCING TECHNOLOGY, INCLUDING ARTIFICIAL INTELLIGENCE AND ADVANCED TECHNOLOGY: JUDICIAL OFFICERS HAVE AN ETHICAL OBLIGATION TO MAINTAIN COMPETENCE WITH AND FURTHER EDUCATE THEMSELVES ON ADVANCING TECHNOLOGY, INCLUDING TECHNOLOGY RELATED TO ARTIFICIAL INTELLIGENCE

HELD: Judicial officers must maintain competence with advancing technology, including but not limited to artificial intelligence.

The Michigan Judicial Commission noted the following key principles in regard to advancing technology and artificial intelligence:

1. Judicial officers have an ethical obligation to maintain competence with and further educate themselves on advancing technology, including but not limited to artificial intelligence.
2. The Michigan Code of Judicial Conduct provides that “A judge should be faithful to the law and maintain professional competence in it.” The commission noted that as the use of technology increases, so does the requirement to maintain competence in what is available, how it is used, and whether the use of the technology in question would affect a judicial decision.
3. As to adjudicative responsibilities, the Michigan Counsel noted that “a judge should be faithful to the law and maintain professional competence in it.”

As to administrative responsibilities, the Michigan Counsel noted that “a judge should diligently discharge administrative responsibilities, maintain professional competence of judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.”

4. The increasing use of artificial intelligence (AI) and other technological programs and devices requires judicial officers to understand how these tools will affect their conduct and docket in accordance with relevant ethical standards.

Legal knowledge, skills, thoroughness, and preparation are required for judicial officers to perform their duties. This includes knowing the benefits and risks associated with the technology that judicial officers and their staff use daily, as well as the technology used by lawyers who come before the bench.

5. As the legal community has seen, there are times when AI may be used improperly such as when AI-generated filings are found to be incorrect.

6. Judges must determine the best course of action for their courts with the ever-expanding use of technology including the use of AI.

The commission suggested that “judges need to understand artificial intelligence and the deep learning it evidentially acquires for the following reasons: (1) advancing AI will eventually lead to inquiry and adjudication of AI related technologies and their use and other manners before the court. (2) Most artificial intelligence programs continue to learn, which requires adjustments and reevaluation of all tools on an ongoing basis. (3) Due process will be a challenge when dealing with AI tools, as a litigant “cannot question the algorithms and the deep learning the AI tool requires over time.” (4) Judges must not only understand the legal, regulatory, ethical, and access to challenges associated with AI, but they will need to continue to evaluate how they or parties before them are using AI technology tools in their own docket.”

CONCLUSION BY A MICHIGAN COMMISSION: Judicial officers have an ethical obligation to understand technology, including artificial intelligence, and take reasonable steps to ensure that AI tools on which their judgment will be based are used properly and that the AI tools

are utilized within the confines of the law and court rules. Further, as AI rapidly advances, judicial officers have an ethical duty to maintain technological competence and understand AI's ethical implications to ensure efficiency and the quality of justice."

Opinion by the Michigan Commission of Judicial Conduct (10/27/23)

FAILURE TO FILE TIMELY RULINGS ON MOTIONS

FAILURE TO TIMELY RULE ON MOTIONS:

TENNESSEE CHANCELLOR WAS GIVEN A PUBLIC REPRIMAND DUE TO FAILURE TO RULE ON MOTIONS FOR A PERIOD OF NEARLY ONE YEAR CAUSING PARTIES IN CASE TO SUFFER EXTREME DELAY, INCLUDING INABILITY TO CONDUCT DISCOVERY OR PROCEED WITH THE CASE FOR NEARLY A YEAR

FACTS: Motions were filed in Chancery Court in October 2022, and the motions was actually heard before the Chancellor on November 18, 2022. The litigant filed a complaint noting that no ruling was forthcoming despite having the delay brought to the Chancellor's attention and despite assurance by the Chancellor to the parties that he would rule on the motions by a certain date. The failure to rule resulted in extreme delays to the parties including their inability to go forward with discovery in the case and/or to make any other progress in the case for nearly a year, to the great frustration of the parties involved.

HELD: The Tennessee Board of Judicial Conduct issued a public reprimand to Chancellor Perkins, noting the following principles:

1. Ethics rules require that judges perform judicial and administrative duties competently, promptly, and diligently. Tenn. Sup. Ct. R 10. This directive includes the specific responsibility of promptly disposing of cases.

2. Motions may not be held under advisement in excess of thirty days absent the most compelling of reasons, as provided for in Tenn. Sup. Ct. R 11.
3. Failure to make timely rulings also implicates Tenn. Sup. Ct. R. 10, that a judge shall comply with the law and violates the ethical provision which requires that “a judge shall promote confidence in the judiciary.”

The public reprimand was also based upon the fact that the Chancellor had previously been sanctioned twice for the same issue, also due to the length of the delay, and not acting promptly when the delay was brought to the Chancellor’s attention. The panel considered in mitigation that the Chancellor had taken full responsibility and offered no excuses for his actions.

The Board of Judicial Conduct noted that “given the reoccurring nature of this problem,” the investigative panel as a part of the public reprimand ordered the Chancellor to submit a semi-annual report to the panel identifying any pending matters in his court, whether motions or other matters, that have not been acted upon within applicable time frames. Any violation would result in immediate thirty days suspension, followed by additional suspensions in the event of any repeated conduct.

The Board of Judicial Conduct noted that “the repetitive nature of this problem not only reflects poorly upon you as a jurist but also upon the court system, as undue delays in resolving cases prevent the parties from moving on from their litigation and undermines public confidence in the proper administration of justice.”

In re: Public Reprimand of Chancellor Russell Perkins, Tennessee
Board of Judicial Conduct File No. B23-9410 (11/8/23)

LETTERS ON BEHALF OF DEFENDANTS IN ACTIVE CRIMINAL CASES

**LETTERS REGARDING ACTIVE CRIMINAL CASES:
JUDGE DISCIPLINED BY PUBLIC REPRIMAND DUE
TO WRITING LETTERS ON BEHALF OF TWO**

CRIMINAL DEFENDANTS IN FEDERAL DISTRICT COURT

FACTS: On 3/13/23, Judge James Jones, Jr., a Criminal Court Judge in Memphis, Tennessee, wrote letters on behalf of two defendants convicted of conspiracy to commit wire fraud in the United States District Court for the Southern District of Florida. The Board of Judicial Conduct noted that in the letters, the judge “vouched for the defendant’s” character and asked the court to show mercy in its sentencing.

The letters were written on official court stationery, and identified the person writing the letters as a “Criminal Court Judge in Memphis, Tennessee.”

HELD: The Board of Judicial Conduct through its investigative panel imposed a public reprimand which noted the following violation of ethical standards as follows:

(1) First, by writing letters on official court stationery, and identifying the writer as a judge and signing the letters as “Hon. James Jones, Jr.,” the judge linked the communications to his official office and to the judiciary, creating the appearance that the judge was using his position as a judge to further the interest of persons with active cases under consideration. The court noted this was at odds with Tenn. Sup. Ct. R. 10 which prohibited the inappropriate use of court stationery.

(2) Second, the Board of Judicial Conduct noted that “in requesting favorable treatment of parties with pending cases,” the judge had lent the prestige of the judicial office for the personal benefit of others. The board noted that the ethics rules are clear that “a judge shall not abuse the prestige of judicial office to advance the personal or economic interest of the judge or others, or allow others to do so.” (Tenn. Sup. Ct. R. 10, RJC 1.3).

(3) Third, the letters extolled the defendants’ personal attributes and virtues in requesting leniency in imposing their respective sentences. The board noted that the letters were a prohibited character reference pursuant to Tenn. Sup. Ct. R. 10, that “a judge shall not vouch for the character of a person in a

legal proceeding absent limited circumstances, which were not applicable in the present case.

(4) Fourth, by permitting the judge's spouse to sign the letters, the judge had allowed a family member to leverage the prestige of judicial office to promote the personal interest of others with whom she had ties, also a violation of Tenn. Sup. Ct. R. 10.

(5) Fifth, the letters to the court failed to disclose that the judge's spouse had been a co-defendant with the subjects of the letters in legal proceedings collateral to their criminal cases. The civil suit involving the spouse of the judge was ultimately dismissed, but the board found that this was still a lack of full disclosure under the circumstances which did reasonably create an appearance of impropriety. Tenn. Sup. Ct. R. 10 ("a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.")

The BOJC did note that the judge had cooperated with disciplinary counsel and had no prior record of disciplinary action but still felt that the matter deserved a public reprimand.

In Re: Public Reprimand of Judge James Jones, Jr., Tenn. Board of Judicial Conduct File No. B23-9328 (8/1/23)

PROMISES TO "LOCK'EM UP"

PROMISES TO GET TOUGH ON CRIME: JUDGE WHO MADE UNEQUIVOCAL CAMPAIGN PLEDGE TO INCARCERATE OFFENDERS, ENSURE MAXIMUM SENTENCING OF REPEAT OFFENDERS, AND PROMISING TO BE THE FRIEND OF LAW ENFORCEMENT FOUND TO BE IN VIOLATION OF CODE TO PERFORM IMPARTIALLY AND WAS

DISQUALIFIED FROM HEARING ALL CRIMINAL CASES, CASES INVOLVING DOMESTIC VIOLENCE, AND CASES INVOLVING PURPORTED DRUG DEALERS

FACTS: During a judicial campaign, a judicial candidate promised, if elected, to: (1) keep drug dealers off the streets; (2) incarcerate offenders and protect victims of domestic violence; and (3) assure repeat offenders are sentenced to the full extent of the law. The statements were made by the candidate in his written campaign literature without qualifiers or caveats and were expressly identified as pledges or promises. They were made in the context of the candidate's law enforcement and/or prosecutorial background.

HELD: The New York State Commission on Judicial Conduct held the conduct of the judicial candidate was unethical and disqualified the judge who was elected for his entire judicial term from (1) all criminal cases; (2) cases in any court involving allegations of domestic violence; (3) all vehicle and traffic law matters; and (4) cases in any court involving purported drug dealers.

The New York State Commission on Judicial Conduct determined that the judge was in violation of the following principles:

1. A judge must always avoid even the appearance of impropriety and must always act in a manner that promotes public confidence in the judiciary's integrity and impartiality.
2. A judge must perform judicial duties without bias or prejudice against or in favor of any person.
3. A judge must dispose of all judicial matters promptly, efficiently and fairly.
4. A judge is disqualified in a proceeding in which the judge's impartiality might reasonably be questioned and specifically in instances where "the judge, while a judge or while a candidate for a judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public

statement not in the judge’s adjudicative capacity that commits the judge with respect to an issue in the proceeding or the parties are controversy in the proceeding.

The disciplinary counsel stated, “In our view, the inquirer’s campaign promises, seen as a whole, created a distinct impression that he/she would, if elected, aid law enforcement rather than apply the law neutrally and impartially.”

The counsel further stated, “In our view, the wording of these campaign promises creates a clear impression that the inquirer was promising to incarcerate offenders and to insure maximum sentencing of repeat offenders.” The judge in the present case made promises about incarceration and the use of maximum sentencing which disqualifies himself from such cases. The panel concluded that the judge’s impartiality “might reasonably be questioned” on the basis of his promises to be tough on crime.

New York State Commission on Judicial Conduct, Opinion 23-158
(December 14, 2023)

PUBLIC PLEDGE TO “REALLY CRACK DOWN ON TRUANCY PROBLEMS”: TENNESSEE JUDGE GIVEN PUBLIC REPRIMAND FOR POSTING PICTURE OF JUDGE IN JUDICIAL ROBE SEATED ON A BENCH IN THE COURTROOM PLEDGING TO “REALLY CRACK DOWN ON TRUANCY PROBLEMS”

FACTS: A Tennessee Juvenile Judge on 8/3/23, posted a video to the county school’s Instagram page which depicted the judge wearing his robe and seated on the bench in the courtroom introducing himself as a General Sessions and Juvenile Court Judge and in which he publicly declared his intent to “really crack down on truancy problems” in his county.

The judge announced publicly his decision that “every unexcused absence that a kid has in school they are going to do seven hours of community service at our local recycling center.” The post also explained that the sentence would entail spending Friday nights from 4:00 p.m. until 9:00 p.m. at the local recycling center and that it “would be a highly unpleasant experience.” It also warned that parents could be incarcerated for up to ten days for unexcused absences.

HELD: The State of Tennessee Board of Judicial Conduct found that such public comments about pending or impending matters, such as the truancy matters, can (1) undermine public perception and confidence that the judge will approach his or her cases fairly and impartially by taking into account the unique facts and circumstances of each case. The board noted that “if the public is to maintain confidence in our system of justice, litigants must be afforded the ‘cold neutrality of an impartial court,’ not one that has or appears to have predetermined matters likely to come before the court.”

(2) The board also noted that “extrajudicial comments regarding pending or impending cases can give rise to a reasonable concern by those whose legal rights and freedoms are at risk about the fairness of their particular outcome.”

(3) Thirdly, the board noted that making extrajudicial comments about pending or impending cases can lead to disqualification issues for the judge.

The investigative panel noted that the board decided to impose a public reprimand due to the fact that the panel considered in mitigation that the judge took full responsibility and offered no excuses for his actions and also fully cooperated with disciplinary counsel and had no prior record of disciplinary action.

In re: Public Reprimand of Juvenile Judge

(BOJC File No. B23-9389 (September 19, 2023))

RACIAL ANIMUS TOWARD BLACK LITIGANT

JUDGE'S BOAST TO COLLEAGUES LEADS TO DISCIPLINE: JUDGE'S REPEATEDLY EMBELLISHED STORY OF HIS PULLING A FIREARM ON A BLACK LITIGANT IN COURT LEADS TO REMOVAL FROM OFFICE

FACTS: A Black man appeared in front of Judge Putorti on a felony charge which was ultimately dismissed by the prosecution, following which the litigant pled guilty to a misdemeanor charge. The litigant was later jailed for failing to pay the fine, but the defendant's wife advised the judge that he simply could not afford to pay the fine, following which the fine was reduced to community service and the litigant was released.

At a later appearance, the judge brandished a firearm at the defendant and initially had claimed that he "subjectively feared for his safety," due to the fact the defendant had approached quickly and too closely to the judge. The judge later admitted that (1) he had "no reasonable basis" to believe that the litigant was about to use imminent deadly force against him and (2) that he was really not justified in brandishing the firearm.

Even after this admission, witnesses recounted that he continuously told the story in which he described his practice of carrying a firearm on the bench and then bragging about the fact that he had once brandished the firearm at someone who came running up to him. At that point his story was that he pulled out the gun and hollered "whoa, whoa, slow down." Other witnesses which were present, including a police officer and assistant district attorney did not corroborate the judge's version of the events. The judge also told about the experience to another judge, telling the female judge about the time he drew his firearm on an agitated black man. From the judge's manner and tone, the female judge had the impression that the judge was bragging about his actions and that he was expressing pride about being featured in an article about the incident. Then at an association of judges meeting, he once again told the story and added the feature that the court

officer made a joke about how quickly the petitioner had been able to draw his gun.

The judge later stipulated that his conduct violated ethical rules and that he had failed to perform judicial duties without bias or prejudice against or in favor of any person based upon race.

HELD: The New York State Commission on Judicial Conduct found that by repeatedly referring to the litigant in the manner that he did, the judge “exploited a classic and common racist trope” about Black men being inherently threatening or dangerous, and by doing so exhibited bias and/or implicit bias against the litigant.

The commission found that the judge violated the ethical principle that “judges must perform their judicial duties without bias or prejudice against or in favor of any person and must not by words or conduct manifest bias or prejudice based upon race, color, or any other protected characteristic.”

The commission found that by his repeated embellishment of the story and discussion on social media that the conduct of the judge was extremely egregious and that coupled with other misconduct justified removal from office. The court found that the gravity of the judge’s wrong doing and the effect of the petitioner’s conduct upon public confidence in this character and judicial temperament necessitated the removal.

The court summarized the matter by stating that “while presiding over this courtroom, (the judge) brandished a loaded firearm at a litigant who presented no threat to anyone. Rather than show remorse, he described his conduct in a press interview and boasted about it to his colleagues, while repeatedly, and gratuitously, referring to the litigant’s race. Also troubling is petitioner’s denial in this court of facts to which he previously stipulated. Petitioner’s unfitness for office is further demonstrated by his improper use of social media to solicit donations.”

The commission found that the judge’s conduct “transcends poor judgment” and warrants removal from office. The commission found that the conduct was “so inexcusable that no amount of mitigation can be sufficient to restore the public’s trust in the judge’s ability to discharge responsibilities of judicial office in a fair and just manner.

THE CONTINUING PROBLEM OF RACIAL DISPARITIES

News reports regarding racial disparities in the Criminal Justice System continued to highlight egregious wrongs in the Criminal Justice System across the nation.

(1) Knoxville News Sentinel (November 16, 2023)

“Racial disparities in sentencing? New study shows Black, Hispanic males more likely to face tougher sentences.”

In a story in the Knoxville News-Sentinel, there was a report in November 2023, about a new study which reveals that, in federal court, Black and Hispanic defendants are less likely than white defendants to receive probation instead of prison. The story points out that “this difference significantly contributes to the racial disparities and the punishments handed down by judges.”

The story noted that the U.S. Sentencing Commission’s findings include updated research on sentencing disparities across demographic groups. The key findings included the following:

(i) Black men receive longer sentences and are less likely to be granted probation. The findings show that Black males are 23.4 percent less likely than their white counterparts to get probation, and his Hispanic males are 26.6 percent less likely than white males to be sentenced to probation.

(ii) Black and Hispanic women were less likely to receive probation than white females; women of all races receive shorter sentences than men. The report included that Black and Hispanic women were 11.2 percent and 29.7 percent less likely to receive probation compared to white women.

Judge Carlton W. Reeves, the chair of the U.S. Sentencing Commission, emphasized the collective responsibility to eliminate racial and unwarranted disparities from “every facet of the criminal justice system.” Judge Reeves stated: “We all have a duty to eradicate racial and other

unwarranted disparities from every part of our criminal justice system. That is why the Commission is committed to providing judges, law makers, and citizens with the most up-to-date information about sentencing differences among demographic groups.”

(2) A story in USA Today on January 12, 2024, is entitled, “Ronnie Long’s wrongful conviction is shocking ----- Unless you study the US justice system.” The authors of the article (Yancey-Bragg, Thao Nguyen and Krystal Nurse) state the following:

“The wrongful conviction of Ronnie Long might appear shocking: No physical evidence, false testimony, a conflicting description of the suspect --- then 44 years in prison for Long.

“But experts and advocates aren’t surprised: They say U.S. prisons are filled with potentially thousands of innocent people....

“The 68-year-old Black man, who is set to receive a historic \$25 million settlement, was convicted by an all-white jury for the rape of a white woman, according to his attorneys. Evidence that could have exonerated Long was not shared with the defense and police officers gave false testimony during the trial, according to Duke Law School’s Wrongful Convictions Clinic. Despite Long not matching the victim’s original description of her assailant, the prosecution relied on the victim’s identification of Long as their main piece of evidence.

“When you take a look at the role that race and official misconduct played in Ronnie Long’s wrongful conviction, this is unfortunately common practice in our criminal legal system,” said Vanessa Potkin, the Innocence Project’s director of special litigation. ‘So it’s not an outlier.’”

The article asked the following:

“Why are people wrongfully convicted?”

“The National Registry of Exonerations tracked six common contributing factors that lead to a wrongful conviction: official misconduct, false accusation, false or misleading forensic evidence, false confession, mistaken witness identification and inadequately legal defense. Possley said the most common factors are official misconduct and perjury.

“Black people comprise 53 percent of the 3,200 exonerations listed in the registry, making African Americans seven times more likely than their white counterparts to be falsely convicted of serious crimes, according to the organization’s report.

Potkins said that racial disparities and wrongful convictions mirror disparities seen throughout the criminal justice system including policing, jury selection and pretrial detention.

(3) A recent study in the Knoxville News Sentinel on February 4, 2024, is entitled “Searching for Justice: Starbucks manager asks for accountability for deputies who beat him.”

While such stories should not really shock us at this point and time in the criminal justice system, this is another story that is deeply disturbing, and yes shocking, at the magnitude of the cruelty and inhuman treatment visited upon the young black victim of a horrific beating by law enforcement. The story by Angela Dennis, begins as follows:

“He won’t sit for journalist photos or videos. He won’t sue the sheriff’s deputies who inflicted injuries that might mark his face for life and have certainly scarred his psyche forever. He’s not looking for attention, publicity, or a payout. Nahshon Bain-Greenidge simply wants you to know his truth, a revelation unloosed by the fists of sheriff’s deputies who didn’t like the

questions the coffee shop shift manager asked when they swarmed without warning the parking lot of the West-Side Knoxville Starbucks he oversaw.

“Policing in America is broken for Black Americans, Bain-Greenidge says. He doesn’t have a solution. But he wants every American to ponder the truth revealed to him and what it means about our commitment to liberty and justice for all.

“Before his encounter with sheriff deputies, Bain-Greenidge was just another guy trying to work and do the right thing. The 29-year-old had just graduated from Arizona State University with a sociology degree.

“He’s soft-spoken, slender and small-framed with a gentle personality. He worked for Starbucks for three years, and the company had helped him pay for his education. He was preparing to leap into his career, leaving the coffee shop to take a job related to his major working with children in Knoxville.

“Then came October 21, upending his thinking about how American society tolerates policing without meaningful accountability.”

The article goes on to describe that Knox County sheriff’s deputies were called to the scene of the Starbucks and that they “arrived in force at the Starbucks on Cedar Bluff Road after receiving a domestic disturbance call.” The officers blocked the drive thru, barring entry for customers.

The article then states: “In an effort to do his job, Bain-Greenidge went outside to ask the deputies what was going on. His questions were met with aggressive responses, and a few minutes later, he was on the ground with officers on top of him. He was shocked by a stun gun, he says, and his face and head were bleeding and bruised.

Police reports provided contradictory details about what led them to push Bain-Greenidge to the ground and physically injure him. The officers ultimately charged Bain-Greenidge with three misdemeanor offenses of resisting arrest, disorderly conduct and assault on a first responder. All charges against him were dismissed on November 22, 2023, after District Attorney Charme Allen who told Knox News that her office watched body

camera footage of the incident prosecutors had not seen. Even though the charges were dropped, the sheriff's office has not released the body cam footage and requests have been ignored in which Knox News sought to be able to review the videos.

The article then states "In the aftermath of what happened to him, watching videos of police violence against Black men and people of color hits differently, he said. Now, he's one of them."

"My message after this happened to me is the same message that we have been saying over and over again. George Floyd died and while it felt like some progress had been made it still feels like we are all still stuck."

"Still pondering how he ended up on the pavement, he's certain it speaks to the ongoing discrimination and racial injustice Black people feel in America every single day."

Bain-Greenidge also made the following thought-provoking quote:

"I wasn't even the reason for them coming to the store. The idea that an unarmed individual could strike so much fear into heavily armed men, it's just astounding."

And one final thought from Nahshon Bain-Greenidge:

"All I asked for was respect. Not one time did I feel they looked at me or treated me as an equal human being.
To be treated with dignity and respect as a citizen should be the standard."

RECUSAL

**THE TRIAL JUDGE "WHO HAD PREVIOUSLY
INVESTIGATED THE DEFENDANT": A TRIAL
JUDGE WHO HAD INVESTIGATED FACTS**

REGARDING THE DEFENDANT WHILE THE TRIAL JUDGE SERVED AS A PROSECUTOR BUT WHO HAD NEVER ACTUALLY PROSECUTED THE DEFENDANT WAS NOT REQUIRED TO RECUSE HIMSELF

FACTS: The defendant asked the judge to recuse himself because years previously (approximately 20 years) the trial judge (when he was a prosecutor) had investigated possible criminal charges against the defendant. The case in which the defendant sought recusal of the judge involved a murder of a victim which occurred approximately fifteen years after the trial judge had left employment at the district attorney's office. The records showed that the trial judge did not prosecute the defendant for previous crimes during the trial judge's tenure as a prosecutor. While he had been involved in several investigations in which the defendant was a suspect, the trial judge could remember no details about the defendant other than his nickname and that the investigations concerned activity in the Austin Homes area of the county.

ISSUE: Whether, under these circumstances, a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality, including whether the trial judge had a personal bias or prejudice concerning the defendant.

HELD: The Court of Criminal Appeals held that under these circumstances, a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would not find a reasonable basis for questioning the judge's impartiality. Therefore, the trial court did not err in denying the recusal motion.

The CCA pointed to several Tennessee cases, including one in which the Court of Criminals held that recusal is not required where the trial judge had at some time in the past been an assistant attorney general who had issued a subpoena in an unrelated trial of the defendant. In that case, recusal was not required because the defendant had failed to show in any manner

whatsoever that he was prejudiced in any way by the fact that the judge presiding at his trial had been involved with some of his previous cases.

In another case, the CCA had held that the recusal of trial judge is not required in the defendant's DUI trial, even though the trial judge previously prosecuted the defendant and obtained a conviction that was used to enhance his sentence in the subsequent case. In that case, the trial judge was held to "not be precluded from presiding over the defendant's case merely because she had prosecuted him in the past, where the defendant did not otherwise show that the trial judge had a personal prejudice or bias against him.

The Court of Criminal Appeals noted that the case at bar was a further step removed from the other cases in that the trial judge never personally prosecuted the defendant. The court noted that the trial judge had also explicitly stated that his previously involvement with the defendant would not affect his impartiality and there was no showing in any way that the judge "harbored a personal bias or prejudice against him."

State v. Hardison S.W.3d 282 (Tenn. Cr. App. 2023)

TEXTING WHILE JUDGING

TEXTING WHILE JUDGING: JUDGE WHO EXCHANGED OVER FIVE HUNDRED TEXT MESSAGES WITH HER BAILIFF, INCLUDING TEXTS WHICH MOCKED THE PHYSICAL APPEARANCE OF ATTORNEYS, JURORS AND WITNESSES AND USED OFFENSIVE LANGUAGE, RESULTS IN PETITION BY OKLAHOMA CHIEF JUSTICE FOR THE TERMINATION OF THE JUDGESHIP, ULTIMATELY RESULTING IN THE RESIGNATION OF THE TRIAL JUDGE

FACTS: Judge Traci Soderstrom, a District Judge in Lincoln County, Oklahoma, was elected to her seat in November 2022 and took the bench on January 9, 2023.

While presiding over a murder trial which began on June 7, 2023, Judge Soderstrom exchanged over five hundred text messages with her bailiff Angela Miller, in which they mocked the physical appearance of attorneys, jurors and witnesses and used offensive language to deride the state's attorneys. The texts included the judge and her bailiff calling murder trial witnesses "liars", admiring the looks of a police officer who was testifying, disparaging the local defense bar, expressing bias in favor of the defendant, and displaying gross partiality against the state.

The texts exchanged between the judge and her bailiff included the following topics:

1. That the district attorney was gross and a horrible speaker;
2. That the jury was going to "hate" the assistant district attorney, to which the bailiff responded, "Absolutely. He's an arrogant asshole." The bailiff made a crass and demeaning reference to the prosecuting attorneys' genitals, to which the judge replied with a "Ha Ha icon."
3. The judge and the bailiff discussed the weird looking "baby hands" of the prosecutor.
4. In regard to the defense attorney who was involved in the case, the judge remarked to the bailiff, "She's awesome."
5. After opening argument by the defense attorney, the judge texted the bailiff and stated, "Can I clap for her?"
6. The judge made comments to the effect that the DA's office was "not used to going up against competent attorneys," which implicitly dismissed the capabilities of the state's attorneys and the defense bar of the county.
7. At one point in regard to the DA, the bailiff texted the judge, "He's horrible," to which the judge replied, "True," and the bailiff replying, "Suckssss."

8. While a video was being played on the witness stand, the judge remarked to the bailiff, “This shit is boring.”
9. At one point during the trial, the judge texted to the bailiff, “State just couldn’t accept that a mom could kill their kid so they went after the next person available,” which was evidencing her opinion about the defendant’s innocence.
10. At one point the judge said about one of the DAs, “He looks constipated,” and followed that up by asking, “is that the oh shit look?” While a co-defendant was testifying in the trial, the judge texted to the bailiff, “Can I please scream liar liar?”
11. When a police officer took the witness stand, the judge texted, “He’s pretty. I could look at him all day,” to which the bailiff replied, “Same lol.”
12. The factual allegations in the petition against the judge also noted that the judge and the bailiff texted back and forth with each other “continuously” during the active portions of the murder trial, with the judge placing her personal cell phone toward the front of her lap outside the view of others in the courtroom.
13. The judge scrolled Facebook and accessed various phone applications and texted for extended periods of time during the trial.
14. The bailiff sat in a witness box at a small desk near the judge and sent and received text messages during the murder trial, and the judge and the bailiff even discussed by text which instructions would best fit their desired outcome.
15. The petition filed by the Chief Justice of the Oklahoma Supreme Court also noted and alleged as follows, “At no time during these exchanges did (the trial judge) admonish her bailiff not to discuss the attorneys appearing before the court in such an inappropriate way. Instead, the judge joined in on the commentary . . .”

The allegations of the petition against the judge noted that “the pattern of conduct demonstrates respondent’s gross neglect of duty, gross partiality, and oppression in violation of the Oklahoma Constitution.” The petition noted that the conduct further demonstrated the judges lack of temperament to serve as a judge, her undermining public confidence in the independence,

integrity, impartiality and competence of the judiciary, and the petition cited numerous violations of ethical codes in regard to her gross neglect of duty, gross partiality in office, oppression in office, and multiple other grounds.

HELD: Judge Soderstrom upon facing removal from the bench for gross neglect of duty and multiple other charges resigned on 2/9/24. After submitting her resignation, the judge stated, “I texted during a trial. It doesn’t matter whether it was a traffic case, or whether it was a divorce case, or whether it was a first-degree murder case. I texted during a trial and that was inappropriate.

PRACTICE POINT: Certainly, this was a gross abuse of the judge’s office and resulted in great disrepute being brought upon her and her bailiff. What shouldn’t be lost in this horrible cautionary tale is the fact that it is very easy during the course of a day for a judge to get caught up in wanting to look at various apps on a cell phone and/or to communicate with others. It is very important to know and acknowledge that it is important for us to use a cell phone at appropriate times, possibly at breaks or at dead periods, and not to ever use it at any time when it could look like we were distracted from paying attention to a case at any stage of the proceedings.

There may be significant times in our lives when we must engage in our judicial responsibilities, particularly on the bench, when we may have a family member with health issues or be awaiting some kind of significant news in regard to health issues of ourselves or loved ones. In such situations, it can certainly be appropriate to check a cell phone during a break in cases and even mention that there are significant matters that the court is needing to keep aware of so that clerks and bailiffs and others are appropriately aware of the same.

State of Oklahoma v. Tracy Soderstrom,

In the Court of Judiciary (Filed 10/10/23) (Resigned 2/9/24)

THE LIMITED RIGHTS TO FREE SPEECH OF A JUDGE

QUOTH THE JUDGE, “NEVER MORE”: IN REGARD TO JUDGES, “FREEDOM OF SPEECH IS NOT THE FREEDOM FROM ALL CONSEQUENCES FOR ONE’S ACTIONS”

FACTS: Judge K. Y. Davis of Detroit, Michigan, had her adjudicative responsibilities removed from her on 10/20/17, by order of Chief Judge Blount due to her failure to follow directives of Chief Judge Blount regarding dismissals and adjournments. The order required Judge Davis to attend work daily and later required reporting her arrival and departure times among other responsibilities.

On 11/6/17, Judge Davis began sending a daily bible verse to the Chief Judge and other judges involved in the disciplinary process which included her telling the judges to “find someone else to harass” and expressing her opinion that she was being treated unfairly. The 11/6/17 email in which she informed the Chief Judge and administration that she had arrived at court, stated among other things:

“Sovereign Lord, my strong deliverer, you shield my head in the day of battle. Do not grant the wicked their desires, Lord; Do not let their plan succeed. Those who surround me proudly rear their heads; may the mischief of their lips engulf them. May burning coals fall on them; may they be thrown into the fire, into miry pits, never to rise.”
Psalm 140:7-10.

Her 11/8/17, email stated:

“But the cowardly, the unbelieving, the vile, the murderers, the sexually immoral, those who practice magic arts, the idolaters, and all

liars ----- they will be consigned to the fiery lake of burning Sulphur. This is the second death. Revelation 21:8.”

The judge sent a total of twelve such emails through that November, following which Judge Paruk met with Judge Davis and her attorney and specifically asked the judge to cease sending the biblical emails. Immediately after the meeting and in defiance of Judge Paruk, Judge Davis sent yet another biblical email, beginning: “You brood of vipers, how can you who are evil say anything good?”

On January 28, 2018, Judge Davis sent another email, the final paragraph being as follows.

“Because the Ghosts of Judges Past were otherwise occupied with exchanging their black robes for white ones and could not do my dockets for me, I went ahead and adjudicated the business license docket to which I had been assigned. I sincerely wish that you, Judge Nancy Blount, and Kelli Moore would find someone else to harass.”

HELD: The Judicial Disciplinary Commission concluded that Judge Davis intended her communications to show disrespect and discourtesy and that she succeeded in doing so. The commission noted that Chief Judge Blount and Judge Paruk testified that they received and understood the biblical emails to be somewhat threatening, that the emails wished negative consequences and harm to people, and they were “disrespectful”, “contemptuous,” “frustrating”, and “disappointing”. The commission thereby concluded that these interpretations by the judges were “fair, reasonable, and exactly what the judge intended.”

The commission thereby found that Judge Davis was guilty of failing to treat follow judges with dignity, courtesy, and respect in violation of ethics canons.

CONCLUSION: On the basis of this judicial misconduct along with several other allegations of misconduct, including (i) using her personal cell phone to create unauthorized recordings of the proceedings in her courtroom; (ii) similarly dismissing or adjourning cases because a party used a process server whom she believed was dishonest; (iii) abusing her

contempt powers in at least two cases; (iv) disconnecting the video recording equipment in her courtroom and failing to maintain a record for weeks; (v) parking in a handicap loading zone and when police responded flashing her judge's badge; and (vi) making material misrepresentations to the commission, the Michigan Supreme Court conditionally suspended the judge for six years, being "conditional" because it will only take effect if the former Judge (Davis) is elected or appointed to the bench within six years, and then the suspension would then extend until six years after the date of her election or appointment.

Complaint against Honorable K.Y. Davis, Formal Complaint No.101
(9/23/22)

Dwight E. Stokes
General Sessions/Juvenile Judge
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Judge Stokes has served as Sevier County's General Sessions and Juvenile Court Judge since his election in 1998. Prior to his judgeship, he practiced criminal and civil law in Sevier County, Tennessee. He holds a B.A. from Carson-Newman University in political science and received his Doctor of Jurisprudence degree from the University of Tennessee at Knoxville. He is a member of the Tennessee Council of Juvenile and Family Court Judges, Tennessee General Sessions Judges, and the National Council of Juvenile and Family Court Judges. He served on the Tennessee Commission of Children & Youth for nine years and previously served on the statewide Disproportionate Minority Contact Task Force and the Tennessee Board of Judicial Conduct.

Debbie Newman has served as the Judicial Assistant to Judge Dwight E. Stokes and Judge Jeff D. Rader since June 2016. She previously served as Judicial Assistant for Circuit Judge Rex Henry Ogle and for the law firm of Ogle, Wynn and Ogle. Debbie spends many hours assisting with the criminal outline. Without her assistance, this outline would not be possible.

For information about the outline or to contact Judge Stokes you may email Debbie at debnewman@seviercountyttn.gov or by calling 865-908-2560.