

TENNESSEE GENERAL SESSIONS JUDGES
CONFERENCE

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Criminal Law Update
Nashville, Tennessee

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TABLE OF CONTENTS

AGGRAVATED CHILD NEGLECT	1
ATTORNEY-CLIENT PRIVILEGE	3
BAIL BOND	4
<u>BRADY VIOLATION</u>	6
DUI	9
EVIDENCE	12
INDIGENT DEFENSE	37
PRELIMINARY HEARING IN SESSIONS COURT	38
PRETRIAL EYEWITNESS IDENTIFICATION	39
RESTITUTION	42
RIGHT TO CONFRONTATION OF WITNESSES	44
RIGHT TO COUNSEL	46
SEARCH AND SEIZURE	48
SENTENCING	63
VIOLATION OF PROBATION	74
ETHICS	78

CRIMINAL LAW UPDATE

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AGGRAVATED CHILD NEGLECT

AGGRAVATED CHILD NEGLECT: TENNESSEE SUPREME COURT REVERSED THE DECISION OF THE COURT OF CRIMINAL APPEALS, FINDING THAT A REASONABLE JURY COULD HAVE DETERMINED THAT THE STATE PROVED ALL OF THE NECESSARY ELEMENTS OF AGGRAVATED CHILD NEGLECT

FACTS: This is a case that I placed in the September 2020 Criminal Law Update, based upon the Court of Criminal Appeals finding that the trial court had properly determined that the evidence was insufficient to prove the defendant knowingly did not feed the minor child or that the defendant knowingly neglected the minor child.

This tragic case involved a child (“Kar’mn”) who was born on 9/5/04 and passed away on 3/3/05. The defendant was the child’s mother and she was interviewed by detectives of the Metro Nashville Police Department (MNPD) on 3/3/05, 10/21/05, and 7/7/14.

On 6/23/15, more than ten years after the child’s death, the Davidson County Grand Jury indicted the defendant for aggravated child neglect (in violation of TCA 39-15-402) and first degree felony murder. The jury returned a guilty verdict of aggravated child neglect and reckless homicide, a lesser included offense of second degree murder. Defendant timely filed a written motion for judgment of acquittal pursuant to TRCP 29(e)(1). The Trial Court found that there was insufficient evidence to prove the defendant acted “knowingly” and set aside the verdict of guilty for aggravated child neglect. The court denied the motion as to reckless homicide. (The Court of Criminal Appeals did note that there was probably an issue regarding the statute of limitations in regard to the reckless homicide charge but that is not the issue that is before the court on appeal.)

HOLDING BY TN COURT OF CRIMINAL APPEALS: The Court of Criminal Appeals, after reviewing all of the events of Kar'mn's short life, held that the evidence was insufficient to prove the defendant (mother) knowingly did not feed Kar'mn or knowingly neglected Kar'mn. The court noted that she died on 3/3/05, only thirty-six days after her 1/26/05 health maintenance visit where she was deemed to be well developed and well-nourished and alert and vigorous. The court noted that defendant took Kar'mn to every scheduled doctor's visit and to the emergency room on one occasion. The court noted the daycare worker's testimony, testimony of the mother of the defendant, and the full history, and stated that while it was unclear what happened in the last few days of Kar'mn's short life, the proof did not show that the defendant knowingly neglected or caused the child's death.

HELD (BY TENNESSEE SUPREME COURT): The Tennessee Supreme Court concluded that "based on the evidence presented at trial, a reasonable jury could have determined that the state proved all of the necessary elements of aggravated child neglect. The Supreme Court therefore reversed the Court of Criminal Appeals' decision to affirm the trial court's partial grant of the motion for judgment of acquittal as to the aggravated child neglect charge. The court vacated the trial court's partial grant of the motion for judgment of acquittal and reinstated the jury's verdict as to the charge of aggravated child neglect.

The Supreme Court specifically stated that "the jury could have made a reasonable and legitimate inference from the evidence that Ms. Weems' statements that she fed Kar'mn were not credible based on the medical and scientific evidence provided by Dr. Hawes and Kar'mn's medical records. The medical and scientific evidence alone provides proof that Ms. Weems knew how to feed her child and that her child needed to eat often, that Kar'mn was able to gain and maintain weight, and that Kar'mn died as a result of chronic malnutrition and dehydration. There is certainly no 'smoking gun' in this case, and Ms. Weems did not admit that she failed to feed Kar'mn. However, Tennessee courts have long recognized that a defendant's mental state, often an essential element in criminal statutes, is often proved by circumstantial evidence, which by its very nature requires the jury to make inferences and draw conclusions based on all the evidence presented. Accordingly, a reasonable jury could have concluded that Ms. Weems knowingly neglected Kar'mn by not feeding her and Kar'mn died as a result of that neglect."

The Supreme Court noted that the trial court appeared to have made its own assessment of the credibility of Ms. Weems and Ms. Owens' testimony and assigned it more weight than the medical testimony that showed Kar'mn suffered from chronic malnutrition and dehydration. The Supreme Court then stated: "Whether or not the trial court agreed with the credibility determinations of the jury, the weight the jury assigned specific testimony and evidence, or the conclusions the jury drew from the evidence is not of consequence to this appeal only because that is not what the trial court must do when ruling on a motion for judgment of acquittal. Those determinations are relevant only to the trial court's decision to accept the jury's verdict in its role as thirteenth juror." The court then stated that it expressed no opinion and makes no determination on the issue of any ruling the trial court may make on its role as thirteenth juror. The Supreme Court reinstated the conviction for aggravated child neglect.

PRACTICE POINT: This is a puzzling case and reflects the difficulties that juvenile courts, trial courts, courts of criminal appeals, and the Supreme Court face in making decisions in these types of cases. It points out that we as sessions judges and juvenile judges have hard decisions to make when there is expert testimony regarding harm or death caused to children in cases of child neglect or abuse.

State v. Weems (TN Supreme Court 3/1/2021)

ATTORNEY-CLIENT PRIVILEGE

ATTORNEY-CLIENT PRIVILEGE: BY HAVING WIFE'S FRIEND PRESENT DURING MEETINGS WITH HER ATTORNEYS, THE WIFE HAD WAIVED HER ATTORNEY-CLIENT PRIVILEGE AS TO THE ENTIRE SUBJECT MATTER OF BRINGING CRIMINAL CHARGES AGAINST HER HUSBAND

FACTS: The wife filed a complaint for divorce against her husband, and her husband asserted claims for intentional infliction of emotional distress and negligent infliction of emotional distress, and filed a motion to compel discovery after the wife did not produce communications with her attorneys.

HELD: The Court of Appeals held that the attorney-client privilege did not

apply to the wife's communications with her attorneys when she could not identify which meetings her friend was present for.

The court found that the attorney-client privilege did not protect communications between the wife and her divorce attorney and the wife and her criminal attorney, which were held in the presence of the wife's friend, and which concerned whether the wife should report husband's actions to law enforcement. The court noted that (1) the wife did not assert that her friend was acting as her agent, (2) she did not contest that she waived the privilege for those conversations that occurred while her friend was present, and (3) the wife could not identify which meeting or meetings her friend had been present for and which she had not.

The Court of Appeals quoted a principle of law as follows: "To successfully invoke the attorney-client privilege, the party asserting the privilege is obligated to establish the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential." The court found that because the wife was in the best place to have the knowledge necessary to prove the existence of attorney-client privilege, the burden of proof was with the wife to show that the communications between her and her lawyer were protected by attorney-client privilege. The court found that the wife had not presented evidence demonstrating that the attorney-client privilege applied to any specific meeting with her attorneys because she could not identify which meetings her friend was present for or not present for. Therefore, the wife had not met her burden of proof to establish that the attorney-client privilege protected those communications.

Pagliara v. Pagliara (Tenn. Ct. App. 2020)

BAIL BONDS

REFUSAL OF DISTRICT ATTORNEY TO EXTRADITE DEFENDANT FROM ILLINOIS: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PETITION OF THE BONDING COMPANY FOR RELEASE FROM THE BOND

FACTS: The defendant, Sergio Lara, was arrested on 11/10/18, and charged with domestic assault, a Class A misdemeanor. The defendant

posted a \$9,000.00 bond by using the services of Debo's Bail Bond Company, LLC. Following a preliminary hearing on 1/22/19, the case was bound to the Rutherford County grand jury, following which the grand jury returned an indictment charging the defendant with one count of domestic assault on 4/2/19. On 4/29/19, the defendant failed to appear at his arraignment hearing. On 4/30/19, the Circuit Court entered an order of conditional forfeiture and executed a writ of scire facias on Debo's Bail Bonds which triggered the 180-day period for the bonding company to show cause if any why the judgment should not be made final.

The bonding company filed a petition for release from the bond explaining that it was a felony in Illinois to "bounty hunt" and "if you take the defendant, its kidnapping." The bonding company then asked the district attorney's office to extradite the defendant from Illinois, but the district attorney's office refused to do so.

The trial court denied the bonding company's petition for release from bond and entered a final forfeiture.

HELD: The Court of Criminal Appeals concluded that the state's refusing to extradite a defendant after he voluntarily flees the jurisdiction of the State of Tennessee does not release the surety's obligation under the bond agreement. The court noted that the bonding company was "presumably aware that the defendant's mother resides in Chicago, a place where the bonding company could not apprehend him without state intervention. The court noted that "a bondsman must evaluate the inherent risk of flight before writing the bond and be diligent in keeping tabs on the defendant after the bond is written."

The court noted the following key principles of bail bond contracts:

1. A bail bond is a contract between the government on one side and the criminal defendant and his surety on the other, whereby the surety assumes custody of the defendant and guarantees to the state either the appearance of the defendant in court or the payment of the full amount of bail set by the court.

2. Because of the risk of the defendant's flight is inherent in every bail bond agreement, it is incumbent upon the bondsman to be thorough in assessing the risk of flight before writing the bond and in keeping tabs on the defendant after the bond is written.

3. The forfeiture of bail bonds is controlled by statute. When a defendant fails to appear in court in accordance with the bail bond agreement, TCA 40-11-201(a) provides that a trial court may enter a conditional judgment of forfeiture against the defendant and his sureties. Upon entry of a judgment of conditional forfeiture, the trial court must issue

a writ of scire facias requiring the defendant and his sureties to show cause why the judgment should not become final.

4. A surety has 180 days from the date the scire facias is served to produce the defendant; otherwise, the court may enter final judgment.

5. The surety may petition the trial court for relief from forfeiture. The trial court must grant the surety a hearing, and the surety carries the burden of proving that its petition for exoneration should be granted.

6. A surety may be exonerated from forfeiture by its surrender of the defendant to the court at any time before payment of the judgment of forfeiture.

7. The Tennessee Supreme Court has noted that TCA 40-11-204(a) provides trial courts with discretion to relieve a surety from forfeiture, but trial courts must exercise this discretion consistently with other statutory provisions.

8. The trial court's discretion under the code is broad and comprehensive, empowering trial courts to make determinations in accordance with their conception of justice and right.

9. The Court of Criminal Appeals must review a trial court's determination on a petition for exoneration for an abuse of discretion. Under this standard, the appellate courts grant the trial court the benefit of its decision unless the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.

10. In the present case, the Court of Criminal Appeals agreed with the State of Tennessee that the state's policy not to pursue extradition after a defendant has fled the jurisdiction does not excuse the surety from its obligation under the bond agreement.

In Re: Debo's Bail Bond Company, LLC (Tenn. Cr. App. 6/30/21)

BRADY VIOLATION

**BRADY VIOLATION AT A PRELIMINARY HEARING:
THE STATE'S FAILURE TO FURNISH OBVIOUSLY
EXCULPATORY INFORMATION IN ITS
POSSESSION BEFORE THE PRELIMINARY
HEARING, COUPLED WITH THE DEATH OF THE
STATE'S KEY WITNESS, BEFORE DEFENDANT**

WAS AWARE OF THE EMAILS AND BEFORE THE DEFENDANT HAD AN OPPORTUNITY TO CROSS-EXAMINE THE KEY WITNESS TO DETERMINE THE TRUTHFULNESS OF THE EMAILS, VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS AND DEPRIVED DEFENDANT OF A FAIR TRIAL

FACTS: On 6/18/15, the defendant was arrested for aggravated rape and domestic assault of his wife, Kimberly Allen. The charges were based primarily on the victim's statement to Detective Fait that the defendant struck her and penetrated her with his hand.

On 6/22/15, the day before the original setting of the preliminary hearing, Ms. Allen sent two emails to Detective Fait, the first of which stated that the defendant did not rape her but that instead she had a consensual sexual encounter with an "unknown man" in his vehicle outside a bar in Nashville during the early morning hours of 6/18/15.

Numerous continuances occurred in the case, and a preliminary hearing was finally held on 3/18/16. During this time the state did not disclose the emails to the defendant. At the preliminary hearing, both Ms. Allen and Detective Fait testified and were cross-examined by defense counsel. Neither witness mentioned Ms. Allen's emails or her recantation of the rape allegation. A few days after the preliminary hearing, Ms. Allen was murdered. The murder was unrelated to the case or to the defendant.

The emails were finally disclosed to defendant when the state provided discovery on 12/21/17. Prior to trial, the defendant moved to exclude Ms. Allen's preliminary hearing testimony based upon Tennessee Rule of Evidence 804 and the Confrontation Clause of the United States Constitution of the Tennessee Constitution. After a hearing on the motion, the trial court declared Ms. Allen unavailable and denied the defendant's motion, finding that defendant had both an opportunity and a similar motive to develop Ms. Allen's testimony at the preliminary hearing through cross-examination.

At the trial, the state played the audio recording of Ms. Allen's preliminary hearing testimony for the jury and introduced the emails as substantive evidence. The jury convicted defendant of one count of aggravated rape and one count of domestic assault and the trial court imposed an effective sentence of twenty years to be served at one-hundred percent.

HELD: The Court of Criminal Appeals held that “the state’s failure to disclose the obviously exculpatory first email before Ms. Allen testified at the preliminary hearing, coupled with her death before trial, deprived defendant of the opportunity to cross-examine Ms. Allen about the veracity of the emails”. The state’s actions or inactions violated Brady v. Maryland, (1963) and deprived defendant of his constitutional right to due process of law. The court reversed the defendant’s convictions and remanded for a new trial.

The Court of Criminal Appeals discussed several key points as the basis for its ruling:

(1) Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness.

(2) In addition to protecting a defendant’s right to confront the witnesses at the time of trial, the state and federal confrontation clauses also guarantee to the defendant an opportunity for effective cross-examination. This is true so that the defendant can expose to the fact-finder facts from which the fact-finder can appropriately draw inferences relating to the reliability of the witnesses.

(3) The prosecution has an affirmative duty to disclose evidence favorable to the defendant in a timely fashion. There are four prerequisites necessary to establish a Brady violation: (i) the defendant must have requested the information, unless the evidence is obviously exculpatory, in which case the state is bound to release the information whether requested or not; (2) the state must have suppressed the information; (3) the information must have been favorable to the accused; and (4) the information must have been material.

The Court of Criminal Appeals found that all four prerequisites were present in the present case as the information was obviously exculpatory, the state clearly suppressed the information by failing to disclose the information until after the preliminary hearing and over two years later; the emails were obviously favorable to the accused and the information was clearly material to the defense.

While the Court of Criminal Appeals agreed with the state that “Brady generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose,” the Court of Criminal Appeals found that the suppression of the emails for a period of over two years during which time the witness died, prevented the defense from using the disclosed material effectively in preparing and presenting the defendant’s case.

The Court of Criminal Appeals reversed the convictions of the defendant and remanded the case for a new trial, stating: “It is axiomatic that nothing can cure the deficiency in Ms. Allen’s preliminary hearing testimony caused by the state’s failure to disclose the obviously exculpatory email prior to Ms. Allen’s death.” The CCA also noted that: “Because of the Brady violation, no future jury will be able to hear what Ms. Allen would have stated concerning the veracity of the email and Ms. Allen’s preliminary hearing testimony will not be admissible in a new trial.”

The court also made a very important qualifying statement in regard to the case, as follows: “To be clear, we are not holding that obviously exculpatory information must be provided before the preliminary hearing or before 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 in preparing and presenting the defendant’s case.’”

In one final issue, the CCA noted that the defendant had filed a pretrial motion to exclude references to Ms. Allen as a “victim,” arguing that to use the term victim allows the focus to shift to the accused rather than remain on the proof of every element of the crime that the state is alleging. The trial court took the issue under advisement and ruled that the parties should refer to the victim in the case as the “alleged victim,” “Ms. Allen,” or “Kimberly Allen.” The Court of Criminal Appeals noted that the state proceeded to use the term “victim” for Ms. Allen seven times during voir dire before defense counsel objected, ten times during voir dire after the bench conference, seven times during its direct examination of witnesses, twice during the cross-examination of the defendant, once in response to an objection, and thirteen times during closing argument, for a total of forty times. The court found that the prosecutor’s flagrant and repeated use of “victim” to refer to Ms. Allen was improper, and when added to the prosecution’s Brady violation it denied the defendant a fair trial.

State v. Allen (Tenn. Cr. App. 12/10/20)

DUI

ENHANCEMENT OF DUI CASE TO DUI SECOND OFFENSE: THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT’S CONVICTION OF

**DUI SECOND OFFENSE AS THE COURT FOUND
THAT THE 2008 JUDGMENT OF CONVICTION OF
THE DEFENDANT FOR A PREVIOUS DUI
SATISFIED ALL THE REQUIREMENTS OF
TENNESSEE RULES OF CRIMINAL PROCEDURE
RULE 32(E)**

FACTS: The defendant plead guilty to DUI in Sullivan County Criminal Court, and the trial court convicted him after a bench trial of DUI second.

The defendant contended that his sufficiency of the evidence issue “hinges around the validity of his 2008 conviction” and that his 2008 conviction was “clearly void” because the affidavit of complaint was signed by a notary public rather than a clerk or magistrate and because no arrest warrant was issued.

HELD: The Court of Criminal Appeals found that the trial court had properly ruled that it could enhance the defendant’s sentence to a DUI second offense because, unless the conviction is invalid on its face, a prior judgment of conviction in a court with personal and subject matter jurisdiction cannot be “collaterally attacked in a subsequent proceeding in which the alleged conviction is used to enhance punishment.”

The Court of Criminal Appeals noted that Tennessee Rule of Criminal Procedure 32(e) provides that a judgment of conviction shall be signed by the judge and entered by the clerk and that the judgment of conviction must include “the plea, the verdict or findings, and adjudication and sentence.” The court noted that the trial court conducted a pre-trial hearing to assess the validity of the 2008 judgment of conviction and that the trial court ruled that the judgment was “facially valid.”

The Court of Criminal Appeals stated: “The document at issue is the standard General Sessions Court form. The form can be found on the AOC website and consists of one page, front and back. The front of the document contains an affidavit of complaint section and a probable cause determination section. The appellant’s written waiver and guilty plea, signed by the appellant, his attorney, and the judge, and the judgment are on the back of the document. The judgment of conviction bears the General Sessions judge’s signature; shows that the appellant entered a guilty plea to DUI and was found guilty of the offense; and reflects a sentence of 11 months, 29 days to be served as 48 hours in jail followed by probation.” The

court therefore noted that “the judgment of conviction satisfies all of the requirements of Rule 32(e), of the Tennessee Rules of Criminal Procedure.

The court noted that the defendant had cited the State v. Jones (Tenn. Cr. App. 2016) in which the Court of Criminal Appeals affirmed the trial court’s holding that the affidavit of complaint was sworn before a notary public rather than a qualified judicial officer and therefore was invalid. The court noted that the Jones case, unlike this case, did not involve a defendant’s collateral attack of a judgment. The court stated that the judgment of conviction had to be facially void in order to be inadmissible and that the judgment at issue in this case was not facially void.

State v. Groseclose (Tenn. Cr. App. 10/15/20)

**TRAFFIC STOP BASED ON SEAT BELT VIOLATION:
EVIDENCE DID NOT PREPONDERATE AGAINST
TRIAL COURT’S FINDINGS OF PROPER
INVESTIGATORY STOP BASED UPON FACT THAT
TRIAL COURT IMPLICITLY CREDITED THE
TESTIMONY OF DETECTIVE KETNER**

FACTS: In a case involving DUI, the defendant maintained that the trial court erred in denying his motion to suppress evidence based upon the fact that there was no reasonable suspicion or probable cause for the traffic stop and therefore the stop was an illegal stop.

HELD: The Court of Criminal Appeals held that the evidence did not preponderate against the trial court’s finding that the investigatory stop was proper based upon the detective’s personal observations that the defendant was driving without a seat belt.

The court noted that a trial court’s finding of fact on a motion to suppress is binding on the court unless evidence on the record preponderates against the findings. The court also noted that questions of credibility are matters entrusted to the trial judge as a trier of fact and the prevailing parties are entitled to the strongest legitimate view of the evidence adduced at the suppression hearing.

The court further noted that a warrant is not required for an investigatory stop “when the officer has a reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed.”

The Court of Criminal Appeals noted that the trial court had “implicitly credited the testimony of Detective Ketner in finding that he had reasonable suspicion to conduct a brief, investigatory stop on the defendant’s vehicle.” The court noted that the trial court stated that the officer said that he saw the defendant coming by without a seat belt on and that would give the officer probable cause to stop the vehicle. The court noted that Detective Ketner’s personal objective observations led him to believe that the defendant was driving without a seat belt and that his patrol car was positioned so that he could see passing vehicles, and its headlights were on so that he could see inside the vehicle. The court noted that Detective Ketner testified he was trained in seat belt detection when it was dark outside and that he was able to look into the defendant’s vehicle and see the defendant was not wearing a seat belt. The court noted that failure to wear a seat belt is a criminal offense and that the detective had a particularized and objective basis for believing the defendant was committing the offense of not wearing a seat belt while driving. The court found that based on the totality of the circumstances, Detective Ketner had reasonable suspicion to conduct a brief, investigatory stop of the defendant’s vehicle.

State v. Simpson (Tenn. Cr. App. 8/9/21)

EVIDENCE

EVIDENCE OF VICTIM’S PRIOR CONVICTION NOT ALLOWED: DEFENDANT IN DOMESTIC VIOLENCE AND AGGRAVATED KIDNAPPING EPISODE WAS PROPERLY DENIED THE OPPORTUNITY TO INTRODUCE A PRIOR CONVICTION OF THE VICTIM IN A RECKLESS ENDANGERMENT CASE INVOLVING THE DEFENDANT SINCE THE TRIAL COURT DID ALLOW DEFENDANT TO CROSS-EXAMINE THE VICTIM ABOUT THE FACTS OF THE CASE

FACTS: The defendant was charged and convicted of three counts of aggravated assault and one count of aggravated kidnapping in a domestic violence incident. The case involved a situation in which the victim had communicated to the defendant that she wanted to end the relationship, after

which the defendant had threatened her with a knife, grabbed her by the neck, and hit her in the mouth. The defendant subsequently refused to let the victim leave the residence, all occurring while the baby was in the room or in the victim's arms. During the incident, the defendant brandished a steak knife and told the victim that if she "wanted a way out," it was going to be "in a body bag."

On cross-examination of the victim, the victim testified that her relationship with the defendant had seen many "ups and downs" but she denied she had "done anything" to bring about conflict in the relationship. At that point, the defendant requested a hearing outside the presence of the jury and informed the court that he wished to impeach the victim's testimony that she did not cause problems with the defendant. The defendant sought to introduce proof that the victim had previously been convicted of reckless endangerment involving an automobile crash with the defendant. Outside the presence of the jury, the victim testified that she agreed that she plead guilty to reckless endangerment on 7/22/16 as a result of an automobile crash involving herself and the defendant. The trial court ruled that it would allow the defendant to question the victim about the circumstances of the crash but would not allow proof of the victim's subsequent conviction.

During her subsequent testimony, the victim reiterated she was not responsible for the problems in her relationship with the defendant, but she agreed that an automobile accident occurred in 2015 involving a vehicle that was being driven by the defendant while she rode as a passenger. The victim agreed in her testimony that while the defendant was driving, she grabbed the steering wheel of the vehicle, which caused an accident, resulting in both of them sustaining minor injuries.

The defendant maintained that the trial court had erred when it did not allow him to introduce evidence of the victim's prior conviction for reckless endangerment. The defendant maintained that the proof of the conviction "went towards the victim's motive for bringing the complaint against him in the present case." The defendant maintained that by preventing cross-examination of the conviction that the trial court had prevented him from presenting a clear picture of the couple's relationship.

HELD: The Court of Criminal Appeals held that the trial court did not abuse its discretion when it excluded the victim's conviction but allowed the defendant to cross-examine the victim about the automobile crash. The Court of Criminal Appeals stated that the defendant was able to question the victim about the entire incident, including eliciting testimony that the victim caused the accident by grabbing the steering wheel and that she ended up in

jail as a result of the incident. The court found that the trial court did not abuse discretion when it excluded evidence of the victim's conviction, as the trial court concluded that the victim's testimony about the incident, specifically her role in the accident and the resulting injuries, was relevant to her motive, but that her resulting conviction, a misdemeanor without a basis of "dishonesty," was not admissible.

PRACTICE POINT: It is reasonable to argue that the defendant should be able to establish that the victim's actions resulted in a criminal conviction, which could relate to her motivation in the present case against the defendant since her going to jail and being convicted of the offense could have made her angry against the defendant. The argument could be made that this would give a more complete picture of the prior incident and the victim's possible motivation.

State v. Stevens (Tenn. Cr. App. 9/21/20)

FORENSIC INTERVIEW OF CHILD VICTIM: NO ABUSE OF DISCRETION BY TRIAL COURT IN ADMITTING A VIDEO RECORDING OF A FORENSIC INTERVIEW OF A CHILD VICTIM AS THE TRIAL COURT CONDUCTED A PRETRIAL HEARING REGARDING CREDIBILITY OF THE PROTOCOL USED AND THE QUALIFICATIONS OF THE INTERVIEWER PURSUANT TO THE PROVISIONS OF TCA 24-7-123 AND DETERMINED THAT THE VIDEO MET "PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS"

FACTS: In a case in which the defendant was convicted of rape of a child and aggravated sexual battery, the defendant maintained that the trial court had erred by admitting the video recordings of the victim's forensic interviews. The defendant maintained the trial court should have excluded the recordings pursuant to TCA 24-7-123 because the interviewer asked leading questions and gave "modified interpretations" of the victim's answers to those questions. The state maintained that the trial court did not abuse its discretion and conducted an appropriate analysis of their trustworthiness.

HELD: The Court of Criminal Appeals found that there was no abuse of discretion in the trial court’s decision to admit the video recordings. The CCA after reviewing the record determined that the trial court properly conducted a pretrial hearing at which various witnesses offered testimony to establish that the video recordings were made as part of the standard operating protocol of the accredited center used in conducting forensic interviews of children who are alleged victims of sexual abuse. The court noted that the interviewer had described her extensive training and education and that a curriculum vitae was provided as an exhibit. The interviewer and the child victim both identified the DVDs as accurate recordings of the interviews and the trial court had made extensive findings of fact which led to the conclusion that the videos met “particularized guarantees of trustworthiness” under TCA 24-7-123.

The court noted that under TCA 24-7-123 there is a non-exhaustive list of factors as follows:

- (A) The mental and physical age and maturity of the child;
- (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
- (C) The timing of the child’s statement;
- (D) The nature and duration of the alleged abuse;
- (E) Whether the child’s young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child’s knowledge and experience;
- (F) Whether the statement is spontaneous or directly responsive to questions;
- (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of leading questions;
- (H) Whether extrinsic evidence exists to show the defendant’s opportunity to commit the act complained of in the child’s statement;
- (I) The relationship of the child to the offender;

(J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and

(K) Any other factor deemed appropriate by the court.

The interviewer, Jessica Tigert, also testified that she interviewed the victim on 10/18/17 and 11/9/17, noting that she had interviewed the victim for a second time in response to a tip that named the victim's father as a second perpetrator. The victim did not, however, report any abuse at the hands of her father.

In cross-examination, Ms. Tigert testified that she generally attempted to avoid leading questions but used some during her second interview in order to help clarify the information the victim had provided and in order to clarify who the victim was talking about on particular occasions. Tigert was adamant that she did not ask any leading questions to obtain the initial revelations of abuse from the victim but instead only to clarify the information the victim had disclosed in response to her initial non-leading questions.

One interesting exchange occurred when Ms. Tigert was asked on cross-examination "if she thought it was appropriate to clean up a child's vague statement and add to it when asking a follow-up question," with the example given of her having asked the victim if something came out of the defendant's private part after the victim testified that it "kind of ... exploded." Ms. Tigert replied that she "interviewed the victim the same way she would any child."

The Court of Criminal Appeals noted that the trial court had made extensive findings of fact in accordance with the statute, finding that the victim was unusually mature, understood the difference between telling the truth and a lie and that there were consequences for lying, and therefore finding her to be a competent witness. The trial court found that Ms. Tigert had not asked any improper leading questions and that she was one of the better interviewers the court had seen in thirty years of working with child abuse cases.

In a related issue, the defendant also contended that the trial court erred by not establishing the child victim's competence as a witness outside the presence of the jury. The defense argued that by questioning the victim in front of the jury about whether or not she would be truthful, the trial court had bolstered her credibility. The Court of Criminal Appeals found that questioning her in front of the jury about the differences between telling the

truth and a lie in no way infringed upon the jury's province of determining the credibility of the witness.

In one final issue, the defendant also contended that the trial court erred by instructing the state on how to phrase a question in order to avoid the defendant's hearsay objection. The defendant had argued that the court's "assisting the state in how to avoid leading questions in front of the jury, and in fact announcing the exact language to be used left the impression that the court was favoring the state's case." The court noted that the exchange occurred during the prosecutor's questioning of Eric Bicaba, an investigator with the Department of Children's Services, as follows:

Q. Now, we'll get to the context of what was said by [the victim] later on, but did [the victim] make any disclosures during that particular interview?

A. Yes, sir. She made disclosures of sexual abuse.

Q. What, I guess, what did she disclose?

A. She disclosed that she was made to perform oral sex.

[DEFENSE COUNSEL]: Judge, I'm going to object. It's hearsay.

THE COURT: General?

[PROSECUTOR]: Your Honor, again, this is not for the truth of the matter asserted. This is to show what, I guess, the impression it had on Mr. Bicaba and how that furthered his investigation.

THE COURT: Well, ask him whether this is - - the statements are going to be in furtherance of a criminal prosecution or what was the reason for the statements, what was the reason for the interview. Follow that up.

The court found that the "complained-of instruction in this case occurs frequently in trials when a court sustains a party's initial hearsay objection to the way a question is phrased and, by way of explanation, offers a suggestion to the other party on how to rephrase the question to avoid hearsay implications. There was nothing improper in the exchange and

nothing in the court’s response that indicated or suggested that the court was no longer impartial.”

State v. Rickard (Tenn. Cr. App. 2/26/21)

HUMAN REMAINS DETECTION (HRD) DOGS: EXPERT TESTIMONY REGARDING THE SEARCHES OF HRD DOGS FOUND TO BE ADMISSIBLE WITHIN THE SOUND DISCRETION OF THE TRIAL COURT BASED UPON THE TRIAL COURT’S COMPLIANCE WITH THE CASE LAW STANDARD OF DAUBERT AND MCDANIEL AS SET OUT IN THE CASE OF STATE V. BARGER (TN. CR. APPEALS 1980)

FACTS: In a case involving premeditated first degree murder, the defendant contended that the trial court had erred when it did not exclude the expert testimony regarding the searches of the HRD dogs because the dogs’ alerts were not corroborated by “scientific verification of the presence of human remains.” The defendant had argued that this error by the court was harmful to the defendant because it allowed the state to argue that it had proven beyond a reasonable doubt that the victim was dead based upon the alerts of the HRD dogs. The defendant further contended that the trial court used an improper standard when deciding this issue and that the dogs in this case were not reliable. The court noted that the Innocence Project filed an amicus curiae brief supporting the defendant’s position.

HELD: The Court of Criminal Appeals held that the trial court did not err in allowing the evidence regarding the HRD dogs as part of the state’s proof as the Court of Criminal Appeals held that the five-step standard for determining the reliability of tracking and trailing scent dogs articulated in the Barger case is also applicable to HRD dogs. The court noted, “In sum, we conclude that expert testimony about a HRD dog’s alert is sufficiently reliable under Daubert and McDaniel standard if the proponent of the evidence establishes the foundation of the five-step standard:

- (1) the dog is of a breed and type that is well-suited for HRD work;
- (2) the dog must have been accustomed and trained to alert to the scent of human remains;

- (3) the dog must be shown by experience to be reliable in detecting human remains;
- (4) the dog must have been taken to a location where a crime was known to have occurred or where there is circumstantial evidence to corroborate the dog's alert;
- (5) the dog must be taken to the location or search the location within its period of efficiency.”

The Court of Criminal Appeals did note in a footnote that the “pure blood” requirement previously established in State v. Brewer is slightly modified so there is no requirement of proof of “pure blood” but instead that the dog is of a breed and type that is well suited for HRD work.

In its opinion, the Court of Criminal Appeals noted that prior to this opinion neither the Court of Criminal Appeals nor any court in Tennessee has ruled on the admissibility of expert testimony regarding an HRD dog's alert. The Court of Criminal Appeals reviewed substantial case law in other states before noting that Tennessee law has not excluded dog scent evidence as unreliable and then came to its conclusion that the Barger standard in regard to determining the reliability of tracking and trailing scent dogs would also be applicable to HRD dogs.

The Court of Criminal Appeals also noted that the defendant had contended that expert testimony about uncorroborated cadaver dog scent alerts must be excluded, the defendant relying heavily on testimony from its own expert who said that HRD dogs may not be able to distinguish between items shed by humans every day, such as hair and blood, and human remains. The amicus curiae brief filed by the Innocence Project also raised the same issue of lack of corroboration. The Court of Criminal Appeals noted that after review of the testimony, arguments and briefs, none of those arguments persuaded the court that the trial court erroneously exercised its discretion when it deemed the K-9 scent evidence admissible. The court noted that “where to draw that line is a decision to be made by the trial court in exercising its discretion after considering all the relevant factors.”

The Court of Criminal Appeals then went on to review the proof in the case as to the qualifications of the expert handler of the dog and the qualifications of the dog itself. There were four separate professional handlers for the four dogs who were named Cleo, Jackson, Libby, and Dakota. The court concluded as to each handler and each dog that the trial court did not abuse its discretion when it determined that the expert testimony about each dog was sufficiently reliable under the standards set forth in Daubert, McDaniel, Barger, and Brewer. The court concluded that

there “should be no requirement of corroboration of the dog’s alerts with chemical evidence.” The court also found that the defendant’s contention that the probative value of the HRD evidence was outweighed by the unfair prejudice of its admission, but the Court of Criminal Appeals disagreed.

PRACTICE POINT: This is a fascinating case by the Court of Criminal Appeals in a case of first impression, which is worthy of close review.

State v Cannon (Tenn. Cr. App. 8/16/21)

IRRELEVANT ISSUE RAISED BY TRIAL JUDGE: IN A CASE INVOLVING THE CLASS E FELONY OF FACILITATION OF THE THEFT OF PROPERTY VALUED AT \$2500 OR MORE, THE TRIAL COURT ERRED IN ELICITING INFORMATION FROM A WITNESS THAT HIS FATHER-IN-LAW WAS ROY LEE CLARK, WELL KNOWN OPERATOR OF A CHOP SHOP IN KNOX COUNTY AND THE SUBJECT OF A MURDER CASE

FACTS: In a case in which the defendant was convicted of facilitation of theft of property valued at \$2500 or more but less than \$10,000, a Class E felony, along with other charges, it was brought up during a jury-out hearing that the father-in-law of the witness, Mr. Hobbs, was Roy Lee Clark, a man known in much of Knox County as the operator of a chop shop and the subject of a murder case. During questions of Mr. Hobbs by the prosecutor, the prosecutor asked Mr. Hobbs if he had ever owned a junk yard, to which Hobbs replied that he had not but that his father-in-law had owned one. The trial court immediately interjected and asked Mr. Hobbs for his father-in-law’s name. Mr. Hobbs replied, “Roy Clark.” The trial court then responded by asking, “Roy Lee Clark?”. Mr. Hobbs then answered affirmatively, following which the topic was not discussed further.

The defendant contended that the trial court erred by eliciting from the witness that his father-in-law was Roy Lee Clark and therefore asked for a mistrial. The trial court refused to declare a mistrial based on this issue.

HELD: The Court of Criminal Appeals found that it was clear error for the court to elicit this testimony from the witness as to the full name of his father-in-law. The court found that the trial court’s eliciting Mr. Clark’s full name provided the jury with potentially prejudicial information that was

wholly irrelevant to any fact at issue in the defendant's trial, including the credibility of Mr. Hobbs. The court noted that the murder in question had occurred in 1990 and Mr. Clark was sentenced to life imprisonment. The court noted that pursuant to Tennessee Rule of Evidence 608(b), any chop shop allegations would not be a proper subject for impeachment unless the trial court determined after a jury-out hearing that there existed a sufficient factual basis for the inquiry and that in the interest of justice the probative value of the evidence substantially outweighed its prejudicial effect. The court noted that such an analysis was not completed by the trial court and this made the line of questioning improper due to the age of the incidents in question and the lack of any factual basis to establish that Mr. Hobbs was involved in the chop shop. The court noted there was an obvious risk of unfair prejudice from Mr. Hobbs being connected to an ongoing enterprise.

The court also noted that the defendant had correctly pointed out at oral argument that when the trial court asked Mr. Hobbs to name his father-in-law, the court already knew the answer to the question. The court noted that by supplying the full name of the chop shop operator himself, the court was communicating to the jury that the court felt it important for the jury to know that Mr. Hobbs was connected to a notorious killer. The court noted that even though it was error for the court to elicit this testimony, this error alone was not sufficiently egregious to justify a new trial.

PRACTICE POINT: It is important for judges to remain neutral and not to interject any facts, particularly irrelevant facts, that may indicate that the trial court is intentionally trying to communicate a message to the jury or to any participants in the courtroom. General Sessions Judges should avoid any conduct of this nature because it tends to suggest a bias on the part of the judge involved in the case.

State v. Seaton (Tenn. Cr. Appeals 2/26/21)

LEADING QUESTIONS OF CHILD WITNESS IN CHILD SEX OFFENSE CASE: PROSECUTOR'S QUESTIONS WERE APPROPRIATELY DETERMINED BY THE TRIAL COURT TO BE A FAIR RESTATEMENT OF THE MINOR CHILD'S EARLIER ANSWERS AND WERE DESIGNED TO CLARIFY THE CHILD'S TESTIMONY RATHER THAN "PLANT IDEAS" IN HER HEAD

FACTS: The defendant was convicted of rape of a child, aggravated sexual battery, and incest committed against his step-daughter and his daughter.

The defendant maintained that the trial court erred by allowing the prosecutor to lead during the direct examination of one of the children (J.M.) and that the prosecutor's leading questions, combined with inaccurate characterizations of the child's answers to some questions, planted ideas in J.M.'s head.

HELD: The Court of Criminal Appeals concluded after examining the evidence and the transcript in the case that the prosecutor's questions were a fair restatement of J.M.'s earlier answers and were designed to clarify her testimony rather than plant ideas in her head.

The court noted the following principles in regard to leading witnesses in a case in which a child is a victim of a sex crime: (1) Tennessee Rule of Evidence 611 vests the trial court with wide discretion in controlling the presentation of evidence, and the Court of Criminal Appeals reviews the decision of the trial court concerning the presentation of evidence under an abuse of discretion standard. (2) Rule 611 permits the use of leading questions during direct examination when necessary to develop the witness's testimony. (3) The Tennessee Appellate Courts have specifically held that a trial court does not err by permitting leading questions of child sex offense victims on direct examination when necessary to fully develop the witness's testimony.

The Court of Criminal Appeals noted that the trial court overruled the defendant's objection to the prosecutor's leading J.M. in her testimony, the trial judge stating that it was "allowing a lot of latitude on the way they're questioning ... given the fact that we've got a nine-year-old." The Court of Criminal Appeals noted that the nine-year-old child clearly had difficulty answering questions, often offering non-verbal answers. The court noted that on one or more occasion she stated that it was "kind of hard" to describe how the defendant had touched her. The court noted that she had to use euphemisms to identify parts of the body and that she lacked the language to fully describe the defendant's assault. The court found that under these circumstances, the trial court did not err by permitting the prosecutor to lead the witness.

The Court of Criminal Appeals also found that the prosecutor's questions did not amount to a gross mischaracterization of her earlier testimony as the defendant claimed. The appellate court found that the trial court had allowed questions about whether the defendant had "touched her

monkey with his thing?” The court found that the wording of the questions was appropriate based upon the age of the child and based upon the nature of her testimony and the follow-up questions.

State v. Lee, (Tenn. Cr. App. 7/29/21)

OFFICER’S USE OF PILLIDENTIFIER.COM: COURT OF CRIMINAL APPEALS FINDS THAT TRIAL COURT ERRED BY PERMITTING LAW ENFORCEMENT OFFICER TO TESTIFY THAT HE HAD RELIED ON THE WEBSITE PILLIDENTIFIER.COM TO IDENTIFY THE PILLS IN THE DEFENDANT’S POSSESSION AS ALPRAZOLAM

FACTS: In a case in which the defendant was convicted of simple possession of a Schedule IV controlled substance, among other charges, the defendant maintained that the trial court had erred by permitting Deputy Steadman to testify that he had relied on the website pillidentifier.com to identify the seven pills in the Altoids tin as Alprazolam because the state failed to lay a proper foundation for the officer’s identification of the pills and that the state had failed to show that pillidentifier.com was a “reliable source for identifying scheduled/controlled substances”, and therefore the information identified by the website was inadmissible hearsay.

HELD: The Court of Criminal Appeals held that Deputy Steadman’s testimony that he identified the pills as Alprazolam based on the search results found on pillidentifier.com constituted hearsay that did not fall within any exception to the hearsay rule and was therefore inadmissible.

The court noted that the state had relied on Rule of Evidence 803(17) to argue that the challenged testimony was admissible hearsay, as the rule allows admission of “market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” The Court of Criminal Appeals pointed out that Deputy Steadman did not testify as an expert in illegal substances. The court noted that as a lay witness, Deputy Steadman was free to testify to matters within his personal knowledge pursuant to Tennessee Rule of Evidence 602 and to offer his opinion or draw inferences if “rationally based on the perception of the witness and helpful to a clear understanding of the witness’s testimony or determination of a fact in issue.”

The court specifically found that Deputy Steadman’s testimony that he searched pillidentifier.com and the results of that search led him to conclude that the pills found in the Altoids tin were Alprazolam is “outside the purview of a lay witness.” The court stated that the personal knowledge of Deputy Steadman did not extend to the identification of the pills and his opinion as to their identity was not based on his own perception.

The court also found that Deputy Steadman’s testifying that he identified the pills based on the search results from pillidentifier.com is hearsay and does not fall within the exception to the hearsay rule. The court noted that the state’s reliance on Rule 803(17) extends only to the market reports or commercial publications themselves, and in this case the state had failed to produce the publication itself. Therefore, Steadman’s testimony that he identified the pills as Alprazolam based on the search results did not fall within any exception to the hearsay rule and was therefore inadmissible. The court did not reach the issue of whether the website generated reliable information because it was not necessary based on the conclusion of the Court of Criminal Appeals.

The court further found that since the improperly admitted testimony was the only evidence that the pills in the Altoid tin were Alprazolam, the error was not harmless and the defendant’s conviction for simple possession of Alprazolam could not stand. The court reversed the defendant’s conviction and remanded the case to the trial court for a new trial.

In a somewhat related issue, the defendant maintained that the prosecutor had made inappropriate comments during closing argument by noting that the “interesting thing about the Altoids can” was that the Altoids can was “cute,” because the theme of the can was from the Disney movie, “Frozen.” The prosecutor said, “My granddaughter loves that. I’m glad she didn’t find the Altoids can here though.” The Court of Criminal Appeals stated that “although the one reference to the prosecutor’s granddaughter’s liking Frozen was inappropriate, it is unlikely that the comment would inflame the passions of the jury or confuse them so as to cause them to convict the defendant on the belief that his conduct endangered children.”

The Court of Criminal Appeals also noted that a prosecutor’s “prefacing of an argument with the phrase ‘I submit’ does not necessarily indicate an impression of personal opinion,” and therefore no clear rule of law was breached.

In a separate issue, the Court of Criminal Appeals also found that the state failed to prove the defendant was driving on revoked or suspended license, as Deputy Steadman merely testified that he had checked the defendant’s driver’s license but did not discuss the result of that search, nor

did the state offer into evidence a copy of the defendant's driving record. The proof therefore did not establish that the defendant actually did drive on a revoked or suspended license.

State v. Richardson (Tenn. Cr. App. 8/17/21)

**PRE-RECORDED TESTIMONY OF FORENSIC
PATHOLOGIST: NO ABUSE OF TRIAL COURT'S
DISCRETION IN ALLOWING THE VIDEO
DEPOSITION INTO EVIDENCE DESPITE THE
FACT THAT THE FACT-FINDER (JURY) WAS
UNABLE TO SEE THE FACE OF THE WITNESS FOR
A LARGE PORTION OF THE DEPOSITION WHICH
INSTEAD SHOWED IMAGES OF THE VICTIM'S
AUTOPSY**

FACTS: In a case involving a first-degree felony murder and robbery, the defendant asserted that the trial court abused its discretion in allowing the testimony of the forensic pathologist, Dr. Scheuerman, by deposition due to the fact that the video displayed autopsy images instead of having a visual representation of the witness himself. The defendant maintained that this had the unintended effect of "unduly emphasizing graphic evidence that was patently prejudicial to the defendant and depriving him of due process of law." The state responded that the trial court properly allowed the state to use the video deposition of the forensic pathologist at trial and that the evidence was relevant and admissible in the sound discretion of the trial judge. The state also maintained that if Dr. Scheuerman had been testifying live, "the lights in the courtroom would have been dimmed, and the jurors still would have not seen his face, but would have instead focused on the exhibits." The state also noted that Dr. Scheuerman was an expert witness presenting his findings on the investigation and was not an eye witness to the event himself.

HELD: The Court of Criminal Appeals concluded "that the display of autopsy photographs in lieu of Dr. Scheuerman's face was not unfairly prejudicial to the defendant, and his rights under the due process clause were not violated because he and trial counsel were present at Dr. Scheuerman's deposition and allowed to cross-examine him." The Court of Criminal Appeals also noted that the court agreed with the trial court's reasoning that,

even if Dr. Scheuerman was testifying in front of the jury, the lights in the courtroom would likely be dimmed and the jury's attention would be focused on the images instead of the witness's face." The court therefore said that it concluded that the trial court did not abuse its discretion in allowing the video deposition of the witness to be entered into evidence despite the fact-finder's inability to see the witness's face for a large portion of the deposition.

PRACTICE POINT: With General Sessions Courts and Juvenile Courts being required to see more and more proof by video presentation, issues like this may be more frequently raised so that this type of analysis can be helpful for us as General Sessions Judges to make rulings on such issues. Factors which can make a difference are the absence of objections made at the time such depositions or videos are made, the fact that we are judges and not lay jurors, and whether or not the point of the deposition or video evidence is presented credibly and accomplishes the purposes of a lawful evidentiary presentation.

State v. Sarden (Tenn. Cr. App. 9/25/20)

**PRIOR INCONSISTENT STATEMENTS: PRIOR
INCONSISTENT STATEMENTS MADE BY VICTIM
IN RAPE CASE COULD ONLY BE CONSIDERED ON
THE ISSUE OF CREDIBILITY AND NOT OF
SUBTANTIVE EVIDENCE OF THE TRUTH OF THE
MATTER ASSERTED DUE TO THE FACT THAT
THE PROSECUTOR HAD INDICATED HER INTENT
TO PLAY EXCERPTS FROM THE FORENSIC
INTERVIEW FOR THE PURPOSE OF
IMPEACHMENT BY PRIOR INCONSISTENT
STATEMENT**

FACTS: The defendant was charged with two counts of rape and two counts of incest related to the sexual abuse of his 17-year-old daughter, H.W. After the trial court granted a motion to sever, the case proceeded to trial on one count of rape and one count of incest.

Detective Derrick Webb of the Newport Police Department testified that on 10/19/16 he responded to a call from Cocke County High School about a sexual assault on a student that had been disclosed to a guidance

counselor. The detective spoke with the 17-year-old victim who stated that that morning prior to school she had had sexual intercourse with her father.

On the same day, Detective Webb and other officers went to the family home and spoke to the defendant, who ultimately gave a statement that he went into the victim's room, rubbed the victim's back, that he ultimately may have pulled her pants off but could not recall, that he digitally penetrated her, and then they had sex. He stated that he looked at himself in the mirror with disgust, then got ready to go to work and left for work.

At trial, the then 19-year-old victim testified with some detail that due to discussions with friends and pressure from friends and due to her being depressed and somewhat suicidal, she made up the story about having sex with her father, telling the police that the defendant had raped her that morning. At trial, she testified that on the date of the incident she waited until her father left for work, went to the bathroom, noticed there was no toilet paper, and that she used a rag that was available to clean herself.

The defendant testified that on 10/19/16 he got up and checked on his children, which was his habit, saw that the daughter was asleep, then went to the bathroom and masturbated while standing over the toilet. He could not recall whether he cleaned up with tissues or a cloth, but then he got ready for work and left for work. He recalled in some detail his discussions with Detective Webb and his ultimately giving a statement which indicated that he had had sex with his daughter because he thought that would give him the best possibility for a sentence of probation and the family getting back together.

The defendant's wife testified that she did not believe the victim's allegation against the defendant because of the actions of the victim over a period of time and how surprised and upset the defendant appeared when he found out about the allegations. She had driven the defendant to the police department where he ultimately gave his incriminating statement.

Following the victim's testimony at trial, and due to the fact that she had changed her version of the events, the prosecutor indicated an intent to display part of the forensic interview to the victim for the purpose of refreshing her recollection. The trial court at that point warned that the forensic interview "must be qualified" before it could be admitted into evidence. The prosecutor responded that would be the case if it was part of a direct examination, but that she was only using the clip of the forensic interview as impeachment. The trial court observed that impeachment was a legitimate goal for the prosecutor, but if she intended to show the entire interview then the judge would have to follow the statutory requirement of

making sure that the forensic interview was such a quality that it would indicate trustworthiness in the interview. Upon being assured by the state that the evidence was being introduced only for impeachment the court did not conduct a hearing outside the presence of the jury to determine the trustworthiness of the entire forensic interview.

The jury did convict the defendant of rape and incest and the defendant was sentenced to ten years incarceration. The defendant appealed and raised the issue of sufficiency of the evidence.

HELD: The Court of Criminal Appeals held that “because the state presented no substantive evidence that the defendant used force or coercion to accomplish the sexual penetration of the victim, we hold that the evidence was insufficient to support the defendant’s conviction of rape.” The court therefore reversed the conviction of rape and dismissed the charge. The court did find the evidence presented at trial was sufficient to support the defendant’s conviction of incest and that conviction was affirmed.

The court noted that in the present case, because the victim recanted her allegation of rape at trial, her testimony did not include any evidence that the defendant had employed either force or coercion to accomplish the act. The court noted that the defendant’s confession contained an admission that he engaged in sexual intercourse with the victim, but included no details that could be construed as force or coercion.

The court also noted that “during closing argument, the prosecutor directed the jury to the clip of the victim’s forensic interview for the details of the rape in support of its allegation that the defendant had used force or coercion.” The Court of Criminal Appeals noted however that the record clearly established that the state played the four-minute clip of the forensic interview only for impeachment purposes.

As indicated in the previous statement of facts, the trial court had warned that the forensic interview must be qualified before it could be admitted into evidence but the prosecutor had clearly announced that the evidence was only to be used as impeachment of the victim who had changed her testimony. The prosecutor clearly stated that the state only intended to offer the video for impeachment, therefore the judge did not go through the entire process of having a jury-out hearing to fulfill the statutory requirement of Tennessee Rule of Evidence 803(26). Tennessee Rule of Evidence 803(26) provides an exception to the hearsay rule for a prior inconsistent statement of a witness if the declarant testifies at trial. The court must conduct a hearing outside the presence of the jury under the rule to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness. The Court of

Criminal Appeals noted that the trial court did not conduct such a hearing because prosecutor repeatedly indicated that she did not intend to offer the recording as substantive evidence. The Court of Criminal Appeals noted that “because the state did not satisfy the requirements of Rule 803(26) and because the state did not seek the admission of the video clip, the jury was not permitted to use the victim’s statements contained on the video recording as substantive evidence of the defendant’s guilt, and the prosecutor “should not have argued otherwise during closing argument.”

The court also noted that the victim’s admission that she had previously reported that the defendant had raped her, when viewed in light of the victim’s unusual testimony, was insufficient to support a determination that the defendant’s actions met the elements of rape as it was charged in the case. The court noted that even though the offense of rape “may be established even in the absence of force or coercion,” the presentment in the present case specifically alleged that the rape of the victims was accomplished by force or coercion. The court noted that even though the trial court did instruct the jury on other modes of rape rather than force or coercion, the state did not charge any “mode of liability” other than force or coercion. The Court of Criminal Appeals quoted from a previous case which stated, “Put simply, not only must the government prove the crime it charges, it must charge the crime it proves.” The court said had we not already reversed the defendant’s conviction based upon insufficiency of the evidence, the court would reverse the conviction due to the fact that allowing the state to prove another mode of rape would be a fatal variance from the indictment.

State v. Wyse (Tenn. Cr. App. 10/2020)

RELEVANCE OF EVIDENCE: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO QUESTION WITNESSES ABOUT CIVIL FORFEITURE PROCEEDINGS REGARDING A LARGE AMOUNT OF CASH SEIZED FROM THE DEFENDANT RESULTING IN DRUG AND GUN RELATED OFFENSES AGAINST THE DEFENDANT

FACTS: In a case in which the defendant was charged with and convicted of numerous drug and gun-related offenses, the defendant Byrd contended that the trial court erred in allowing the state to question law enforcement witnesses about the civil forfeiture proceedings which resulted when officers seized drugs and guns from the defendant and a co-defendant. Officers and witnesses were allowed to testify in some detail about the forfeiture of drug related cash and property and the fact that the defendant chose not to contest the forfeiture or reclaim his cash. The defendant argued that the evidence related to a separate civil forfeiture proceeding and was not relevant to the issues in his criminal trial and that, even if marginally relevant, its probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury.

HELD: The Court of Criminal Appeals held that the trial judge did not abuse his discretion in allowing the proof into evidence. The Court of Criminal Appeals found that the evidence was relevant to the issue of whether the drugs found in the vehicle were possessed with the intent to sell and deliver them. The court also found that the probative value was not substantially outweighed by the danger of unfair prejudice or misleading the jury.

The court noted that counsel for the defendant Byrd was successful in eliciting admissions from the state's witnesses about the cost involved in filing a petition to contest the forfeiture and also the fact that the sheet provided by the officer did not include an affidavit of indigency which could indicate that the defendant was not aware that he might be able to avoid the cost of the proceeding. The court noted that Investigator Jinks, in his testimony, also acknowledged that he had no idea if the defendant Byrd received notice from the Department of Safety about the forfeiture proceedings, and the court noted that defendant Byrd testified that he did not receive the notice. Therefore, the court pointed out that the defendant was able to ask questions of the witnesses which brought out important points for the defense.

PRACTICE POINT: While this case held that the judge did not abuse his discretion in allowing the proof into evidence, these issues are problematic and should be carefully weighed by the court because defendants often feel it is not in their best interest to follow through with civil forfeiture proceedings based upon the cost, the unlikelihood of prevailing due to the nature of the administrative proceedings, and due to possibly having to testify in the proceedings. This case also indicated other pitfalls such as the state's proof being that the witnesses were not even

aware of whether or not the defendant had even been given proper notice of the proceedings.

State v. Brown and Byrd (Tenn. Cr. App. 6/17/21)

REPUTATION OR OPINION EVIDENCE: THE REPUTATION OR OPINION EVIDENCE ADMITTED BY THE TRIAL JUDGE, THROUGH THE TESTIMONY OF LAW ENFORCEMENT OFFICERS, WAS NOT RELEVANT IN THE FACILITATION OF THEFT CHARGE BECAUSE THE EVIDENCE WAS ADMITTED WITHOUT SUFFICIENT FOUNDATION AND THE PROOF WAS BASED UPON “LONG-AGO EVENTS”

FACTS: In a case involving facilitation of theft of property valued at \$2500 or greater, a Class E felony, the trial court admitted reputation or opinion evidence from three law enforcement officers regarding a key defense witness’s character for truthfulness. Specifically, Chief Deputy Lyon testified that he began his career at the jail in 1979, that he had worked in every division of the sheriff’s office, that he was familiar with Mr. Hobbs, and that Mr. Hobbs had a poor reputation for truthfulness based upon unspecified conduct that had occurred in the 1990s.

Officer Bates testified that he worked for the Knoxville Police Department for 32 years and he based his opinion of the witness upon events which had occurred when he was eighteen and serving as a reserve officer with the city. Bates testified that in regard to Mr. Hobbs’s character for truthfulness that he would regard Mr. Hobbs as “an untruthful person ... involved in criminal activity.”

Captain Amburn had testified that he was a narcotics unit supervisor working for the Knox County Sheriff’s Department for 28 years in a wide range of positions, that he was familiar with Mr. Hobbs and when asked about his reputation for truthfulness or untruthfulness, Captain Amburn responded, “I would not deem him as a credible witness, no ma’am.”

HELD: The Court of Criminal Appeals concluded that the trial court committed an egregious error by allowing the testimony of the officers. The court noted that the state itself had characterized the character of Mr. Hobbs to be “of the utmost importance,” and that Mr. Hobbs was the only person

who could corroborate the defendant's mistake of fact theory. The court stated that: "Given that the reputation/opinion evidence was admitted without sufficient foundation, its probative value is minimal when weighed against the potential for unfair evidence. Three law enforcement officers were permitted to testify that they were familiar with Mr. Hobbs and that their impression of his credibility was poor; in fact, two of the officers indicated that their impression of Mr. Hobbs was based upon long-ago events." The court noted that the jury was left to speculate about the nature of Mr. Hobbs's prior contact with police, "some of which was apparently so substantial that the officers remembered Mr. Hobbs thirty years later." The court also noted that jurors may attribute more weight to a law enforcement officer's opinion over that of a lay person. The court found that on this basis alone the defendant was entitled to a new trial.

In a related matter, the Court of Criminal Appeals also held that the trial judge had improperly allowed evidence of other convictions as the state failed to even prove that the defendant had the convictions on his record.

On that issue the Court of Appeals stated several principles as follows:

1. The Supreme Court of Tennessee has held that NCIC reports are not admissible as a substitute for certified copies of court convictions nor for any other purpose. The court found that the convictions that the trial court allowed to be brought out by the prosecution were not even validly shown to be convictions.

2. The court also noted that "even if every behavior addressed in the state's cross-examination resulted in a conviction, we cannot say that misdemeanor vandalism, driving with a suspended license, failure to appear, or violating one's probation involved dishonesty such that they would have been relevant to Mr. Hobbs's character for truthfulness." The court also noted that, "alternatively, if the behavior did not relate to a conviction, no factual basis for the incidents was offered by the state, and their probative value was minimal." The court noted that the question regarding these incidents was therefore in error.

3. The court also noted that the court's determination that Mr. Hobbs "made relevant" his character for the past thirty years, thereby opening the door to question him about the thirty-year old chop shop operation, was an abuse of discretion. The court noted that while a witness can "open the door" to cross-examination regarding past criminal behavior by insinuating that he had never committed illegal acts, the Court of Criminal Appeals disagreed "with the trial court that Mr. Hobbs's stating that he had worked

on vehicles with his father in childhood and that he owned a business for thirty years “made relevant” his character for the past thirty years.

4. The court also stated that even assuming, for the sake of argument, that Mr. Hobbs created a misleading impression of his law-abiding character,” our Supreme Court has recently observed that the remedy sought after a party has opened the door should be both relevant and proportional, as well as limited to that evidence necessary to correct a misleading advantage created by the evidence that opened the door.” The court noted that the fact that the door has been opened does not permit all evidence to pass through because the doctrine is intended to prevent prejudice and is not to be subverted into a rule for the injection of prejudice.

5. Accordingly, a trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued, including weighing the probative value of the evidence against the risk of unfair prejudice.

The Court of Criminal Appeals emphasized that “simply stating that one is experienced in a specific industry or owned a business for many years does not speak to one’s character, for good or for ill.” The court found that the court’s determination that Mr. Hobbs opened the door to inquiry into his character over the span of thirty years was error, and that the trial court had failed to make findings of fact indicating that it had weighed the probative value and prejudicial effect of the chop shop evidence in rendering its decision.

State v. Seaton (Tenn. Cr. App. 2/26/2021)

VICTIM’S MENTAL HEALTH RECORDS: TRIAL COURT’S RULING THAT THE VICTIM’S MENTAL HEALTH RECORDS WERE NOT RELEVANT TO HER CREDIBILITY WAS IN ERROR BASED UPON THE IMPORTANCE OF THE PROOF TO THE DEFENSE WHICH MAINTAINED THAT THE VICTIM HAD A HISTORY OF HALLUCINATIONS THAT MAY HAVE AFFECTED HER TESTIMONY CONCERNING THE DAY OF THE CRIME

FACTS: In a case involving attempted second degree murder, aggravated rape, and rape, the defendant contended that the trial court erred by denying his request to review the victim’s mental health records and to present proof of the victim’s history of auditory and visual hallucinations that may have affected the credibility of her testimony regarding the date of the crimes. The defendant had filed a motion for production of medical and psychiatric records for in camera inspection prior to trial, arguing that it “bears upon her ability to form coherent thoughts at the time of the alleged events, free from delusion and psychosis, and bears upon her ability to sustain accurate memories of those events.” The defense counsel had asked for the trial court to review the psychiatric records in regard to the relevance of the same.

HELD: 1. The Court of Criminal Appeals concluded that “based on the appellant’s defense and the unusual nature of the victim’s recollection of the encounter, we conclude that some of the victim’s mental health records were relevant to her credibility and that the trial court should have allowed the defense to review the relevant records.” The CCA concluded that the victim’s hospital records contained information about the victim’s history of auditory and visual hallucinations and about her failure to take medications that had been prescribed for those hallucinations.

The court did find that even though the defense was not privy to the details of the victim’s hallucinations which were in the psychological records, the defense nevertheless was aware of the fact that the victim suffered hallucinations and was able to make the jury aware of that fact. The CCA therefore determined that while the trial court had committed error in limiting the proof that the error was harmless.

2. In a related issue, the defendant contended that the trial court erred by suppressing during a jury-out hearing the victim’s testimony concerning her prior mental health history of visual and auditory hallucinations and her failure to take the prescribed medication for the problem.

The Court of Criminal Appeals concluded that the trial court did commit error by not allowing defense counsel to question the victim and explore evidence of the victim’s history of visual and auditory hallucinations as documented in the victim’s medical records.

The Court of Criminal Appeals noted that the trial court had found that the victim testified that she never experienced hallucinations prior to the assault that resulted in her hospitalization and that based on that finding, the trial court ruled the defense counsel could not question the victim about her history of hallucinations. The Court of Criminal Appeals found that the trial court’s finding was incorrect because the victim testified that she

experienced auditory and visual hallucinations sometime prior to the crimes but that she did not know what year it was. The CCA also noted that “had the trial court bothered to review the victim’s sealed medical records, the court would have seen that the victim experienced hallucinations in 2012 and 2013 (prior to the case at hand) and had sought treatment.” The victim had also testified during the offer of proof that she was prescribed medication for the hallucinations.

Importantly, the Court of Criminal Appeals stated: “In our view, the victim’s history of hallucinations and her failure to take medication that had been prescribed for those hallucinations were relevant to her ability to perceive what occurred on the day of the assault and were relevant to her credibility that she was not hallucinating that day.” The court also noted that it was perplexed that the trial court failed to review the sealed records when the issue arose during trial, particularly in light of the defendant’s theory of defense and the victim’s testimony during the offer of proof.” The CCA therefore stated that the trial court “should have reviewed the records.”

Even though the court concluded that the trial erred by not allowing defense counsel to question the victim, the court found that the error was harmless under all the proof. The court noted that the defendant had questioned Dr. Evans about the victim’s hospital records and that Dr. Evans testified that the records contained information that on two occasions the victim had been to a hospital reporting auditory and visual hallucinations. Dr. Evans further testified that the records also contained the information that the victim’s mother said the victim stopped taking her medication for the hallucinations because “we did not want her on any crazy-ass pills.” The court noted that there was DNA evidence linking the defendant to the crimes and the computer-generated drawing based upon the victim’s descriptions of her assailant “strikingly resembled” the defendant. The court therefore found that “allowing cross-examination of the victim on this issue regarding the records would not have changed the outcome of the trial; therefore, we conclude that the error was harmless.”

State v. Boyd (Tenn. Cr. App. 11/19/20)

VICTIM’S STATEMENT: COURT OF CRIMINAL APPEALS FOUND THAT WHILE THE VICTIM’S STATEMENT WAS NOT AN EXPRESS ASSERTION OF THE VICTIM’S MENTAL STATE AND THEREFORE NOT ADMISSIBLE PURSUANT TO

**THE MENTAL STATE EXCEPTION TO THE
HEARSAY RULE, THE VICTIM’S STATEMENT DID
CONSTITUTE CIRCUMSTANTIAL EVIDENCE OF
THE VICTIM’S MENTAL STATE TOWARD THE
DEFENDANT AT THE TIME IT WAS MADE**

FACTS: In a case involving first degree premeditated murder, a witness, Ms. Pruett, testified that the victim told her that the victim held yard sales to raise enough money to purchase a bus ticket in order to send the defendant back to Mississippi.

The defendant maintained that the trial court erred by permitting this testimony as it was irrelevant and also inadmissible hearsay evidence. The defendant asserted that Ms. Pruett’s testimony indicating the victim intended to end her relationship with the defendant was irrelevant and was inadmissible as evidence of the victim’s existing state of mind.

HELD: (1) The Court of Criminal Appeals concluded that the state offered the victim’s statement to prove the truth of the matter asserted and as a result such testimony was hearsay. The court noted that although the trial court determined that the statement was reflective of the victim’s mental state and admissible pursuant to TRE Rule 803(3), the Court of Criminal Appeals concluded that the statement was not “an express assertion of the victim’s mental state and was not admissible pursuant to the mental state exception to the rule against hearsay.”

(2) The Court of Criminal Appeals did find the victim’s statement was circumstantial evidence of the victim’s mental state toward the defendant at the time the statement was made and therefore was admissible as non-hearsay.

The Court of Criminal Appeals noted that although the victim’s statement to Ms. Pruett cannot be offered to prove the truth of the matter asserted, the statement was admissible for the circumstantial implication that the victim intended to end her relationship with the defendant. The court also stated that the court noted that “whether the defendant acted with premeditation was the critical issue in this case and that the evidence was relevant in refuting the defendant’s claims that he acted without premeditation, that he did not know why he killed the victim, and that the situation just got out of hand.”

The court therefore concluded that although the trial court should not have admitted the evidence pursuant to Rule 803(3), the evidence was none-the-less admissible pursuant to TRE Rule 801(c). The court also concluded

the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant.

State v. Stewart (Tenn. Cr. App. 11/5/20)

INDIGENT DEFENSE

EX PARTE MOTION TO OBTAIN FUNDS FOR AN ADDITIONAL MEDICAL EXPERT: TRIAL COURT ABUSED DISCRETION BY DENYING EX PARTE MOTION FOR FUNDS TO HIRE EXPERT AFTER THE DEFENSE MET ITS BURDEN FOR ESTABLISHING A PARTICULARIZED NEED FOR THE ASSISTANCE OF AN EXPERT WHICH WILL MATERIALLY ASSIST WITH TRIAL AND DEFENSE PREPARATION

FACTS: In a case involving rape of a child and other sexual crimes, the defendant filed an ex parte motion to obtain funds for an additional medical expert, after the trial court had initially approved funding for a consulting medical expert. The motion for an additional medical expert on behalf of the defense was based on the recommendation of a Dr. Pedigo who concluded that hiring a testifying medical expert for the trial was necessary because the initial medical examination performed on the victim was inadequate and a defense witness needed to be available to respond to the state's proof. The defense had also shown to the court that a defense witness had been located and therefore relevant proof was available if funding was provided by court order.

HELD: The Court of Criminal Appeals concluded that the trial court abused its discretion by denying the ex parte motion for funds to hire an additional medical expert. The court noted that pursuant to the Tennessee Supreme Court Rule 13, Section 5, that such expert services should be provided if shown to be necessary to ensure that the constitutional rights of the defendant are properly protected. The rule provides that if such determination is made, the court may grant prior authorization for the necessary services in a reasonable amount to be determined by the court.

The Court of Criminal Appeals pointed out that the trial court erred in its determination that the defense failed to establish a particularized need

warranting release of the funds for an additional medical expert since the defense sufficiently established, based upon the facts of the case, that medical expert testimony was necessary to challenge the adequacy of the victim's physical examination, while an internal examination would likely have shown if it had been performed, and to challenge Dr. Westbrook's opinions and conclusions. The court noted that the defense provided the substance of the anticipated expert testimony and established that expert testimony was necessary to challenge the state's theory of the case that the victim had suffered prolonged sexual abuse between the ages of five and ten. The court noted that the expert testimony was "critical to the defendant's ability to present a defense showing that evidence did not support the state's allegations of prolonged sexual abuse."

The Court of Criminal Appeals also questioned the trial court's determination that "although the consulting and testifying experts' conclusions might have been valid, the expenditure of funds is over the line in my mind because effective cross-examination would be sufficient." The court noted that since the defendant established a particularized need for the expert witness to participate and testify that the defense had met its burden and the trial court erred in determining otherwise.

PRACTICE POINT: We may not see these type of requests very often in Sessions Court but this case has a good discussion of the issues that need to be addressed in the event expert witnesses are requested in a case.

State v. Breeden (Tenn. Cr. App. 9/21/20)

PRELIMINARY HEARING IN SESSIONS COURT

**DENIAL OF RIGHT TO PRELIMINARY HEARING:
RIGHT TO PRELIMINARY HEARING WAS NOT
DENIED TO DEFENDANT AS DEFENDANT HAD
MOVED TO DISMISS THE CASE SINCE THE STATE
WAS NOT READY TO PROCEED WITH THE
PRELIMINARY HEARING, AND THE STATE DID
NOT ACT IN BAD FAITH IN PROCEEDING TO
OBTAIN AN INDICTMENT OF THE DEFENDANT**

FACTS: Defense counsel maintained that the state had acted in bad faith by urging the defense counsel to move to dismiss the case in General

Sessions Court which effectively denied the defendant his right to a preliminary hearing. Defense counsel alleged that the state was trying to circumvent the defendant's rights to a preliminary hearing.

The facts show that on the day of the preliminary hearing, the state notified defense counsel that the victim was unavailable to testify and that the state could continue to try to get the victim for a preliminary hearing that day, or that the preliminary hearing could be set to another day (which had happened before), or that trial counsel could move to dismiss the case. Defense counsel decided to ask the court to dismiss the case, and the General Sessions Court granted the motion.

As soon as the case had been dismissed, the prosecutor waited in the clerk's office until the order of dismissal was filed and then obtained a print-out that the case had been dismissed. The same day, the prosecutor presented the case to the grand jury who proceeded to indict the defendant, which effectively kept the defendant in the custody of the jail.

HELD: The trial court did not err by denying the defendant's motion to dismiss the indictment. The Court of Criminal Appeals noted that the defendant's claim that the state acted in bad faith appeared to focus primarily on the timing of the state's effort to obtain the indictment. The court noted that the trial court had accredited the prosecutor's statement that "she offered to attempt to find the victim, reset the preliminary hearing to another date, or, in the alternative, the appellant could ask the court to dismiss the case." The CCA noted that the trial court had found that the case was dismissed in the General Sessions Court before the state sought an indictment against the defendant. The Court of Criminal Appeals added that "defense counsel should have been aware that once the initial prosecution against the appellant ended, the state was free to seek an indictment against the appellant."

State v. Boyd (Tenn. Cr. App. 11/19/20)

PRETRIAL EYEWITNESS IDENTIFICATION

PHOTOGRAPHIC LINE-UPS: COURT FINDS THAT PHOTOGRAPHIC LINE-UP IN WHICH THE VICTIM IDENTIFIED THE DEFENDANT, THOUGH TAINTED BY A PREVIOUS SINGLE PHOTOGRAPH IDENTIFICATION BY THE VICTIM, WAS

REASONABLY RELIABLE PURSUANT TO THE FIVE FACTORS OF THE CASE OF NEIL V. BIGGERS

FACTS: In a case involving aggravated kidnapping and aggravated robbery, the defendant asserted that the trial court had erred in denying his motion to suppress as the defendant argued that showing the victim a single photograph prior to a subsequent photographic line-up was impermissibly suggestive and tainted the entire identification process.

At the suppression hearing, the victim testified that on 4/27/18 at approximately 5:00 a.m. he was robbed by the defendant and a co-defendant (Barley) at a hotel on Gunbarrel Drive. The victim then left the hotel on foot and called the police and an officer arrived at the scene. The victim was in the officer's police vehicle when he was directed to the officer's computer when the officer pulled up the defendant's record. The victim saw the defendant's face on the officer's computer, following which the victim said, "That's him." The victim described the defendant as a "tall, skinny, black man with dreads in his hair."

Defense counsel played body camera footage from another investigating officer, at which time the victim confirmed that the officer in the police vehicle showed the victim a picture and asked the victim, "Is that the guy right here?" The victim confirmed that the first time he saw a photograph of the defendant was when the officer pulled up the defendant's criminal history on his computer. The victim also confirmed he had never seen the defendant before 4/27/18 and the facts showed that the encounter of the victim with the defendant lasted only a few seconds in a fairly dark environment.

The trial court denied the defendant's motion to suppress the identification and noted that the victim had a "sufficient" opportunity to view the suspect when the "victim's entire focus" was on the perpetrators during the robbery.

HELD: The Court of Criminal Appeals concluded that giving the state, the prevailing party, the strongest legitimate view of the evidence, that the court was constrained to conclude that while the analysis was close, the Biggers factors and the presence of corroborating evidence weighed in favor of the court finding that it was a reliable identification process.

The court in its opinion noted the following key factors in a case of this nature:

1. When reviewing a motion to suppress, the appellate courts are bound by the trial court's findings of fact unless the evidence preponderates otherwise.
2. The Court of Criminal Appeals noted that Tennessee appellate courts have long recognized the "dangers of photographic line-ups." The court noted that case law particularly urged "caution against the use of photographs in general, and a single photograph in particular, immediately proceeding a line-up or show-up."
3. Convictions based on eyewitness identification at trial following a pretrial photographic identification will be set aside only if the photographic identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."
4. The danger of misidentification is enhanced if the witness is told that "other evidence links a particular person to the crime."
5. The court noted that when reviewing pretrial photographic identifications, the identification may satisfy due process as reliable and admissible when considering the totality of the circumstances.
6. The court stated that it is essential for courts to review these cases using the five factors set out in the United States Supreme Court case of Neil v. Biggers (1972), as follows: (1) The opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the confrontation.

Reviewing all of these factors, the court noted that the single photographic identification prior to the line-up was inherently suggestive and therefore it was important to closely look at the Biggers factors. The court noted that weighing in favor of reliability, the victim testified he saw the male perpetrator within an arms-length for a few seconds and that he "got a good look at him." The court noted that the victim's description to police of the male perpetrator, which he made prior to both the single photographic notification and the line-up, matched defendant virtually exactly -- that he was a "tall, skinny, black male with dreads in his hair."

The court also said that it is very significant under Tennessee law that Tennessee courts routinely consider whether an eyewitness identification is supported by corroborating evidence. The court noted that in the present case the defendant was involved in a relationship with the co-defendant Barley who plead guilty to the crime and the defendant was arrested while in Florida with co-defendant Barley. The court also noted the defendant's email was listed on the room rental agreement where the robbery took place,

and when the defendant and co-defendant were arrested in Florida, they were residing together in a Florida duplex where a receipt and several items belonging to the victim were found inside. The court noted that these corroborating facts strongly supported the reliability of the identification process.

The court therefore concluded that the trial court did not err in denying the defendant's motion to suppress and found that the analysis of the Biggers factors along with the corroborating evidence weighed in favor of finding that it was a reliable identification.

State v. Hill (Tenn. Cr. App. 5/3/21)

RESTITUTION

ORDER OF RESTITUTION: ORDER OF TRIAL COURT FOR THE DEFENDANT TO PAY TEN THOUSAND, SEVEN HUNDRED FIFTY DOLLARS IN RESTITUTION WAS REVERSED BECAUSE THE TRIAL COURT FAILED TO CONSIDER NOT ONLY THE VICTIM'S LOSSES, BUT ALSO FAILED TO TAKE INTO CONSIDERATION THE FINANCIAL RESOURCES AND FUTURE ABILITY OF THE DEFENDANT TO PAY

FACTS: The defendant plead guilty to one count of attempted aggravated burglary, seven counts of aggravated burglary and ten counts of theft of property among other charges, following which the trial court imposed an effective sentence of fifteen years and ordered the defendant to pay \$10,750 in restitution.

The defendant appealed and argued that the trial court should have held a hearing regarding his ability to pay restitution and the reasonableness of the restitution amount.

HELD: The Court of Criminal Appeals reversed the judgment of the trial court with respect to restitution and remanded the case for a restitution hearing and entry of amended judgments that reflect the amount of restitution and the manner of payment.

The court noted the following principles in regard to restitution:

- (1) TCA 40-20-116 mandates restitution of either the property or, if that is not possible, the value of the property in cases in which a defendant has been convicted of stealing or feloniously taking or receiving property.
- (2) The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty.
- (3) Tennessee courts are encouraged to order restitution when appropriate (40-35-102 and 103), but trial courts are without inherent power or authority to order payment of restitution except as derived from legislative enactment.
- (4) When ordering restitution as a condition of probation, the trial court must consider not only the victim's losses but also the financial resources and future ability of the defendant to pay. This is because an order of restitution which obviously cannot be fulfilled serves no purpose for the defendant or the victim.
- (5) The trial court shall specify the amount and time for payment and may permit payment or performance of restitution in installments.
- (6) The court may not establish a payment or schedule that extends beyond the expiration of the sentence. If, however, any portion of the order of restitution remains unpaid at the expiration of the payment period, it may be converted to a civil judgment.

Based upon review of these principles and the facts of the case, the Court of Criminal Appeals stated that there was nothing in the record to determine how the restitution amount was determined except that the parties had stipulated that the losses of the victims amounted to \$10,750. The court noted there was nothing in the record to indicate that the trial court considered the defendant's ability to pay restitution as required by TCA 40-35-304(d), and the judgment forms failed to state the time of payment or any other repayment terms as required by TCA 40-35-304(c). The case was therefore remanded to the trial court for further findings regarding the defendant's resources and future ability to pay as well as a determination of

the reasonable amount of restitution, including the setting of a monthly payment plan, if appropriate.

State v. Griffith (Tenn. Cr. App. 2/25/21)

RIGHT TO CONFRONTATION OF WITNESSES

ZOOM VIDEO CONFERENCING PURSUANT TO COVID-19 PANDEMIC ORDER: THERE WAS NO PLAIN ERROR FOR THE TRIAL COURT TO CONDUCT A PROBATION REVOCATION HEARING VIA ZOOM AS THE ZOOM HEARING MET THE MINIMAL DUE PROCESS REQUIREMENTS FOR PROBATION REVOCATION HEARINGS AND THE DEFENDANT EFFECTIVELY AGREED TO ALL PARTS OF THE ZOOM HEARING

FACTS: The defendant had previously entered guilty pleas to various drug related offenses and received an effective sentence of fourteen years of probation. Subsequently, arrest warrants were issued alleging that the defendant violated his probation. Following a hearing conducted via Zoom video conferencing technology, the trial court revoked the defendant's probation and ordered the defendant to serve his sentence in confinement.

In his appeal, the defendant argued that the trial court erred in conducting the probation hearing via Zoom video conferencing in violation of his right to confrontation in the Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution. The defendant further claimed that the failure of the trial court to conduct a probation revocation hearing in person constituted plain error.

The state responded by saying that the defendant had expressly confirmed that he was freely and voluntarily giving up the right to be present in court and the right to confront and cross-examine witnesses against him and that the court exercised proper discretion in fully revoking the defendant's probation.

It was specifically noted in the Court of Criminal Appeals opinion as follows: "The probation revocation hearing occurred during a pandemic, a world-wide public health emergency due to the continuing spread of the novel coronavirus and the deadly disease it causes known as COVID-19.

During this time, all Tennessee courts were subject to various orders of the Tennessee Supreme Court, which discouraged in-person court activity.” The footnote referred to the order of the Supreme Court, In Re: COVID-19 PANDEMIC, No ADM2020-00428 (Tenn. May 26, 2020), stating that trial courts should “continue to conduct as much business as possible by means other than in-person court proceedings.”

HELD: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in ordering the defendant to serve the balance of his fourteen-year sentence in confinement. The court made key findings as follows: (1) The record clearly reflected that the defendant expressly waived his right to be physically present in court for the probation revocation hearing. The court stated that the defendant is therefore “prohibited from now claiming error on appeal based upon the same grounds.” (2) The court also stated that a defendant’s right of confrontation in a probation hearing stems from the due process clause, and it is not absolute. The court noted that the U.S. Supreme court case of Morrissey v. Brewer stated that “the process should be flexible enough to consider evidence including letters, affidavits, and other material that would NOT be admissible in an adversarial criminal trial.” The court noted that the “functional purpose of the confrontation clause is nevertheless to ensure the defendant an opportunity for meaningful cross-examination.” The court went on to state that the record reflected that the defendant “stipulated to the factual basis in each of the four violation of probation affidavits. By doing so, the only issue to be determined by the trial court was the appropriate sentence. In other words, the probation revocation hearing was uncontested, the state put forth no witnesses, and the confrontation clause was not implicated.” The court then concluded that the defendant had failed to establish a breach of a clear and unequivocal rule of law or that a substantial right was adversely affected during the hearing.

PRACTICE POINT: 1. During the COVID-19 pandemic, Tennessee Supreme Court has encouraged hearings by Zoom and this opinion indicates that the Zoom hearing in this case was appropriately performed with the court securing waiver of personal appearances, discussing those issues in advance, having appropriate equipment for the Zoom hearing and recording the hearing, and securing proper stipulations in regard to the evidence being presented. The hearing was simply performed in a similar pattern to hearings which are performed everyday in person.

2. The court also made the important notation that a defendant is not entitled to the full panoply of rights afforded a defendant in a criminal

proceeding and that the Zoom conference would be appropriate to satisfy “minimal due process requirements for probation and revocation hearings.”

State v. Wines (Tenn. Cr. App. 7/20/21)

RIGHT TO COUNSEL

WAIVER OF RIGHT TO COUNSEL: COURT OF CRIMINAL APPEALS FINDS THAT THE NON-INDIGENT DEFENDANT KNOWINGLY AND VOLUNTARILY AND EXPLICITLY WAIVED HER RIGHT TO COUNSEL BY HER STATEMENTS AND CONDUCT

FACTS: In a case in which the defendant was convicted of passing a worthless check, a Class D felony, the defendant contended that the trial court erred in determining that she had made a knowing and voluntary waiver of her right to counsel and by requiring her to proceed pro se at trial, particularly when she had not executed a written waiver to that effect.

The facts establish that at her arraignment on 3/19/18, she indicated and expressed a desire to proceed pro se with her arraignment. She indicated that she would represent herself until her attorney could get in on her case. The defendant later affirmed her understanding that she had a right to a lawyer at any critical stage in court and that she had a right to an appointed lawyer if she could not afford one. Thereafter, the defendant continued to appear in court and represent herself at the hearings that fell on 4/9/18 and 6/18/18. At a hearing on 4/9/18, the trial court noted that the defendant was proceeding pro se and that they had gone “through that process before.” The prosecutor also had stated at that hearing that the defendant was proceeding pro se and that she was doing so at her own peril. At the 6/18/18, the trial court noted that the defendant was proceeding pro se to which the defendant responded affirmatively. The trial court reminded the defendant that she would be held to the same level of conduct and competence that a lawyer would be at trial. There were also other casual conversations between the judge and the defendant about her proceeding pro se, and the trial court observing that a lawyer might not have agreed with her decision for a bench trial.

At the outset of the 12/13/18 trial, the defendant was asked if she had any questions and she responded by saying that she had been unable to secure local counsel and that she was unable to afford an out-of-town lawyer, so she would have to proceed for herself. During conversation with the court, the defendant acknowledged that she had been represented by counsel in many of her prior cases as well as her being represented by counsel in General Sessions Court in the present case.

HELD: The Court of Criminal Appeals concluded that the record was clear that the defendant understood her right to counsel and that her decision to proceed pro se was clear and unequivocal based upon her statements and conduct. Th court noted that “one with means and ability to employ counsel is not indigent, and she cannot be permitted to frustrate the process of the law and completely thwart and avoid trial indefinitely by just not employing counsel.”

In regard to whether the colloquy between the court and the defendant was compliant with the requirements of the Von Moltke case, the court noted that the trial court did assess the defendant’s age and education and informed her that she would be held to the same standard as a lawyer. The fifty-six-year-old defendant stated that she had a college degree in business management, computer programming, and an accounting degree and a legal minor in business contracts. She confirmed that she was familiar with United States and Tennessee Constitutions and was advised that she faced a Class D felony and was subject to two to twelve years in prison and a \$5,000.00 fine if convicted.

The Court of Criminal Appeals found that even though the defendant was not specifically warned that self-representation was unwise or about the pitfalls of self-representation, she was aware of what she faced in the prosecution because she had prior convictions for passing worthless checks in four Tennessee counties. The prosecutor had also told the defendant that she was representing herself “at her own peril.” The court also noted that the trial court discussed legal issues with the defendant and that while the court did not mechanically ask all of the questions suggested, the court concluded that the trial court substantially complied with the suggested format and that the inquiry by the trial judge was sufficient to comply with Von Moltke. The defendant made a knowing and voluntary waiver of her right to counsel.

In regard to the defendant’s argument pertaining to Tennessee Rule Criminal of Procedure 44 which requires a written waiver of the right to counsel, the Court of Criminal Appeals on prior occasions had concluded that it was not clear whether the requirements of Rule 44(a) apply to other

than indigent defendants. The court noted that a prior case had commented that the best procedure would require a written waiver of counsel in all cases when an accused insists on self-representation. The court noted that “while written waiver of counsel would provide prima facie evidence of an explicit waiver of the right to counsel, Rule 44 only requires such if a defendant is indigent.”

State v. Walker (Tenn. Cr App. 1/20/21)

SEARCH AND SEIZURE

CONSENT TO SEARCH HOME FOR CHILD SEX PICTURES: THE COURT OF CRIMINAL APPEALS HELD THAT THE EVIDENCE IN THE CASE DID NOT PREPONDERATE AGAINST THE TRIAL COURT’S FINDING THAT THE DEFENDANT’S CONSENT WAS INVOLUNTARY SINCE THE TRIAL COURT FOUND THAT THE DETECTIVE LACKED PROBABLE CAUSE TO SEARCH THE HOME WHEN HE IN FACT HAD THREATENED TO SEIZE THE SCENE AND OBTAIN A SEARCH WARRANT

FACTS: The defendant was charged with sexual exploitation of a minor involving more than one hundred images, a Class B felony. The defendant filed a motion to suppress evidence, as the defendant argued he turned over the images to a police officer involuntarily after the officer threatened to obtain a search warrant for his residence when the officer did not have probable cause for the issuance of a search warrant. The trial court conducted an evidentiary hearing and subsequently granted the defendant’s motion to suppress the evidence.

HELD: The Court of Criminal Appeals concluded that a review of the evidence showed that the evidence did not preponderate against the trial court’s finding that the defendant’s consent was involuntary.

The Court of Criminal Appeals noted that the trial court had the opportunity to view the demeanor of the witnesses and hear the in-court testimony and was therefore in the best position to weigh the evidence and assess the witnesses’ credibility.

The Appellate Court noted that the trial court had in its opinion recounted that during the interview the defendant told Detective Adkins that he had printed stories about underage girls having sex and that the stories occasionally were accompanied by nude images or drawings of girls. The defendant had denied in his discussions with the officer that the images depicted girls “engaging in sex.” The Court of Criminal Appeals noted that “when the officer asked to see the images, the defendant declined consent. At that point, Detective Adkins told the defendant that he was going to call a patrol car to the defendant’s residence while the officer went downtown to get a search warrant. The defendant told the officer, “Okay. You’ve got consent it’s not like I have a lot of choice.” Detective Adkins told the defendant he did have a choice, but the defendant responded, “I don’t have to, but you’ll”

The Court of Criminal Appeals noted several important principles in reviewing these types of cases: (1) Questions of credibility of the witnesses, the weight and value of the evidence, and resolutions of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. (2) A trial court’s finding of fact in the suppression hearing will be upheld unless the evidence preponderates otherwise. (3) During the appeal process, the prevailing party is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. (4) Both the Fourth Amendment to the United States Constitution and Article I section 7 of the Tennessee Constitution provide protection for citizens against unreasonable searches and seizures. (5) One of the exceptions to the warrant requirement is a search conducted pursuant to consent, and the sufficiency of consent depends largely upon the facts and circumstances in a particular case. (6) Whether consent exists and whether it was voluntarily given are questions of fact. (7) The prosecution bears the burden of proving that the defendant freely and voluntarily gave consent. (8) Factors to consider in determining whether consent is voluntary include the time and place of the encounter, whether the encounter was in a public or secluded place, the number of officers involved, the degree of hostility during the incident, whether weapons were displayed, whether consent was requested, and whether the consenter initiated contact with the police. In addition, an individual’s age, education, intelligence, knowledge, maturity, sophistication, experience, prior contact with law enforcement personnel, and prior cooperation or refusal to cooperate with law enforcement personnel are relevant in determining whether consent is voluntary. Also, an individual’s knowledge of the right to refuse consent is also a factor in determining the

voluntariness of consent. (9) Mere nudity of children, without more, is insufficient to establish the crime of sexual exploitation of a minor. (State v. Whited, 2016). (10) Mere nudity of children also does not establish probable cause for a search warrant.

Reviewing all these factors, the Court of Criminal Appeals emphasized that the trial court found the consent to search was involuntary because the consent was a result of the detective’s “threat to call in additional law enforcement to hold the defendant in his home for a couple of hours while the detective sought a search warrant.” The court noted that the defendant’s tone of voice and his responses to the detective’s questions did not suggest in any way that the defendant was familiar with the criminal justice system. The court also noted that while the officer was polite and courteous, the underlying conduct of the officer was a “persistent yet subtle determination to press the defendant’s apparent naivete and gain access to the materials he sought.”

The court therefore concluded that the evidence did not preponderate against the trial court’s finding that the defendant’s consent was involuntary.

State v. Cohen (Tenn. Cr. App. 7/29/21)

**INVESTIGATORY STOP OF DEFENDANT’S PT CRUISER:
THE OFFICER HAD REASONABLE SUSPICION
SUPPORTED BY SPECIFIC AND ARTICULABLE
FACTS FOR THE TRAFFIC STOP OF THE
DEFENDANT’S PT CRUISER SINCE THE OFFICER
HAD RECEIVED A BOLO DISPATCH FOR A
“WHITE OR CREAM-COLORED” PT CRUISER
BELIEVED TO BE INVOLVED IN THE SHOOTING
AT MS. EVANS’S HOUSE**

FACTS: In a case in which the defendant was convicted of numerous counts of attempted aggravated robbery, aggravated assault, and reckless endangerment by discharging a firearm into an occupied habitation, the defendant contended that the trial court had erred in denying his motion to suppress the evidence found as a result of the traffic stop because it was based only upon a general description of the vehicle and that there was insufficient evidence to establish the defendant’s identity as the perpetrator

of the offenses. The trial court had denied the defendant's motion to suppress and the defendant was convicted by a jury of the multiple offenses.

HELD: The Court of Criminal Appeals found that the trial court had appropriately found that Sergeant Skellenger articulated a reasonable suspicion for making an investigatory stop of the PT Cruiser. The court noted that several basic principles apply in cases of this nature:

1. The prevailing party is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence.
2. Questions about the assessment of witness credibility, the weight and value of evidence and the resolution of evidentiary conflicts are entrusted to the trial court as the trier of fact.
3. When the trial court makes findings of fact in the course of ruling upon a motion to suppress, those findings are binding on appeal unless the evidence in the record preponderates against them.
4. Both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution guarantee the right to be free from unreasonable searches and seizures.
5. A warrant is not required for an investigatory stop when the officer has reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed.

The court concluded that in the present case Sergeant Skellenger had reasonable suspicion to make a brief investigatory stop based on several factors:

1. Ms. Evans reported that her house had been fired upon, that she had surveillance equipment, and that she had viewed the recording and saw shots fired from a white or cream-colored PT Cruiser;
2. The location where Sergeant Skellenger observed the vehicle was in close proximity to Ms. Evans's home and only a short period of time had elapsed between the report and the observation;
3. Skellenger testified that there were few other cars on the road at the time and that PT Cruisers were not common in the area; and
4. The level of danger in this situation was apparent and Sergeant Skellenger had a reasonable basis for assuming the suspects in the PT Cruiser were armed and dangerous and had fired from inside their vehicle.

The court noted that while there were three incidents reported in a certain geographical area on that day, the Court of Criminal Appeals limited its analysis to reasonable suspicion that the vehicle was involved in the shooting at Ms. Evans’s residence, based upon the fact that the first incident in the area did not involve a description of a vehicle and the report at the other location was not called in on a 911 call until after the traffic stop had already been initiated on the call by Ms. Evans. Based on these key facts, the trial court did not err in denying the defendant’s motion to suppress.

State v. Kea (Tenn. Cr. App. 3/2/21)

**REASONABLE SUSPICION TO CONDUCT
INVESTIGATORY STOP: OFFICER DID NOT HAVE
REASONABLE SUSPICION TO CONDUCT
INVESTIGATORY STOP OF DEFENDANT SIMPLY
BECAUSE HE WAS STANDING IN A PRIVATE
PARKING LOT FOR A FEW SECONDS BEFORE
APPROACHING THE APARTMENT COMPLEX**

FACTS: In the case involving defendant’s conviction for unlawful possession of a firearm, the defendant asserted that the mere presence of a non-tenant in a parking lot adjacent to an apartment building is not enough to establish reasonable suspicion for officers to seize him and is therefore in violation of the Fourth Amendment.

HELD: The Court of Criminal Appeals concluded that the officers did not have reasonable suspicion to conduct an investigatory stop because Lieutenant Bush did not have reasonable suspicion simply because defendant was standing in a private parking lot for “maybe a few seconds” before approaching the apartment complex.

The state conceded that a Fourth Amendment seizure of the defendant had taken place when the defendant was seized and therefore the question regarding suppression of the firearm was whether Lieutenant Bush had reasonable suspicion to detain defendant.

The facts established that while on patrol, Lieutenant Bush observed defendant standing still for “maybe a few seconds” in the parking lot of an apartment building containing six rental units. The portion of the parking lot fronting Magnolia Avenue was fenced and attached to the fence was a statement that “video recordings will be used to prosecute criminal activity,”

and a second sign which read: “No Trespassing, Tenants Only, Enforced by Knoxville Police.”

Lieutenant Bush had testified that when “we observe somebody just standing around, appearing not to have a reason to be there, that’s what draws our attention to the area that the person is clearly not supposed to be there.” The court noted that Lieutenant Bush did not elaborate on why defendant appeared not to have a reason to be there. The Court of Criminal Appeals held that the defendant had an implied license to approach a front door of a residence and knock, and his standing still for maybe a few seconds did not convert that implied license into criminal trespass.

The court also noted that based on prior cases, the posting of no trespassing signs “may indicate a desire to restrict unwanted visitors and announce one’s expectations of privacy, but such signs cannot reasonably be interpreted to exclude normal, legitimate inquiries or visits by mail carriers, newspaper deliverers, census takers, neighbors, friends, utility workers and others who restrict their movements to the areas of one’s property normally used to approach the home.” The court noted that such a conclusion would render illegal any person’s approach of a residence which displayed a no trespassing sign, including a law enforcement officer’s approach for a knock and talk if that person happened to stand still for a few seconds before reaching the front door.

The court concluded that taken in the light most favorable to the state, the court concluded that under the totality of the circumstances, Lieutenant Bush did not have reasonable suspicion to conduct an investigatory stop of the defendant.

Because the court concluded that the officer did not have reasonable suspicion for the investigatory stop, the firearm obtained during the stop of the defendant should have been excluded at trial. The court noted that without the firearm there was no evidence that defendant committed unlawful possession of a firearm and the court reversed the conviction of the defendant for unlawful possession of a firearm.

State v. Brown, (Tenn. Cr. App. 4/27/21)

**SEARCH OF CELL PHONE: SEARCH WARRANT
AFFIDAVIT SUPPORTING SEARCH OF CELL
PHONE LACKED THE PARTICULARITY
REQUIRED BY UNITED STATES AND TENNESSEE
CONSTITUTIONS AND THE AFFIDAVIT WAS**

DEFICIENT IN ESTABLISHING A NEXUS BETWEEN “ANY AND ALL DATA” IN THE CELL PHONE AND THE CRIME

FACTS: The defendant was charged and convicted in Davidson County Criminal Court of first degree pre-meditated murder and other offenses. The defendant maintained that the trial court erred in denying his motion to suppress the evidence obtained pursuant to a search warrant for the contents of his cell phone. The search warrant affidavit, sworn to by Detective Chandler on 3/10/17, sought permission to search a specified black LG cell phone belonging to the defendant for “all electronic data related to communication on the phone through calls, text messages, social media, “apps,” photos, internet searches, geotags, and all other electronic data found upon the device.”

The affidavit stated that Tiffany Ferguson was found on 2/28/17 in her bedroom with multiple stab wounds and was transported to Vanderbilt Hospital where she was pronounced dead. The affidavit noted that the defendant was developed as a suspect and that “video surveillance showed the suspect used the cell phone flashlight function as he was walking around the parking lot attempting to break into vehicles. The phone was also in his possession when he fled on foot from the scene. It is believed that the phone was used after the incident and would have information needed for the investigation to continue.”

The defendant challenged that the search warrant to search all the information on the cell phone “with no limitations related to the alleged criminal homicide,” violated the constitution.

The trial court found that pursuant to United States v. Bass (6th Cir. 2015), there “was no way for MMPD to limit the search to areas solely concerning the alleged criminal homicide. Cell phones are complex machines which hold a multitude of information. A complete search of the cell phone was required to find potential information concerning the alleged criminal homicide.” The trial court therefore concluded that “the broad scope of the search language was reasonable under the circumstances at the time.”

HELD: The Court of Criminal Appeals concluded that the warrant lacked the particularity required by the Fourth Amendment in article I section 7 of the Tennessee Constitution” but ultimately concluded that the error was harmless beyond a reasonable doubt. The Court of Criminal Appeals stated that the “affidavit sufficiently established a nexus between the criminal

activity and the thing to be searched, that is, the cell phone.” The court noted that although it identified items to be seized, that is, any and all data, the affidavit was deficient in establishing a nexus between “any and all data,” the cell phone, and the crime. The court commented that while the affidavit alleged usage of the cell phone’s flashlight function contemporaneously with the crime, the affidavit also sought the authority to search any and all data, “without demonstrating a connection between the data and the crimes.” The court stated, “In our view, the broad scope of the warrant, without specific information showing that information relevant to the crime will be contained in all of the cell phone’s data, is problematic.” Specifically, the court noted that no effort was made in the affidavit to identify the type of usage the affiant believes had occurred such as text messaging, voice calls, and internet searches. The court noted that no effort was made to identify the type of data the affiant believed might exist on the cell phone, such as relevant photographs, browser history of internet searches related to the crimes, or GPS location information. The court noted that “in effect, the affidavit sought unrestricted access to all data on the defendant’s cell phone without identifying the types of data relevant to the investigation which the affiant had a basis to believe existed.”

The court specifically noted that Tennessee appellate courts had yet to address the particularity required of a warrant for the search of a cell phone in light of the wide-ranging data storage capabilities and corresponding privacy concerns of modern cell phones addressed in the Tennessee Supreme Court case of State v. Riley. The court noted that it would therefore look to decisions from other jurisdictions.

Of key importance to the Tennessee Court of Criminal Appeals was the Nebraska Supreme Court case of State v. Goynes (Neb. 2019), which had the following significant quote:

“[The detective’s] affidavit provided probable cause that [the defendant] committed the shooting and that he was aided by others. When [the defendant] was taken into custody, he had the cell phone in his possession. [The detective] explained cell phone data provides insight for criminal investigations on the motivation, method, and participants in that cell phones are used for communication, access to information, socialization, research, entertainment, shopping, and other functionality. Accordingly, [the detective] listed several types of data he was seeking to search through the warrant and how the data was relevant to the investigation. These types of data included the

following: cell phone information, configurations, calendar events, notes, and user account information which could identify who owns or was using a cell phone; call logs which could establish familiarity between people involved and timelines of an incident; short and multimedia messaging service messages, chat and instant messages, and emails which could provide insight to establish an individual's level of culpability and knowledge of the incident; installed application data which could aid in determining a user's historical geographic location and demonstrate the user's association with investigated people, location, and events; media files such images, videos, audio and documents which could provide times and locations as well as firsthand documentation of the incident; internet browsing history which could demonstrate the planning, desire, and participation in a crime; cell tower connections, global positioning system data, Wi-Fi, Bluetooth, and synchronization logs which could provide information on location in relation to the incident, and user dictionary information which could demonstrate familiarity with the crime being investigated.”

The Tennessee Court of Criminal Appeals concluded that therefore the affidavit in the present case was deficient as compared to the Goynes affidavit where the affidavit was “sufficiently particular because it identified and described the specific areas of the cell phone to be searched and described the information held in those areas which were relevant to the investigation.”

The court did go on from there to conclude that even though the error in this case in regard to the search warrant was substantial, the error was still harmless beyond a reasonable doubt because the trial proof of the defendant's guilt in the present case was overwhelming which included a confession by the defendant, surveillance video from the scene and other substantial information.

PRACTICE POINT: This is a very key case at the present time pending any further action taken because it does address key issues in regard to search warrants for cell phones and talks about key issues of which we need to be aware as General Sessions Judges.

State v. McLawhorn (Tenn. Cr. App. 10/20/20)

SEIZURE OF DEFENDANT’S CELL PHONE BY PRIVATE SECURITY GUARD: SECURITY GUARD’S SEARCH OF PRIVATE CELL PHONE LEFT BEHIND BY DEFENDANT IN A BAR DID NOT VIOLATE THE FOURTH AMENDMENT DUE TO THE FACT THAT THE SECURITY GUARD’S ACTIONS WERE BASED ON A “REASON INDEPENDENT OF A GOVERNMENTAL PURPOSE”

FACTS: On 9/18/14, the defendant accidentally left his cell phone at the Bikini Beach Bar. The proof established that the private security guard at the establishment found the phone and, with the intent to identify the phone’s owner, the guard pressed the phone’s home button, resulting in explicit sex images appearing on the screen. The guard explained that his intention in doing so was to identify the phone’s owner and not to aid the police in an investigation. The security guard then contacted the police, resulting in a detective ultimately securing a search warrant to search the cell phone and then a search warrant to search the property of the home of the defendant. Detective Carrigan of the Metropolitan Nashville Police Department (MNPd) testified that the phone contained over one hundred sexual images of minors with the children “posed in sexual positions” where the focus of the images was the private parts of the minor children.

The defendant moved to suppress the evidence found on his cell phone, and the trial court denied the motion to suppress in a written order dated 9/18/17.

The defendant maintained that the trial court had erred when it found that the security guard who seized the defendant’s phone did not intend to assist law enforcement. The defendant contended that the security guard was a “state actor” for the purposes of the Fourth Amendment. The defendant maintained also that Davidson County Law Enforcement had knowledge of and acquiesced to the roll of private security guards in such establishments and therefore the security guards were effectively “state actors” acting in contravention of the search warrant requirements of the Fourth Amendment.

The state responded by arguing that the security guard was not a state actor but instead was a private party with legitimate independent motivation to search the phone, and that there was “no excessive entanglement between his employment and the state.”

HELD: (1) The Court of Criminal Appeals held that under the “legitimate independent motivation test” that the trial court did not err in finding that the security guard was not a state actor.

The Court of Criminal Appeals made the following significant determinations in the case:

1. That the United States and Tennessee Constitutions protect citizens from unreasonable searches and seizures.
2. In State v. Burroughs (Tenn. 2000), the Tennessee Supreme Court adopted the “legitimate independent motivation test” for determining whether a private individual acted as an agent of the state for purposes of the Fourth Amendment.
3. The critical factors in the analysis under this test are (a) the government’s knowledge and acquiescence; and (b) the intent of the party performing the search.
4. The court noted that “a private party acting for a reason independent of a governmental purpose does not implicate the Fourth Amendment.”
5. The court noted that in the present case, the “knowledge and acquiescence to (the security guard’s) initial actions of examining the phone to identify its owner cannot be attributed to the state.” The court noted that while it was true that law enforcement officers in Davidson County were not permitted to work as private security guards in establishments deriving more than twenty percent of their revenue from alcohol, “it does not follow that law enforcement tasked this security guard with searching lost phones for contraband, nor does it follow that law enforcement knew of or acquiesced to (this security guard’s) search of defendant’s phone.”

The Court therefore concluded the evidence did not preponderate against the trial court’s findings that the security guard had merely found the smart phone left behind by the defendant and was pursuing his responsibilities as a bouncer and security guard in seeking to find the owner of the cell phone. The Court of Criminal Appeals concluded that the security guard had acted with a “reason independent of a government purpose” when he searched for the identity of the phone’s owner. The court found that under the legitimate independent motivation test, the trial court did not err in finding that the security guard was not a state actor.

(2) The Court of Criminal Appeals also noted that the defendant had argued that under the “public function test”, the security guard was performing police functions by his actions. Under the public function test, a private party made be deemed a state actor if he or she exercises powers that are traditionally reserved exclusively to the state.

The Court of Criminal Appeals held that the Tennessee Supreme Court has not adopted the public function test in determining whether a private party is a state actor for purposes of the Fourth Amendment, but, “nevertheless, even under the public function test, (the security guard) was not a state actor.” The court noted that federal courts do not recognize a private security guard’s mere assistance in a criminal investigation to be state action. The Court of Criminal Appeals found that the defendant’s reliance on the public function test was misplaced because the security guard in the present case did not have the authority to arrest a person without a warrant. The court noted that no law in Tennessee endows a private security guard with plenary police powers, but “rather, a private security guard has the same power to arrest as any private citizen in Tennessee.”

(3) The defendant also argued that the security guard was a state actor because “the state is inextricably entwined with the security guard business through its regulatory scheme” and because the Metropolitan Government of Nashville has abdicated its responsibility for the maintenance of law and order in business establishments that derive over twenty percent of their revenue from the sale of alcoholic beverages.

The Court of Criminal Appeals held that that under the proof “there is no such entwinement between private security guards and the state; the connection between private security and the state is nominal at best.” The court noted that because of the “twenty percent rule” law enforcement in Davidson County does not allow their officers to serve as private security in establishments which derive more than twenty percent of their income from alcohol. The court noted that the private establishment was therefore required to look to other forms of security or choose to have no security at all. The Court of Criminal Appeals found that “this choice by private establishments is not an affirmative action by the state to control, designate, or direct private security guards to act in a certain way in the course of their employment, as ‘excessive entanglement’ requires.” The court also noted that security guards do not benefit financially from the state by way of their employment.

Therefore, the Court of Criminal Appeals concluded that all of the theories of the defense were unsuccessful in establishing that the security guard in the present case was a “state actor” for purposes of the Fourth Amendment. The trial court properly found that the motion to suppress must be denied.

State v. Simpson (Tenn. Cr. App. 9/1/20)

**SEARCH OF DEFENDANT’S PRIVATE RESIDENCE:
SEARCH OF RESIDENCE BY LAW ENFORCEMENT
WAS ILLEGAL DUE TO THE FACT THAT THERE
WERE NO EXIGENT CIRCUMSTANCES FOR THE
ENTRY INTO THE DEFENDANT’S HOME, THE
DEFENDANT’S CONSENT TO ALLOW THE
SEARCH WAS COERCED, AND THE INEVITABLE
DISCOVERY DOCTRINE DID NOT APPLY**

FACTS: The White County Sheriff’s Office asked neighboring Warren County Sheriff’s Office to look for a male named Ronald Dishman who had multiple outstanding warrants for his arrest from White County. An employee of White County told an employee of Warren County that Dishman was likely armed with a handgun or rifle and gave an address of a home where Dishman was supposedly located. Twenty minutes later, with this limited information and without any independent corroboration, nine Warren County deputies converged on the given address, which was the defendant’s home.

One of the deputies saw a white male standing on the porch of the house and the officer assumed that the man he saw on the porch was the intended arrestee, without any clear reason in the record why he felt that was the case except that he felt that he matched the description for Dishman. After the man on the porch went inside the residence, deputies surrounded the house armed with weapons and began yelling out over loud speakers, “Subjects in the residence, please come out with your hands up; we have the house surrounded.” This stand-off went on for approximately twenty to thirty minutes until the defendant eventually exited her home. She testified she delayed in going out because she was having a panic attack due to all the weapons. Once she came out of the house, she was told to put her hands above her head, get down on her knees, and “walk” backwards from her front porch to the edge of the woods by her house.

Deputies explained that they were searching for Ronald Dishman and she advised that Dishman was not in her home. Officers refused her offer to phone Dishman who she was related to. The person in the home was named Scott Bell, a friend of the defendant.

The deputies continued to press the defendant repeatedly for consent to enter the home but she refused and insisted that Dishman was not in the house. Approximately one hour passed from the time law enforcement

surrounded her home and she eventually relented and gave written consent allowing law enforcement to search her home. The officers entered the home with weapons drawn and, while they did not find Dishman, one of the officers saw a bag of meth on the floor of the bedroom and another officer smelled a “strong chemical smell.”

Based on this information obtained from the officers going inside the house, they obtained a search warrant several hours later and while executing the search warrant the deputies found meth, drug paraphernalia, and cash. The defendant was ultimately charged with one count of possession of a scheduled II controlled substance, methamphetamine greater than twenty-six grams with intent to deliver, tampering with evidence and one count of possession of drug paraphernalia.

The defendant filed a motion to suppress evidence claiming that the entry into her home was unlawful under the Constitutions of the United States and the State of Tennessee and that her consent was based upon several factors, including (1) the overwhelming show of force; (2) the officers’ entering and remaining on the curtilage of her home without permission or warrant; (3) the officers’ failure to leave after a reasonable amount of time; and (4) the officers’ pointing weapons at the defendant without any display or threat of violence from the defendant who had no violent history.

The trial court denied the defendant’s motion to suppress, following which she plead guilty to drug related charges with a certified question regarding an illegal search.

HELD: The Supreme Court of Tennessee held that the facts presented in the case simply did not establish “exigent circumstances” that would justify the armed seizure of the defendant’s home and person. The court noted that a possible “exigent circumstance” occurs if officers are acting in response to an immediate risk of serious harm to police officers or others, but the court found that the record did not support this theory. Neither the defendant or Mr. Bell threatened the officers with a weapon and Mr. Bell simply went inside and closed the door when he saw the deputies. The court also found that there was nothing to the argument about exigent circumstances based on destruction of evidence as there was simply no factual justification for the same.

In regard to the exception to the search warrant for any voluntary consent, the Supreme Court stated that the defendant’s consent was not voluntarily given and was therefore invalid. The court noted that at least nine law enforcement officers had converged on the defendant’s home with guns drawn; for thirty minutes the defendant refused orders to come outside

because she was having a panic attack; and when she finally exited her residence she was detained by deputies who continued to ask her for another thirty minutes for consent to search her home; she was ordered to get on her knees and walk on her knees with her hands up in the presence of the officers; testimony described the defendant as being extremely upset, crying, and then ultimately relenting to the officers' request only after being detained for nearly an hour. The court said that under these circumstances, the defendant's consent to search the home was not freely and voluntarily given.

In summary, the Supreme Court of Tennessee found that the initial search of the defendant's home was unlawful because there were no exigent circumstances to the allow the officers to go into the home and the consent of the defendant was not freely and voluntarily given to justify the initial search. The subsequent search of the defendant's home pursuant to the search warrant was tainted due to the previously unlawful search and was fruit of the poisonous tree.

The court also concluded that the inevitable discovery doctrine did not apply in any way, shape, form, or fashion as the officers had no right to search the home and any basis for the search warrant was based upon the previous illegal search. The judgment of the Court of Criminal Appeals was reversed and the defendant's convictions were set aside and dismissed.

State v. Scott (Tenn. Supreme Court. 2/23/21)

TRAFFIC STOP FOR U-TURN: MUNICIPAL ORDINANCE WHICH PROHIBITED U-TURNS PROVIDED PROBABLE CAUSE FOR THE OFFICER TO STOP THE DEFENDANT'S VEHICLE, OVERRULING THE RULING OF THE TRIAL JUDGE THAT THERE WAS NO REASONABLE SUSPICION FOR STOPPING THE VEHICLE AS ANY REASONABLE DRIVER WOULD HAVE BELIEVED IT WAS LEGAL AND APPROPRIATE TO PERFORM A U-TURN AT THE LOCATION

FACTS: On 1/11/19, the defendant was driving on Murfreesboro Road in LaVergne, Tennessee, when Officer Darby observed the defendant making a U-turn in violation of municipal code. The officer after pulling over the defendant's vehicle asked for permission to search the vehicle after

he thought he smelled marijuana. The defendant denied permission so Officer Darby deployed his canine to “conduct a free-air sniff” around the vehicle. The canine indicated a positive alert and marijuana was located inside the vehicle and the defendant was arrested.

The defendant filed a motion to suppress which was granted by the trial court who held that any driver would reasonably believe it was legal and appropriate to conduct a U-turn at the location, as photographs reflected that the area appeared to be designed for the purpose of pulling out of traffic to make a left turn or a U-turn and that the location was an area where U-turns were “routinely performed on a daily basis.”

HELD: The Court of Criminal Appeals held that the trial court erred in granting the motion to suppress because Officer Darby did in fact have probable cause to initiate a traffic stop.

The court noted that while the state bears the burden of proving that a warrantless action was justified as a lawful investigatory stop, the court found that the defendant was clearly prohibited from making a U-turn by a municipal ordinance. The court noted that there is no statute which requires the placement of signage that prohibits U-turns at breaks in the median and accordingly “the ordinance was not in conflict with state law and was enforceable.” The court stated that the “defendant’s lack of awareness of such a municipal ordinance prohibiting a U-turn at this particular location is of no consequence. This is simply a case of defendant committing a traffic violation which resulted in a constitutional stop based on the officer’s reasonable suspicion that a traffic violation had occurred.”

The court noted that the City of LaVergne had simply chosen to enact an ordinance that prohibited U-turns pursuant to the authority of T.C.A. 55-10-307(a), which gives municipalities the ability to enact additional requirements. The court also held that the break in the highway in question was not an intersection as defined by T.C.A. 55-8-101(32). The court also found that the trial judge had misapplied the law in regard to statutes regarding U-turns.

State v. Love (Tenn. Cr. App. 10/8/20)

SENTENCING

**ALTERNATIVE SENTENCING: TRIAL COURT
SENTENCING OF DEFENDANT TO FIVE YEARS
CONFINEMENT REVERSED AND REMANDED DUE**

TO TRIAL COURT'S FAILURE TO CONDUCT AN APPROPRIATE ANALYSIS REGARDING JUDICIAL DIVERSION AND THE MANNER OF SERVICE OF THE SENTENCE

FACTS: Near midnight on 11/2/18, the defendant entered the victim's home without permission, undressed in the victim's living room, and proceeded to the victim's bedroom where she was asleep in her bed. When the victim's dog began to bark, the victim woke to find the defendant standing naked next to her bed, at which point the victim screamed and demanded the defendant to leave her home. The defendant informed the victim that he did not intend to hurt her and returned to the living room to get dressed and attempted to leave. The victim at that point entered the room with a .380 caliber handgun and held him at gunpoint while she called 911 and waited for the police to arrive.

When police did arrive, the defendant claimed that he had entered the victim's house based on a bet with his uncle claiming that his uncle bet him \$300.00 to enter the victim's home and scare her. When questioned by police, the uncle denied any knowledge of the bet.

After indictment for aggravated burglary and indecent exposure, the defendant plead guilty to both charges with the length and manner of service of the sentences to be determined by the court.

At the sentencing hearing on 8/9/19, Brandon Bookout, probation officer with the Tennessee Department of Correction, testified that he had completed an investigative report of the defendant which determined that the defendant was a moderate risk and that the defendant did not have a criminal history. Bookout testified that he believed the defendant "will do fine on probation if he were to be put on probation." The defendant's mother testified that the defendant was placed in foster care when he was seven years old and remained in foster care until he turned eighteen. During that time the defendant had lived in over ten different homes with different families and the mother had remained in contact with the defendant and exercised visitation. The defendant's father with whom the mother remained married, was incarcerated for most, if not all, of the time the defendant was in foster care. The mother testified that the defendant had lived with her for the past five months and would continue to live with her and she would be responsible for taking him back and forth to work at his recently obtained employment.

The defendant provided a statement which stated that he was “very sorry” for what happened and that it was based upon a “stupid dare.” He stated that he knew he was wrong to do what he did but that even though his uncle had denied it that his actions were based upon a bet with his uncle and that the bet had been witnessed by his grandmother who unfortunately had passed away a few months prior to the sentencing hearing.

The trial court denied the defendant’s request of alternative sentencing and imposed a sentence of five years in confinement.

HELD: The Court of Criminal Appeals reversed the trial court’s judgments and remanded the case back to the trial court, directing the trial court “to conduct an appropriate analysis regarding judicial diversion and the manner of service of the sentence, indicating on the record its compliance with the consideration of the statutory and common law criteria of sentencing.” The CCA noted that the burden establishing that the sentence was improper rests with the party challenging the sentencing on appeal.

The court noted that under TCA 40-35-401, that in imposing a sentencing, the trial court must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and - 114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant made in the defendant’s own behalf about sentencing; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report.

The Court of Criminal Appeals also gave instructions pertaining to whether the defendant should be awarded judicial diversion, stating that the trial court must consider the following factors: (1) the defendant’s amenability to correction, (2) the circumstances of the offenses, (3) the defendant’s criminal record, (4) the defendant’s social history, (5) the defendant’s mental and physical health, (6) the deterrent effect of the sentencing decision to both the defendant and other similarly situated defendants, and (7) whether judicial diversion will serve the interests of the public as well as the defendant. The court noted that the trial court record must reflect that the trial court considered and weighed all the factors in arriving at a decision on judicial deferral.

The court also gave directions in regard to the issue of whether or not to order confinement, with the court stating that the trial court should consider:

(1) Sentences involving confinement should be based on the following considerations:

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

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

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

(2) The sentence imposed should be no greater than that deserved for the offense committed:

(3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;

(4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. The length of a term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence;

(6) Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation, community service or all of these; and

(7) Available community-based alternatives to confinement and the benefits that imposing such alternatives may provide to the community should be considered when the offense is nonviolent and the defendant is the primary caregiver of a dependent child.

The Court of Criminal Appeals again emphasized that the defendant bears the burden of establishing suitability for probation, including that probation will serve the ends of justice in the best interest of both the public and the defendant. The court emphasized the obligations of the trial court to place into the record any enhancement or mitigating factors as well as the reasons for the sentence, in order to ensure fair and consistent sentencing. The court noted that it was critical for a trial court to articulate fully and coherently the various aspects of its decision as required by statutes and case law. The court noted that the trial court failed to differentiate between diversion and probation or any other type of alternative sentence and more specifically the trial court did not mention diversion or probation, as the court simply stated that the court had considered an alternative sentence to incarceration without providing a full analysis of the statutory considerations for imposing confinement.

The trial court's decision was therefore reversed and the case remanded for the trial court to make its sentencing determinations based upon its factual findings and the appropriate sentencing considerations.

PRACTICE POINT: Even though general sessions judges are not courts of record, all of the sentencing principles discussed are important considerations for general sessions judges to consider and reflect upon in making appropriate decisions about sentencing, including alternatives to incarceration and utilization of any programs available to the court that would be in the best interest of achieving justice in each factual situation. This is a time when considerations of reform in the criminal justice system are being considered, and each court can go a long way in ensuring fairness and justice by doing a fair and reasonable analysis of the objectives of statutory principles and making a proper application of the principles to the facts in each case.

State v. Wilson (Tenn. Cr. App. 11/19/20)

DENIAL OF DIVERSION: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING JUDICIAL DIVERSION TO THE DEFENDANT, INCLUDING CONSIDERATION OF THE DEFENDANT'S PRIOR JUVENILE RECORD WHICH ESTABLISHED THAT THE DEFENDANT WAS IN STATE CUSTODY AND

CONFINED AT WILDER YOUTH DEVELOPMENT CENTER WHEN HE COMMITTED THE INSTANT FELONY OFFENSES

FACTS: The factual bases for the defendant's plea of guilty were that, on 9/22/19, six juveniles and two adults, including the defendant, attacked Graylon Butler, an employee at Wilder Youth Development Center, punching and kicking him in the face and body and attempting to take the security keys from him. The facts established that the juveniles became very destructive, busted a door open, and began to riot along with several other individuals throughout the facility, running from building to building, climbing on top of roofs and vandalizing several doors and windows and causing extensive damage to the buildings of the facility totaling \$32,115.00. Mr. Butler was checked out by EMS personnel and taken to the hospital by his personal vehicle. Pursuant to the plea agreement, the parties submitted to the trial court the issue of whether defendant would receive judicial diversion pursuant to TCA 40-35-313.

The presentence report indicated the defendant was eighteen years old at the time of the offenses, had no prior adult criminal record, that the defendant did have records of delinquent acts which would constitute felonies if committed by an adult and that the presentence report had classified the defendant as a "high for violence risk level." The report also indicated that the defendant had been expelled from high school, and had not obtained a GED, was kicked out of an inpatient drug center in 2016 for fighting and being out of the area trying to see females, had begun using marijuana at age thirteen and non-prescribed pills when he was seventeen. At the time of sentencing, the defendant lived with his mother and siblings and had been employed at a tire store for approximately one year in 2016-2017, but that he quit because he got tired of it.

The trial court found that the defendant was not a proper candidate for judicial diversion based upon the fact that he was "under the watchful eye of the State of Tennessee" at the time of the offenses so there were strong questions about his "amenability to correction." The court noted that the defendant was guilty of crimes that if committed by an adult would be felonies and that he assaulted people and had done great damage to property. The court noted that the social history did not bode well for him because of his history of expulsion and drug problems and that the deterrent value of incarceration of the defendant would be great in regard to people in similar circumstances in juvenile detention. The court concluded that the defendant

was not amenable to correction and therefore found that he was not a good candidate for judicial diversion.

HELD: The trial court did not abuse its discretion denying judicial diversion pursuant to TCA 40-35-313. The court noted that the trial court clearly considered and weighed all the appropriate factors under the law and therefore the trial court’s decisions was entitled to a presumption of reasonableness under prior case law.

The defendant argued that the trial court had improperly considered his prior juvenile record and that the proof is not sufficient for the same, but the court found that reliable hearsay could be used at a sentencing hearing and the presentence report stated that defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult.

The defendant also argued that the trial court abused its discretion in failing to consider the “judicially recognized differences between juveniles and adults,” that were utilized by the U.S. Supreme Court in cases such as Roper v. Simmons (2005). The court found that the defendant was an adult at the time of the incident charges and that he had assaulted an employee of the center and engaged in vandalism, rioting, and felony escape. The court noted that judicial diversion is a form of “legislative largess,” to which a defendant is not automatically entitled. The court found that the consequences the defendant was suffering in being denied diversion or deferral were the “direct result of the defendant’s actions and conduct, both as an adult and as a juvenile.”

State v. Robertson (Tenn. Cr. App. 11/20/20)

**FAILURE TO CONSIDER ALTERNATIVE SENTENCING:
COURT OF CRIMINAL APPEALS HELD THAT
WHILE THE TRIAL COURT WAS CORRECT IN
DETERMINING THAT THE DEFENDANT WAS NOT
ENTITLED TO FULL PROBATION BASED UPON
THE AGGRAVATED CIRCUMSTANCES OF THE
OFFENSES, THE TRIAL JUDGE FAILED TO
PROPERLY CONSIDER ALTERNATIVE
SENTENCING, FAILED TO PROPERLY CONSIDER
THE MANDATED RISK ASSESSMENT AND**

OTHERWISE WAS NOT IN COMPLIANCE WITH THE PURPOSES AND PRINCIPLES OF THE SENTENCING STATUTES

FACTS: Defendant in the present case entered an open plea to multiple charges resulting from a high-speed chase through Jackson, Tennessee, which culminated in an automobile crash injuring the other driver and doing damage to a telephone pole and the front porch of a house.

The trial court sentenced the defendant to an effective sentence of eight years of incarceration.

The defendant contended that the trial court erred by denying probation or an alternative sentence, arguing that the principles of sentencing, his youth, and his lack of criminal history made a him a “proper candidate for probation or at a minimum a proper candidate for split confinement.

HELD: The Court of Criminal Appeals found that while the trial court was correct in making a determination that the defendant was not entitled to full probation in this matter, the trial court failed to consider the mandated risk assessment as to statistical information before imposing the defendant’s sentence. The Court of Criminal Appeals also found that a review of the entire record established that the defendant was a favorable candidate for split confinement, which would allow the state to supervise him and also give him the opportunity to work toward rehabilitation while making restitution payments to the victims. The court therefore ordered the defendant’s sentence to be modified to reflect one year in confinement and seven years on supervised probation.

Specifically, the Court of Criminal Appeals held that the trial court had failed to properly consider all of the principles regarding alternative sentencing, including: (1) TCA 40-35-103(1) requires a trial court to consider three factors: (a) whether confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; (b) whether confinement is necessary to avoid depreciating the seriousness of the offense or will serve as an effective deterrence to others; (c) whether less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. (2) The trial court is statutorily obligated to consider the AOC’s statistical information regarding sentencing practice and the record did not establish that the court complied with this duty. (3) The Court of Criminal Appeals found that the record reflected that the trial court had also failed to consider a validated risk and

needs assessment. The court noted that such an assessment is “a determination of a person’s risk to reoffend and the needs that, when addressed, reduce the risk to reoffend through the use of an actuarial assessment tool designed by the department that assesses the dynamic and static factors that drive criminal behavior” (TCA 40-35-207(d)) since the trial court only briefly considered the defendant’s potential for rehabilitation and did not properly take into account that the defendant’s criminal history contained far less than the three prior felony convictions specified by statute to denote defenders who are not favorable candidates for alternative sentencing.

PRACTICE POINT: Though courts of record are obligated to go through certain steps that General Sessions Judges do not, it is important for us to realize the principles of sentencing are applicable to General Sessions Court based upon the fact that we also must be aware of principles, guidelines, factors regarding sentencing, a preference for using pretrial diversion and judicial deferral pursuant to the availability of said programs through legislative acts, and otherwise make a decision that is proper based upon the law and the facts.

State v. Blaylock (Tenn. Cr. App. 5/27/21)

JUDICIAL DIVERSION: COURT OF CRIMINAL APPEALS FOUND THAT THE REPEATED REFERENCE THROUGHOUT THE TRIAL COURT’S RULING ABOUT THE FACT THAT SEXUAL BATTERY WAS “WRONG” INDICATED THAT THE TRIAL COURT WAS NOT APPROPRIATELY REVIEWING THE COMMON LAW FACTORS BUT WAS ATTRIBUTING INAPPROPRIATE WEIGHT TO THE NATURE OF THE CRIME ITSELF, SINCE THE LEGISLATURE HAS SPECIFICALLY ALLOWED FOR JUDICIAL DIVERSION IN CASES OF SEXUAL BATTERY

FACTS: In a case in which the defendant entered a best interest guilty plea with no agreement as to sentence, the trial court denied judicial diversion and ordered the defendant to serve a one-year sentence, suspended to probation. The trial court also ordered defendant to serve periodic

confinement of six weekends in jail over the course of the probation. The defendant appealed arguing that the trial court improperly denied judicial diversion.

HELD: The trial court improperly considered irrelevant factors and did not base its decision to deny diversion on the application of the common law required by Tennessee case law. The Court of Criminal Appeals noted that the trial court abruptly ended the defendant's testimony about his social, mental and physical history, all factors that should have been considered by the trial court in determining whether to grant or deny diversion. The court also found that the record was inadequate for a de novo review by the court because of the court's cutting off the proof of the defendant, and the case was remanded to the trial court with an order that the trial court hold a hearing at which defendant was able to enter evidence about each of the common law factors. The matter on remand would be left to the trial court's discretion as long as the trial court does not consider irrelevant factors.

The court particularly noted the following factors in regard to sentencing when the defendant is eligible for judicial diversion: (1) the appellate courts review the trial court's sentencing decisions under an abuse of discretion standard with the presumption of reasonableness. (2) Judicial diversion is a form of probation that affords certain qualified defendants the opportunity to avoid a permanent criminal record pursuant to TCA 40-35-313(a)(1)(A). If a defendant qualifies for judicial diversion, a trial court may defer proceedings without entry of a judgment of guilty, placing the defendant on probation without categorizing the defendant as a convicted felon. Upon successful completion of the probationary period, the trial court will dismiss the charges and the defendant may seek expungement of the record, which restores the person to the status the person occupied before such arrest or indictment or information. (3) However, if the defendant violates the terms of his or her probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court noted that judicial diversion is a form of a legislative remedy available to qualified defendants who have entered a guilty or nolo contendere plea or have been found guilty of an offense without the entry of a judgment of guilt. (4) A defendant is eligible for judicial diversion if he or she is found guilty or pleads guilty or nolo contendere to a Class C, D, or E felony, has not been previously convicted of felony or Class A misdemeanor, has not been previously granted judicial or pretrial diversion, and is not seeking deferral for a sexual offense. (5) In considering judicial diversion the trial court must consider several common law factors: (a) The accused's amenability to correction, (b) the circumstances of the offense, (c) the

accused's criminal record, (d) the accused's social history, (e) the accused's physical and mental health, and (f) the deterrence value to the accused as well as others. The trial court should also consider whether judicial diversion will serve the ends of justice, the interest of the public as well as the accused. (6) The court noted that failure to consider the common law factors results in a loss of the presumption of reasonableness of the trial court.

In this case, the Court of Criminal Appeals agreed with the defense that the trial court failed to consider and explain how the factors weighed in favor of or against diversion and considered and placed undue weight on irrelevant factors.

The Court of Criminal Appeals noted that the proof showed the defendant had never previously received pretrial or judicial diversion and had no criminal record. The court did find that the defendant's social history was somewhat unclear because when the defendant attempted to introduce evidence regarding his social and family history, the trial court stopped defense counsel instructing him that the only important information was whether the defendant committed the act and if he was remorseful in any way whatsoever. The court noted that the trial court had deemed social and family history information "totally off" base with regard to a determination on diversion.

The Court of Criminal Appeals disagreed with the trial court that judicial diversion serves as condonation of behavior that violates the law. The Court of Criminal Appeals noted when a defendant is granted judicial diversion, he or she is placed on probation and must comply with all manner of probation conditions, including supervision by a probation officer. It is only when the defendant successfully completes probation that the charges will be dismissed and the defendant can seek to have his or her record expunged. The court insisted that judicial diversion is not a lack of consequences for one's actions, but "a one-time opportunity for certain defendants to avoid a permanent criminal record." The court stated that "when properly applied, the law of diversion demands that anyone who squanders the opportunity by violating the conditions of probation, will be held accountable."

The Court of Criminal Appeals reversed the trial court's judgment denying judicial diversion and remanded the case to the trial court for further proceedings consistent with the opinion.

State v. Mehdi (Tenn. Cr. App. 5/7/21)

VIOLATION OF PROBATION

FAILURE TO REPORT BY “HOMELESS” DEFENDANT: NO ABUSE OF DISCRETION BY TRIAL JUDGE IN REVOKING DEFENDANT’S PROBATION AS THE CONCLUSION OF FAILURE TO REPORT WAS SUPPORTED BY THE FACTS

FACTS: On 11/8/18, the defendant plead guilty to identity theft with an agreed sentence of three years, to be served on probation. The defendant was to notify his probation officer about any change of residence or employment and report to his probation officer as instructed.

On 11/28/18, the defendant’s probation officer filed an affidavit stating that the defendant was instructed to attend probation orientation on 11/15/18 but failed to do so and that upon checking for the defendant at his last known address was informed that the defendant did not reside at the address, concluding that the defendant’s whereabouts were unknown. The trial court issued a warrant for the defendant’s arrest on 2/26/19.

At the hearing on 6/21/19, the defendant explained why he failed to meet with his probation officer, noting that on the day he was released from jail he called “this number” and spoke with a man and that the man advised defendant he was not on his caseload. The following day the defendant went to the courtroom where he had been sentenced looking for the probation officer where he spoke with a bailiff who advised him of some rooms where the probation officer might be located. The defendant was unable to find his probation officer and nothing else was done for a few months when he learned of the probation violation warrant. Defendant advised that this was his first probation sentence, and when asked by the judge what the defendant thought would happen when he did not report, he replied, “I knew they’d probably put a warrant or something on me and then I’d just have to deal with it when it happened.” He explained, “I was out there trying to live, man. I was out there trying to find me some work, and survive.”

The trial court found the defendant had violated probation by failing to report to his probation officer and ordered him to serve the three-year sentence in confinement.

HELD: The Court of Criminal Appeals found that the record in the case provided “substantial evidence to support the trial court’s revocation of probation.” The court noted that the defendant admitted that he did not

report to his probation officer as required and that based upon the defendant's testimony it was clear the defendant understood he needed to meet with his probation officer and the consequences of failing to do so. The court noted that the defendant had stopped making any attempts to contact his probation officer and offered little explanation of why he abandoned his attempts to report, which supported the trial court's conclusion that the defendant violated the condition of probation requiring him to report to his probation officer. The court also noted that he was serving a separate probation violation for failure to appear in another matter, further exhibiting a pattern of difficulty with compliance. The Appellate Court noted that the trial court had retained discretionary authority to require the defendant to serve the entire sentence or a portion thereof.

State v. Davis (Tenn. Cr. App. 10/16/20)

PROBATION VIOLATION: REVOCATION OF THE DEFENDANT'S PROBATION WAS REVERSED AND REMANDED FOR A NEW PROBATION HEARING DUE TO THE FACT THAT THE TRIAL COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS BY FAILING TO GIVE HIM NOTICE OF HIS PROBATION VIOLATION AND AN OPPORTUNITY FOR A FULL REVOCATION HEARING

FACTS: On 11/9/18, the defendant plead guilty to driving under the influence and was sentenced to eleven months and twenty-nine days in a workhouse, which the court suspended to eleven months and twenty-nine days on supervised probation. A supplemental probation order required the defendant, among other things, to report to immigration authorities and update his address with immigration authorities. The trial court placed the defendant on the docket for 12/10/18 at which time he was to provide to the trial court proof that he had abided by the supplemental probation order.

On 12/10/18, defense counsel informed the trial court that the defendant had been directed by immigration authorities to go to their office in order to comply with the supplemental probation conditions, and the trial court reset the hearing for 12/13/18. There was some confusion at subsequent hearings, resulting in the case being reset. On 1/7/19, defense counsel requested that the court again reset the case to 1/24/19, at which

time the prosecutor informed the trial court that she believed the defendant's failure to register with immigration authorities constituted a "valid basis" to revoke his probation. The prosecutor told the trial court that she had "been told by two different agents that the [defendant]'s not in the system at all and that they can confirm that he has not reported and they have no record of him," and she added that he had not abided by the judge's instruction to go report and that they have no record of him.

Following the discussion, defense counsel questioned whether it was necessary to have a hearing of some type and the prosecutor stated that the violation would be filed and then the case would be set on the docket. The trial court responded that the trial court "doesn't think it's necessary." On 1/7/19, the trial court entered a written order stating in its entirety that the "defendant is in violation of this court's order to report to ICE as part of the probation. As such, the defendant is in violation of probation, and probation is hereby revoked."

On 1/8/19, the court told the defendant that part of his probation was that "you were to get right with the Federal government and you did not do so." The court then found he was in violation of his probation and that he was ordered to serve the remainder of his time. The trial court on 1/8/19 entered an "order revoking suspension of sentence and directing execution of judgment of conviction." The defendant filed a timely notice of appeal on 1/23/19.

HELD: 1.) In regard to defendant's argument that the Supremacy Clause of the United States Constitution preempted the trial court from requiring the defendant to comply with federal immigration laws, the Court of Criminal Appeals held that the court was unable to find any Tennessee cases directly related to the instant case, but found persuasive authority in other jurisdictions. The court noted that in the present case the special probation condition "simply echoed existing federal requirements pertaining to immigration." The court noted that the trial court's supplemental condition that he follow a law that he was already supposed to be following is "markedly different than the State of Arizona creating new state crimes or new state penalties with regard to federal law." The court found that the trial court had merely emphasized that the defendant should follow the federal laws he was already required to follow by virtue of being in the United States, and therefore the supplemental probation conditions were not preempted by federal law and did not violate the Supremacy Clause.

2.) The court also held that the defendant had failed to cite any relevant legal authority explaining how the trial court had a duty to outline exactly what steps the defendant needed to follow to comply with the probation

conditions or how the court's inability to do so violated his due process rights, therefore waived this part of his appeal.

3.) In regard to the defendant's argument that the trial court violated the defendant's due process rights by failing to give notice of his probation violation and providing a revocation hearing, the Court of Criminal Appeals found that it was clear from the record that the defendant was "not remotely afforded a probation revocation hearing." The court noted that when defense counsel questioned whether a hearing needed to be conducted, the trial court responded that a hearing was not necessary. The court noted the defendant did not present any evidence and in fact that the only thing the trial court considered was the prosecutor informing the trial court she had "been told by two different agents that [the defendant]'s not in the system at all and that they can confirm that he has not reported and they have no record of him."

The Court of Criminal Appeals concluded that the defendant's due process rights were undoubtedly violated and therefore the court reversed the revocation of probation and remanded for a probation of revocation hearing "in which the defendant is afforded the minimum due process rights," including (1) written notice of the claimed violation(s) of probation; (2) disclosure to the probationer of evidence against him or her; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact-finder regarding the evidence relied upon and the reasons for revoking probation.

State v. Hernandez (Tenn. Cr. App. 10/29/20)

JUDICIAL ETHICS

BAIL PROCEDURE IN GENERAL SESSIONS COURT

In the Criminal Law Update for February 2021, I included a summary of the ongoing federal case originating in Hamblen County, Tennessee, in the case of Michelle Torres, et al. v. W. Douglas Collins, et al., United States District Court Eastern District of Tennessee (Greeneville Division) (11/30/20). This case emphasized the finding of a federal judge who held that bail practices of courts violate the rights of criminal defendants to substantive due process when a judge or magistrate fails to make an individualized determination that the defendant poses a risk of harm to the public's safety and/or fails to consider the defendant's ability to pay, among other issues.

Partially in response to this case and to the substantial concerns that have been voiced across the state by judges, lawyers, the media and organizations seeking reform in the criminal justice system, TGSJC President, Judge Lynda Jones, appointed a bail bond committee to address these issues. The committee consisted of Judge Andy Brigham, Judge Lynda Jones, Judge Vicki S. Snyder, Judge Lila Statom, Judge Dwight E. Stokes, Commissioner Lorrie Mabry and Commissioner Daniel Masten. This committee led by Judge Andy Brigham worked diligently and received extensive input from several sources, including the Board of Judicial Conduct, numerous judges, and law school personnel. The committee also reviewed TN statutes and case law. The result is entitled "Best Bail Practices – 2021", and this document has been forwarded to General Sessions Judges in Tennessee and will be summarized in a presentation by the committee, led by Judge Andy Brigham, at our October 2021 conference.

Other suggested reading includes:

- 1) - "Getting Clients Out of Jail: Bail Statutes vs. Reality," by Wade V. Davies, Tennessee Bar Journal Volume 57, No. 4 (July/August 2021), pp. 42-44.
- 2) – "Fix the Broken Bail System," Editorial in Johnson City Press (August 21, 2021)
- 3) – "Judges to Study Bail Law After Probe," by Jamie Satterfield, Knoxville News Sentinel (March 7, 2021)
- 4) – "The Economics of Bail in Pretrial Detention," by Patrick Liu, Ryan Nunn, and Jay Shambaugh (The Hamilton Project, December 2018)

5) – “An Experiment in the Law: Studying A Technique to Reduce Failure to Appear in Court,” by Thompkins, Bornstein, Herian, Rosenbaum and Neeley, Court Review, The Journal of the American Judges Association, Vol. 48 (pp 96-106).

BOARD OF JUDICIAL CONDUCT COMPLAINT AGAINST TRIAL JUDGE AND NECESSITY OF RECUSAL ISSUE

FILING COMPLAINT AGAINST JUDGE WITH BOARD OF JUDICIAL CONDUCT: RECUSAL IS NOT REQUIRED SIMPLY BECAUSE PERSON SEEKING RECUSAL FILED COMPLAINT AGAINST JUDGE WITH BOARD OF JUDICIAL CONDUCT

FACTS: In a Tennessee medical malpractice case, the medical malpractice action was dismissed but the trial court retained jurisdiction over a motion for sanctions against the plaintiff’s former attorney, Brian Manookian. The issues in the sanctions matter revolved around certain alleged misrepresentations made to the trial court by the attorney during his representation of the plaintiff in the underlying medical malpractice case.

On 12/17/20 and before any hearing on the motion for sanctions was heard by the trial court, Manookian filed a complaint with the Board of Judicial Conduct accusing Judge Jones of various alleged misdeeds which were wholly unrelated to Mr. Manookian personally, to any personal dealings he had with the judge, or to the matter pending before the trial court. Subsequently, Manookian filed a motion to disqualify the judge in the trial court and sought recusal of the judge from the case.

HELD: The Court of Appeals held that the trial court’s denial of Mr. Manookian’s “motion to disqualify” was affirmed, based upon the fact that there was no evidence before the Court of Appeals that Judge Jones possessed any actual bias or prejudice against Mr. Manookian. The court noted that the complaint accused Judge Jones of various alleged misdeeds which were wholly unrelated to Mr. Manookian personally, to any personal dealings he had with the judge, or to the matter pending before the trial court.

The Court of Appeals noted that, as previously explained by the Tennessee Supreme Court, the judicial qualification standards do not require recusal simply because the person seeking recusal has filed some type of

complaint against the judge. The court noted that “the concern of strictly requiring recusal in such circumstances, of course, is that it could foster abuse of the judicial system by encouraging people to judge-shop and manufacture recusals.” As a general matter, absent some additional showing of bias or prejudice resulting from the complaint against the judge, the complaint standing alone will not ordinarily require recusal.

Salas v. Rosdeutscher, M.D., ET AL (Tenn. Court App. 3/4/21)

FAILURE TO DISCLOSE PERSONAL RELATIONSHIPS

CHURCH MEMBERSHIP: NO FACTS ESTABLISHED ANY REASON THAT THE JUDGE’S IMPARTIALITY COULD REASONABLY BE QUESTIONED BASED UPON THE CHURCH MEMBERSHIP OF THE JUDGE OR ANY OF HIS RELATIVES

FACTS: The case arose out of the fact that the defendant entered onto the grounds of Covenant Presbyterian Church in Nashville where the defendant had previously been a deacon and his being charged with aggravated criminal trespass after he had been repeatedly warned to stay off the property. The defendant apparently became convinced that the church’s elected group of ruling elders was protecting a former member and deacon of the church who was excommunicated from the church. The defendant believed that the church was somehow involved with a coverup of child abuse which to some extent also involved the Metro Nashville Police Department and other government officials. Police had warned the defendant if he went to the church again, he would be charged with criminal trespass. The defendant was tried and convicted of the indicted charge by a Davidson County Criminal Court jury in September 2017, and sentenced to eleven months twenty-nine days to be served on supervised probation. Subsequently, a probation violation warrant was filed against the defendant.

The trial judge who had presided over the original trial recused himself from further proceedings, noting in a footnote in the order of recusal that the defendant’s latest batch of emails contained photographs of the judge and a claim that the judge should have recused himself because the judge’s uncle at one point had been a member of the church.

On appeal, the defendant claimed that he was denied a fair trial due to

the trial judge's relationship with several individuals and that the trial judge was prejudiced against him and should have recused himself due to his association with various members of Covenant Presbyterian Church. The defendant also maintained that the trial judge who presided over the probation revocation also should have recused herself due to the ongoing influence of people involved with the case.

HELD: The Court of Criminal Appeals held that the defendant never brought up the trial judge's relationships with the various individuals prior to, during, or immediately after the trial and did not file any motion for the judge to recuse himself. The court agreed with the state that the defendant had effectively waived the issue but that the court would review the claims by plain error review.

The Court of Criminal Appeals held that the defendant had failed to show "any reason that the judge's impartiality could reasonably be questioned." The court noted that the judge himself had brought up the fact that he and the magistrate were at one point and time "members of the same Baptist church after the defendant elicited from the magistrate that he began attending the church in September 2007, after many years spent at Woodmont Baptist Church."

The Court of Criminal Appeals found that there was "absolutely nothing to indicate that their membership together in the same church rendered the judge partial." The court also noted that there was no reason to think that any kind of relationship with the church by any other member of the judge's family could in any way be shown to have affected the judge's impartiality.

The court noted that under Tennessee Supreme Court Rule 10, that "a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." The court also stated that "the test for recusal requires a judge to disqualify himself or herself in any proceeding in which 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."

The Court of Criminal Appeals simply concluded that the defendant had not shown that any clear and unequivocal rule of law was breached, that any substantial right of the defendant's was adversely affected, or that consideration of the error was necessary to do substantial justice. There was absolutely no showing of any reason that the judge's impartiality could be questioned.

INAPPROPRIATE USE OF SOCIAL MEDIA

FACEBOOK AND TELEPHONIC COMMUNICATION: JUDGE'S EX PARTE FACEBOOK AND TELEPHONIC COMMUNICATIONS WITH A FEMALE DEFENDANT FACING CRIMINAL CHARGES IN THE JUDGE'S COURT CONSTITUTED INAPPROPRIATE SOCIAL MEDIA COMMUNICATIONS AND RESULTED IN HER FORWARDING INAPPROPRIATE EXPLICIT PHOTOGRAPHS IN RETURN

FACTS: (1) The Judicial Discipline and Disability Commission of Arkansas received stipulations of fact which included the judge engaging in ex parte Facebook Messenger and telephonic communications with a female defendant in his court. On Facebook, the defendant revealed to the judge that she had criminal charges including a potential probation revocation in his court, and the judge failed to immediately recuse himself from the case.

Later, the judge did recuse himself from her case due to the obvious conflict, but the judge continued to send communications with her, including messages that he was going to check into the cases and try to help see that she did not get “buried in fines,” and suggesting he wanted to see her get all of this behind her.

Subsequently, the judge received explicit photographs from the defendant to his cell phone and a communication to her indicated that he was requesting additional photographs of the same nature.

(2) A separate alleged fact pattern indicated that the judge's wife was cited for a traffic offense on 9/28/17 following which the judge contacted both the mayor and the chief of police and indicated that the police department was out of control and that there should have been “professional courtesy” extended to the judge and his wife about her traffic offenses.

The judge used extremely unprofessional language and extremely poor demeanor regarding the incident including the fact that he was going to create problems for the officers involved as he sought retribution for their acts.

HELD: The Judicial Discipline and Disability Commission concluded that the judge's conduct had violated the following:

(1) Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

(2) Canon 2: A judge shall perform the duties of judicial office impartially, competently, and diligently. The commission found that the judge had violated the rules regarding impartiality and fairness, bias, prejudice and harassment, allowing external influences on his judicial conduct, participating in improper ex parte communications with the defendant in his court, and in failing to disqualify himself from any actions pertaining to her charges.

The consequences were that the judge was required to resign from his position and concede that he would no longer be eligible to serve in a judicial capacity in the State of Arkansas.

In Re: Honorable John Throesch, JDDC Case No. 18-274 (Arkansas 5/1/20)

SEXUAL CONVERSATIONS BY A JUDGE ON SOCIAL MEDIA: ENGAGING IN SEXUAL CONVERSATIONS AND SOLICITING PICTURES BY A JUDGE WHILE IN HIS JUDICIAL ROBE WOULD APPEAR TO A REASONABLE PERSON TO BE COERCIVE, PARTICULARLY WHEN THE RECIPIENTS OF THE COMMUNICATIONS INCLUDE FORMER LITIGANTS AND PERSONS WHOSE JOB RESPONSIBILITIES INTERSECT WITH THE COURT SYSTEM

FACTS: A Tennessee judge participated in inappropriate messages sent to multiple women on various social media platforms from 2015-2020.

Recipients of the messages included, among other persons, a legal professional employed by a law firm that conducts business in the judge's court and a litigant who formerly had a child custody matter before the judge. The messages included content ranging from flirtatious to overtly sexual. Most of the communications depicted the judge in his judicial robe. The conduct included "engaging in sexual conversations and soliciting pictures" while in the judge's judicial robe.

HELD: The Board of Judicial Conduct reprimanded the judge for his conduct and came to the following conclusions:

(1) Judges are prohibited from engaging in personal activities that would appear to a reasonable person to be coercive. The court noted that engaging in the sexual conversations and soliciting pictures while in his judicial robe would appear to a reasonable person to be coercive particularly since the recipients were former litigants or those with job responsibilities related to the court system.

(2) Judges are prohibited from engaging in personal activities that would appear to a reasonable person to undermine the judge's integrity and impartiality. The BOJC noted that the judge's inappropriate use of social media has created ethical dilemmas for attorneys who litigate before the judge, especially in domestic matters. The BOJC noted that some of the attorneys had to seek advice from the Board of Professional Responsibility regarding their own ethical obligations to disclose to clients what they know about the judge's activities.

(3) A participant in a legal proceeding, especially in a domestic relations matter, who learns that the judge sent inappropriate messages to women on social media may reasonably perceive that the judge is biased or prejudiced, regardless of whether biased or prejudice actually exists. The board noted that "while there is nothing to suggest that you were biased or prejudiced in any case, such litigants may reasonably question whether they received impartial and unbiased treatment."

(4) Judges are prohibited from engaging in personal activities that interfere with the proper performance of their duties. The inappropriate social media communications could well interfere with the judge's ability to preside over future litigation. The board noted that the judge had already had to recuse himself in a case after a party learned of his social media activities and asked the judge to step aside. The court further noted that while judges may utilize social media, they must at all times remain conscious of the solemn duties they may later be called upon to perform.

(5) Judges are required to act all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The board noted that inappropriate messages such as those sent by the sitting judge do not inspire such confidence.

The board issued a public reprimand for the judge which included a suspension of thirty days which will be held in abeyance provided there were no meritorious complaints; the defendant would refrain from using a picture of himself in a judicial robe as a profile picture on any social media

platform unless conducting court business; (2) the judge would complete a judicial ethics program addressing issues in the context of social media; (3) the judge was to recuse himself as a matter of course from all cases involving attorneys who will be identified separately regarding these legal issues. The board concluded that “your use of social media has reflected poorly on you as a jurist.” The board concluded: “Every time a judicial officer engages in misconduct, he or she spends the goodwill of the judiciary as a whole.”

In Re: Public Reprimand of Judge Jonathan Lee Young, File No. B20-8220 State of Tennessee Board of Judicial Conduct (10-5-20)

SYSTEMIC RACIAL INJUSTICE: ON THE STREETS AND IN THE COURTS

“EQUAL JUSTICE UNDER LAW”: STATE SUPREME COURTS AND INDIVIDUAL JUDGES SPEAK OUT AS OUR NATION IS “ROCKED BY THE WANTON AND VIOLENT DEATHS OF YOUNG, BLACK LIVES”

State Supreme Courts and individual judges and justices have issued statements and proclamations across the nation during 2020 and 2021 in regard to the prevalence of systemic racism in the criminal justice system and in the juvenile justice system which has resulted in a disproportionate number of people of color in our prisons and in our court rooms. The following is a sampling of the statements issued across the nation, bringing much needed attention to the horrific issues which still plague our nation, including the State of Tennessee.

Statement of the Tennessee Supreme Court on its commitment to equal justice:

The Latin phrase that adorns the seal of the judiciary for the State of Tennessee means, “Let justice be done, though the heavens fall.” In many instances over the past few months, it seemed the sky was falling. In March, hundreds in middle

Tennessee suffered the most devastating tornado to hit the area in twenty years. Only days later, Covid-19 officially was named a pandemic, and we sought to navigate for the first time what “open courts” look like during a massive health crisis. Recently, a series of tragic deaths have reminded us that racism and injustice remain a mortal threat to the lives of Black people in our country.

Racism still exists and has no place in our society. Upon entering service in the judiciary, we swore to uphold the constitutions of the State of Tennessee and the United States. Thus, it is our moral obligation and our sworn duty to ensure that the people of Tennessee receive equal protection of its laws. Justice must be for all.

To do our part, we have provided training to Tennessee judges on implicit bias, and we will continue to do so. Our commitment to equal justice led the Supreme Court over ten years ago to establish the Access to Justice Commission. In light of recent events, the Access to Justice Commission is already having conversations about racism in the justice system and the importance of assuring the public of the judiciary’s commitment to access, fairness and justice for all. We are directing the Commission to establish a new initiative to identify and eliminate barriers to racial and ethnic fairness and justice. The Access to Justice Commission will lead the search for and advise the Court about how to accomplish change in areas of education and training, our judicial environment, and court policies and procedures that in any way lead to racial bias.

We are striving toward a better tomorrow and know there is much more work to do. Change is needed and only can happen through listening as well as valuing and respecting a myriad of voices with different perspectives and views. Our commitment today is another step in what will be a long, sustained journey.

Statement by the Supreme Court of Rhode Island

To the Members of the Judiciary and the Bar:

Once again our nation is rocked by the wanton and violent death of young, black lives. Once again, we are deeply saddened and angered as we grieve with the families of George Floyd, Breonna Taylor, Ahmaud Arbery, and Rayshard Brooks. Yet as we mourn the needless loss of life, those of us in the legal community must face the painful reality that racism continues to infect our system of justice.

The lodestar of our legal system is engraved above the front entrance of the United States Supreme Court: “Equal justice under law.” Equal justice, however, is not a prize to be won and then displayed proudly. Rather, it is a challenge that we must confront each and every day in our courts, our law offices, our boardrooms, and wherever it is that we practice or seek to adhere to the law.

Although the primary focus of recent demonstrations and protests has been on law enforcement, it behooves us to constantly re-examine our role in the criminal justice system. We believe our system of justice is the finest in the world, but it is not perfect. It is created and applied by men and women, each of whom brings to their responsibilities all of their life experiences, including their biases, both conscious and unconscious.

Overt prejudice may be relatively easy to identify and eradicate: implicit racism is far more insidious. In society at large, its consequences can be seen in inadequate housing, educational, health, and employment opportunities. In the criminal justice system, it results in a disproportionate number of people of color in our prisons, either under sentence or awaiting trial for lack of ability to post bail, critically because of greater arrests compared with society at large.

Our goal must be to achieve a system of justice that is accessible to all and treats all persons equally. We ought not lose sight of the fact that our courts are largely populated by dedicated attorneys, efficient court personnel, honest jurors, and fair-minded judicial officers. Yet bias does exist, and we all must remain vigilant to recognize it and ensure that it plays no role in our court proceedings.

Lawyers have the opportunity to truly level the playing field merely by providing pro bono or limited scope representation to those

least able to afford legal services. Judicial officers have the opportunity, indeed the responsibility, to ensure that all persons are treated fairly, impartially, and with dignity and respect. We cannot allow “equal justice under law” to become a mere platitude. We must instead strive to confront prejudice and racism, implicit or otherwise, wherever it lurks. It will undoubtedly require uncomfortable conversations and honest introspections. Only then will we earn the confidence of all litigants in our courts. Only then can we fulfill the promise set forth in the preamble to the United States Constitution to “establish justice.”

Statement by the Supreme Court of the State of Washington

Dear Members of the Judiciary and the Legal Community:

We are compelled by recent events to join other state supreme courts around the nation in addressing our legal community.

The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding. But recent events have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge: the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.

The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.

As judges, we must recognize the role we have played in devaluing black lives. This very court once held that a cemetery could lawfully deny grieving black parents the right to bury their infant. We cannot undo this wrong --- but we can recognize our ability to do better in the future. We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and

support court rules in a way that brings greater racial justice to our system as a whole.

As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a justice system must operate. Too often in the legal profession, we feel bound by tradition and the way things have “always” been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly.

Finally, as individuals, we must recognize that systemic racial injustice against black Americans is not an omnipresent specter that will inevitably persist. It is the collective product of each of our individual actions --- every action, every day. It is only by carefully reflecting on our actions, taking individual responsibility for them, and constantly striving for better that we can address the shameful legacy we inherit. We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism.

As we lean in to do this hard and necessary work, may we also remember to support our black colleagues by lifting their voices. Listening to and acknowledging their experiences will enrich and inform our shared cause of dismantling systemic racism.

We go by the title of “Justice” and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative.

PRACTICE POINT: As judges in the General Sessions Courts and Juvenile Courts of the State of Tennessee, we must likewise commit and dedicate ourselves to our moral obligations and our sworn duty to ensure that the people of Tennessee receive equal protection of its laws and that we address the systemic injustices of racism which persist in Tennessee today.

ZOOM HEARINGS AND ETHICS ISSUES

CRIMINAL “ZOOM” DOCKET: JUDGE ABDICATED HER RESPONSIBILITY TO ENSURE THAT ALL

PERSONS ARE GIVEN AN OPPORTUNITY TO BE HEARD BY NOT ALLOWING DEFENDANT IN THE ZOOM “WAITING ROOM” TO JOIN THE ZOOM DOCKET

FACTS: Judge Debra Burchett of Cowlitz County, Washington, was conducting a criminal docket by Zoom on 2/26/21, when the court clerk alerted the judge that there was one more person in the Zoom “waiting room” and asked if the defendant should be “let in” so that the judge could speak with them and address their case. The judge was tired and simply responded that she “just can’t.” The clerk indicated to the judge that they would need to see who it was and maybe reset the case and noted that the person in the Zoom waiting room had renamed herself “Help I couldn’t log in at 2:00 p.m.” The clerk noted that because one person from the 2:00 p.m. docket had failed to appear and a warrant had been issued for her arrest that the clerk surmised it could be that individual. The judge noted that the individual must be pretty sharp to rename themselves on the Zoom call and said, “You almost hate to not talk to them if they can figure that out.” The judge denied the clerk’s request to allow the person into the waiting room, and the judge said they “would have to do the bench warrant docket,” indicating that the person that didn’t make it to the docket would just have to be arrested and subsequently go through the bench warrant docket.

HELD: By this conduct and other conduct related to this judge, the State of Washington Commission on Judicial Conduct found that the judge had engaged in a pattern of misconduct that went to the core duties of her judicial position. In regard to this specific conduct, the commission stated: “By choosing not to hear from a person who seemed to be a litigant attempting to participate in a hearing via Zoom, the judge abdicated her responsibility to ensure the right to be heard.”

In addition to this Zoom hearing issue, the judge was also cited for other issues including failing to advise defendants at probation review hearings of their rights, including their right to counsel and the right to a hearing to contest the allegations; the judge had conducted an ex parte investigation into whether the defendant in a case had actually performed community service hours and that she intended to recommend significant jail time on the case, prior to realizing she needed to recuse herself from the case; at arraignment hearings, the judge was eliciting statements from defendants charged with driving offenses against their interest in violation of their Fifth amendment right to remain silent by asking them questions

which would result in self-incriminating statements in the presence of the district attorney; the judge had also recommended specific businesses to criminal defendants in regard to issues such as insurance.

The judge did admit and recognize that she had failed to conduct herself appropriately, and because she had no previous misconduct, the commission gave her a public reprimand and required her to continue to work with a mentor judge approved by the commission and perform ethics training relevant to the misconduct. The judge further agreed to not retaliate against any person known or suspected of cooperating with the commission regarding the charges and agreed not to repeat such conduct in the future.

In Re: The Matter of the Honorable Debra Burchett, CJC No. 9848-F-191 (Commission on Judicial Conduct in the State of Washington, 4/23/21)

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