# TENNESSEE GENERAL SESSIONS JUDGES CONFERENCE

## FEBRUARY / MARCH 2022

## Criminal Law Update
## Murfreesboro, Tennessee

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# CRIMINAL LAW UPDATE
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## *ARREST WARRANT*

### CONTENTS OF ARREST WARRANT: ARREST WARRANT AFFIDAVIT DID NOT CONTAIN ANY MISLEADING INFORMATION AND THE TRIAL COURT PROPERLY CONCLUDED THAT THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS "A SYNOPSIS OF INFORMATION DERIVED FROM MULTIPLE LINES OF INVESTIGATION" AND ALTHOUGH THE AFFIDAVIT DID NOT CONVEY THE INFORMATION PERFECTLY, PERFECTION IS NOT REQUIRED

**FACTS**: In a case involving charges of aggravated kidnapping, domestic assault, and other charges, the defendant moved to suppress the evidence seized from the defendant's home following his arrest based upon his argument that the affidavit in support of the arrest contained information that the affiant knew to be false and because the officers executing the arrest warrant did not possess a reasonable belief that the defendant was at home at the time of the officers going into the residence of the defendant.

At the hearing on the defendant's motion to suppress any evidence seized as a result of the execution of the arrest warrant, Officer Carver explained that the alleged victim's sister had called to report that the victim had contacted her and stated that she was assaulted and for her to please call the police. The officers arrived at the scene and attempted to make contact multiple times by knocking on all the doors and looking in the windows, "just trying to assess the scene." The officers attempted to call the victim multiple times and when she was ultimately reached, she advised the officers that she was ok when they asked if she was ok. When asked to step outside so officers could lay eyes on her to do a welfare check, the victim paused for multiple seconds and then said, "I can't." Officers could hear whispering in the background but testified they were advised not to enter the residence.

The facts showed Detective Ferrell made telephone contact with the victim's sister and also spoke with the victim's mother who informed officers that the victim wanted to seek medical treatment and that the suspect would not let her leave. The detective filled out the affidavit of arrest from information that he gleaned during the conversations and from information he received from officers who responded to the scene. Detective Ferrell acknowledged that he did not personally speak to the victim at any point before obtaining the warrant but did view photographs that the victim had sent to her sister relating to her being beaten by the defendant.

At the conclusion of the suppression hearing, the trial court observed that the affidavit in support of the arrest warrant was "a synopsis of information derived from multiple lines of investigation" and even though the affidavit did not contain the information "perfectly", the trial court found that "perfection is not required." The trial court concluded that the affidavit provided probable cause to justify the issuance of the warrant and found that the "entire situation is an exigency," where there was some evidence of "kidnapping" and the involvement of a gun. The trial court also determined that the officers had a reasonable basis for believing the defendant was inside the premises and the officers had a legal right to enter the premises with the warrant.

**HELD**: The Court of Criminal Appeals found that "the information contained within the affidavit was accurate and sufficient to support a finding of probable cause." The court found that even though Detective Ferrell did not explicitly indicate that the information in the affidavit was gleaned from other officers and from specific witnesses, his references to information gleaned by officers and his references to "they" and the victim's sister created a reasonable inference that the information was not obtained by Detective Ferrell directly but was information properly obtained from witnesses such as other officers and the victim's family.

The court found that "the facts and circumstances surrounding the giving of information, is generally relevant to the issue of credibility," and the "omission of information concerning the informant's status is not always fatal to the search warrant". The court noted that the omission from the affidavit of the victim's statement to her mother and Officer Carver that she was "fine" or "ok" did not have any impact on the actual existence of probable cause considering all the attendant circumstances and information that was properly ascertained by Detective Ferrell.

The court noted Tennessee Rule of Criminal Procedure 3 allows for hearsay evidence to establish the credibility of both the informant and the informant's information. Also, TRCP Rule 4 provides that the finding of

probable cause shall be based on evidence which may be hearsay in whole or in part provided there is a substantial basis to believe (1) the source of the hearsay is credible and (2) there is a factual basis for the information furnished. The court concluded that the information contained within the affidavit was accurate and sufficient to support a finding of probable cause.

The Court of Criminal Appeals also stated that it agreed with the trial court that the totality of information communicated to the officers provided the officers with reason to believe that the defendant was home when they executed the arrest warrant.

In regard to the related issue of whether or not the victim's consent was sufficient to permit the search of the residence, the Court of Criminal Appeals found that "because the defendant was absent from the residence he shared with the victim due to his lawful arrest, her consent to search the residence, given in his absence, was sufficient to permit the officers to search."

State v. Edwards (Tenn. Cr. App. 6/22/21)

## ***CONTRABAND IN A PENAL FACILITY***

### MARIJUANA V. HEMP: COURT OF CRIMINAL APPEALS AFFIRMS CONVICTION OF DEFENDANT FOR POSSESSION OF CONTRABAND IN A PENAL FACILITY SINCE HEMP AND MARIJUANA BOTH CONTAIN CANNABIS, AND THE PROOF ESTABLISHED THAT THE DEFENDANT POSSESSED CANNABIS, AN INTOXICANT, INSIDE THE JAIL

**FACTS**: On March 31, 2017, Deputy Harrison smelled a strong odor of marijuana coming from a secured room occupied by multiple male inmates. Harrison saw the defendant take a puff and pass it to another inmate, and Harrison asked the inmates, "Where's the weed?" The defendant took ownership of the item and said, "Man, it was just weed."

TBI Forensic Analyst Lauren McCormick, an expert in forensic drug analysis, testified that she analyzed the hand rolled cigarette recovered at the jail in 2017 and concluded that the substance was "cannabis". McCormick testified that the tests she performed in 2017, were "industry standard" and

scientifically accepted to determine whether a substance was marijuana. She testified that the testing protocols for cannabis have changed because "industrial hemp" has been legalized and that further analysis is now required to determine if the substance was marijuana or hemp. She testified that she could not now determine if the substance was hemp or marijuana and that the amount of the substance remaining is too small to conduct such a test.

The court noted that, at the time of the offense, legal distinction did not exist between marijuana and hemp, as possession of both substances was unlawful. The court noted that the record reflected at the time of McCormick's analysis in 2017, she concluded the substance was marijuana. On April 4, 2019, the possession of hemp was legalized in Tennessee.

The defendant argued and maintained on appeal that the state had failed to establish he possessed an intoxicant.

**HELD**: The Court of Criminal Appeals held that the evidence in the case provided sufficient evidence for the jury to conclude that the defendant possessed an intoxicant inside the jail. The court noted that the evidence reflected that the officer had the conversation with the defendant regarding weed, that the officer testified that the defendant's face and eyes were red, that the defendant looked slumped and tired, and that the defendant's speech was slurred slightly. The proof was clear that the defendant had been smoking the "weed", which was an intoxicant whether it was marijuana or hemp. The court noted that "hemp" is defined as Cannabis sativa containing not more than 0.3% THC, and marijuana is defined as Cannabis sativa containing greater than 0.3% THC. The court noted that Ms. McCormick had testified that hemp and marijuana were both cannabis and THC is the primary psychoactive component of the cannabis plant. The jury was allowed to determine that the substance nonetheless contained an intoxicant, whether it was marijuana or hemp.

On a related issue, the defendant maintained that the trial court had erred by allowing McCormick's forensic chemistry report as an exhibit because Ms. McCormick had in fact "repudiated" her initial conclusion that the substance was marijuana.

The Court of Criminal Appeals concluded that the defendant had failed to demonstrate an abuse of discretion in the trial court's allowing McCormick's report as an exhibit and allowing the jury to review the report. The court pointed out that McCormick analyzed the substance pursuant to the testing protocols in effect in 2017, concluding that the substance was marijuana under the protocols at the time. In any event McCormick testified that the substance involved was cannabis and that based upon the modified

protocols she could not determine whether the substance was marijuana or hemp. The court found that based upon these conclusions, the trial court did not err in allowing the expert testimony.

**PRACTICE POINT**: This case adds a little bit of information to the hemp v. marijuana debate, making it clear that it is in fact very difficult for even experts to differentiate between marijuana and hemp, and certainly that a human cannot detect the difference by smell, and apparently a K-9 cannot either.

State v. Underwood (Tenn. Cr. App. 12/16/21)

## *DISMISSAL IN THE INTEREST OF JUSTICE*

### "SITTING IN JAIL FOR NEARLY TWO YEARS" DUE TO COVID-19 PANDEMIC DELAY: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE INDICTMENT OF THE DEFENDANT FOR DUI IN LIGHT OF THE DEFENDANT'S ALREADY SPENDING TWO YEARS IN JAIL BASED UPON A PAROLE VIOLATION CAUSED EXCLUSIVELY BY HIS ARREST FOR DUI MISDEMEANOR CHARGES

**FACTS**: The defendant was charged with driving under the influence and violation of the open container law on August 25, 2018. The charge was based on the defendant driving southbound in the northbound lane in Cocke County, and after being stopped by an officer he was very unsteady on his feet, had blood shot eyes and a strong odor of alcoholic beverage on his person. The defendant refused to do any field sobriety tests and refused a breathalyzer test. On 2/11/19, the Cocke County grand jury returned a two-count indictment that charged him with DUI and violation of open container law.

On 3/12/20, the defendant filed a pro se motion to dismiss his indictment, asserting that because it was nineteen months from his arrest date (8/25/20) to the present time frame that his indictment should be dismissed for failure to prosecute within the applicable statute of limitations. The trial court dismissed the motion, finding that the defendant was indicted on 2/11/19 after being arrested on 8/25/18, "well within the one-year statute of limitations."

At the same hearing, the trial court also denied his request to set the trial date for a specific date due to the fact that the Covid-19 pandemic was "blowing up" in Cocke County.

The defendant then made an oral motion to dismiss his indictment "in the light of justice." Defendant argued that he had been in jail since his arrest in August 2018 and that his DUI had been the "sole basis" of his parole revocation. The defendant noted that he had been on parole for twenty-two years and was otherwise doing everything correctly and that since he had been in custody for almost two years he had "done more time than he knew of anybody ever doing on a DUI" and had therefore "paid his burden to the state." At that point, over the state's objection, the trial court dismissed the indictment "in the interest of justice," noting that "the defendant had sat in jail for nearly two years because of this charge" and that had it not been for the COVID-19 pandemic, he would have had a trial scheduled. Trial court also noted that the state had not done anything wrong but entered an order stating that "upon motion of the defendant and after hearing, the charges against the defendant are dismissed, over the objection of the State of Tennessee."

The state filed a timely notice of appeal. The state contended on appeal that the trial court committed error by dismissing the defendant's indictment in the "interest of justice" and asked the Court of Criminal Appeals to reinstate the indictment.

**HELD**: The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in dismissing the defendant's indictment. The Court of Criminal Appeals concluded that the trial court had dismissed the indictment on its authority to do so under Tennessee Rule of Criminal Procedure 48(b), which provides the trial court with the authority to dismiss an indictment if unnecessary delay occurs in bringing a defendant to trial. The court noted that, given the fact that the trial court denied the defendant's motion for speedy trial and did not otherwise determine that a constitutional violation had occurred, "we are inclined to conclude that it did not dismiss the indictment on constitutional grounds, for violation of the right to speedy trial or otherwise."

The Court of Criminal Appeals quoted the Tennessee Supreme Court in its opinion of State v. Benn, 713 S.W.2d 308 (Tenn. 1986), in which the Supreme Court held that Rule 48(b) grants trial courts authority to dismiss a case for want of prosecution, whether or not there has been a constitutional speedy trial violation. The court noted that "the rule is derived from the inherent common law power of the trial court to control its own jurisdiction and docket."

The Court of Criminal Appeals also found that a dismissal pursuant to Rule 48(b) can be with or without prejudice, "but a dismissal on a non-constitutional ground is normally without prejudice to a subsequent re-indictment and prosecution. The court noted that dismissal with prejudice for want of prosecution, not arising from a constitutional violation, "should be utilized with caution and only after a forewarning to prosecutors of the consequences." The court also noted that when it is found to be appropriate to dismiss a case with prejudice, the trial judge "must make express findings of fact on each of the relevant factors."

The court found a parallel in a prior case where a trial court dismissed an indictment without prejudice where a material state's witness was deployed to Iraq. In that case, the Court of Criminal Appeals concluded that "the trial court's dismissal was not against logic and did not unjustly affect the state's power to prosecute the defendant where there was no realistic prospect of proceeding to trial on any scheduled date in the near future. The court also noted in that case that the state had no control over the situation (the deployment of the witness to Iraq). The trial court had not abused its discretion when it exercised its inherent powers to dismiss without prejudice.

The Court of Criminal Appeals noted that in the instant case the trial court had explained that it could not set a date for the defendant's trial because of the COVID-19 pandemic and was unsure of when jury trials would resume in Cocke County. Just like the case where the witness was deployed to Iraq, the state did not have any control over the situation and was not at fault.

The Court of Criminal Appeals found that it was appropriate for the trial court to conclude that it was proper to dismiss the indictment in light of the defendant having already been in custody for two years because of the parole violation based on misdemeanor charges and because of the uncertainty of jury trials during the COVID-19 pandemic. Also, since it was dismissal without prejudice the dismissal did not unjustly affect the state's power to prosecute.

State v. Anderson (Tenn. Cr. App. 12/22/21)

## ***DUE PROCESS OF LAW***

### MOTION FOR DEFENDANT TO BE PERMITTED TO SIT AT TABLE WITH DEFENSE COUNSEL: THOUGH IT IS THE BETTER PRACTICE TO ALLOW A DEFENDANT TO SIT AT COUNSEL TABLE, THE TRIAL COURT IN THIS CASE DID NOT ABUSE ITS DISCRETION OR DENY THE DEFENDANT DUE PROCESS IN DENYING THE MOTION BASED UPON THE FACT THAT THE DENIAL WAS BASED ON SPACE CONSTRAINTS IN THE COURTROOM

**FACTS**: In a case in which the defendant was charged and convicted of robbery, defense counsel, prior to trial, filed a motion to allow the defendant to sit at the table with trial counsel. The trial court denied the motion citing space constraints. The defendant maintained that the trial court's ruling that he could not sit at counsel table was a violation of his due process rights. The state asserted that there was no showing that the trial court abused its discretion in making the decision.

**HELD**: The Court of Criminal Appeals concluded that the trial court's decision to deny the motion based on space constraints did not use an incorrect legal standard, reach an illogical conclusion, demonstrate a clearly erroneous assessment of the evidence, or cause an injustice to the complaining party, and accordingly, the court did not abuse its discretion.

The Court of Criminal Appeals noted that the defense moved prior to jury selection for the defendant to be permitted to sit at the table with counsel. The trial court denied the motion based "on only one thing, you've got two lawyers and you are taking up all the table here now." The court concluded that the court's decision was based strictly on room and observed that he as the judge was reluctant to "jam this whole situation up just for his convenience" and that the defendant was seated two feet behind counsel and able to consult with counsel. The defense made the point that he had previously tried a case in the same room at which the defendant was permitted to sit at the table with counsel even though there were two attorneys in that case also.

The Court of Criminal Appeals quoted the case from State v. Rice (Tenn. 2006), in which the trial court ordered the defendant to sit on a bench less than two feet behind counsel table, and the defendant asserted that was a

due process violation. The court noted that the Tennessee Supreme Court in that case concluded that the trial court did not abuse its discretion because the seating arrangement did not impair the defendant's presumption of innocence and because the defendant's ability to communicate with counsel was not affected. The Court of Criminal Appeals did note that in State v. Smith (Tenn. 2016), the Tennessee Supreme Court concluded that arbitrarily denying the defendant the opportunity to sit at counsel table based solely on the fact that he was not an attorney was an abuse of discretion, even though in that case the court nevertheless concluded the defendant had not shown prejudice by the action.

The Court of Criminal Appeals concluded that the trial court made findings both at the time at trial and during the hearing on the motion for new trial that the only reason the defendant was not permitted to sit at counsel table was the "cramped conditions" of the courtroom, since the defendant would have been sitting on top of the state and his attorneys at the table. The court noted that it would have granted the motion had there been fewer attorneys or larger tables or had the remodeling been completed. The court noted that a previous District Court case had determined that "neither the Sixth Amendment, nor federal law mandates that sitting at counsel table is constitutionally required." The court stated that while "it is the better practice to allow defendant to sit at counsel table," the trial court in this case did not abuse its discretion or deny the defendant due process in denying his motion since it was based on space constraints.

State v. Walker (Tenn. Cr. 10/1/21)

## ***DUI***

### STATEMENTS MADE BY DEFENDANT DURING DUI INVESTIGATION: TOTALITY OF CIRCUMSTANCES INDICATE THE DEFENDANT WAS NOT IN CUSTODY DURING THE DUI INVESTIGATION AND THEREFORE THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENTS HE MADE TO THE OFFICER

**FACTS**: Sergeant Hatfield of the Gatlinburg Police Department stopped the defendant for speeding and having a malfunctioning brake light. The officer immediately asked the defendant how much he had to drink, to which the defendant responded that he had consumed two Miller Lite draft beers. The officer asked the defendant to perform field sobriety tests after which the following exchange took place:

> Defendant: Just out of curiosity, what happens if I decline, sir?
> Officer: If you decline to take the test?
> Defendant: Yes, sir.
> Officer: You'll be placed under arrest.

After field sobriety tests were conducted another conversation took place in which the officer asked the defendant "how much beer or how much alcohol" he had had to drink. The defendant responded that he had three drinks earlier and that they were Miller Lite, twelve ounces. The officer commented that now he was saying three beers and that earlier he said two. The defendant responded that he had "two one-thousand," sir. When asked what he meant by that the defendant said it was an "incorrect statement."

Later during the conversation with the officer, the officer asked if he felt "buzzed or anything" and the defendant said: "I do slightly, sir, just want to be honest with you."

The defendant requested the suppression of all the statements he made after Sergeant Hatfield informed him that if he did not perform the field sobriety tests that he would be arrested. The trial court denied the motion and concluded that Sergeant Hatfield was conducting an investigatory stop and that the officer's statement did not transform the encounter into a custodial arrest.

The defendant maintained that the trial court erred in admitting the statements he made to the officer after the officer told him that a failure to perform the field sobriety tests would result in his arrest.

**HELD**: The Court of Criminal Appeals concluded that "under the totality of the circumstances, the defendant was not in custody and that the trial court, accordingly, did not err in admitting the statements."

The Court of Criminal Appeals made the following findings and conclusions in regard to the case:

1. Miranda warnings are required only when a suspect is subjected to questioning or its functional equivalent while in custody. Custodial interrogation is "questioning initiated by law enforcement officers after a

person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

2. In the present case, the parties do not dispute that the officer's questions constitute interrogation. The court noted that custody analysis requires determining "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest."

Relevant factors include: time and location of interrogation; duration and character of the questioning; officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation of movement; the extent to which the suspect is confronted with law enforcement officer's suspicions of guilt or evidence of guilt; and the extent to which the suspect is aware that he or she is free to refrain from answering questions or to end the interview at will.

3. It is undeniable, said the court, that a routine traffic stop "significantly curtails the freedom of action of the driver and passengers."

4. The courts have previously held that persons temporarily detained pursuant to routine traffic stops are not in custody for the purposes of Miranda.

The Court of Criminal Appeals referred to the case of Berkemer v. McCarty (U.S. Supreme Court, 1984) in which the court noted features of traffic stops which militate against the underlying concerns which Miranda has intended to allay;

1. Detention of a motorist pursuant to a traffic stop is presumptively temporary and brief and generally lasts only a few minutes which is quite different than questioning incident to an interrogation at a stationhouse where a conversation can be quite prolonged.
2. The circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. This includes the fact that the typical traffic stop is at least in some degree out in the public and the exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit incriminating statements and diminishes the fear of the motorist that if he does not cooperate, he will be subjected to abuse. The court noted that "in short, the atmosphere surrounding an ordinary traffic stop is substantially less police dominated."
3. The court noted that the only relevant concern to the custody determination of a person seized pursuant to a traffic stop is a

reasonable person's understanding of his or her freedom of movement and that a police officer's "unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time."

4. An officer's knowledge or beliefs may bear upon the custody issue if the officer's knowledge and beliefs are conveyed, by word or deed, to the individual being questioned. In other words, threats of arrest are pertinent to the determination of whether a suspect is in custody. The court noted that in plenty of cases, courts have indicated that threats of arrests to induce cooperation are important elements of assessing whether a person is in custody. The court determined that "a threatened arrest is a factor that weighs in favor of the determination that the suspect was in custody under the Miranda principles.

5. Courts have found that in light of the totality of the circumstances, a threat of arrest is not dispositive of the issue that the defendant was in custody or not. The court said that the "ultimate inquiry remains whether a reasonable person in the defendant's position would consider himself deprived of freedom of movement to a degree associated with a formal arrest."

The Court of Criminal Appeals emphasized the following:

1. The defendant was stopped for speeding and brake light violation in downtown Gatlinburg.
2. The interaction between the defendant and Sergeant Hatfield was cordial throughout and lasted approximately fourteen minutes prior to the defendant's arrest.
3. The scene remained public and the defendant was asked to perform field sobriety tests on the sidewalk of a well-lit trolley stop. The officer told defendant in response to a question that if he did refuse to take field sobriety tests he would be arrested.
4. The officer did not raise the "specter of arrest" as a tool to coerce the defendant into making a statement, but instead he was responding to defendant's "hypothetical question" regarding what action he would take if the defendant did not cooperate with further investigation.

The Court of Criminal Appeals concluded that a reasonable person in the defendant's situation would conclude that Sergeant Hatfield's determination regarding whether to arrest the defendant was being delayed until Sergeant Hatfield had furthered his investigation. The court found

accordingly, while the defendant certainly remained under a temporary detention, the court "did not think the defendant was deprived of freedom of movement to a degree associated with a formal arrest." The Court of Criminal Appeals concluded that the trial court did not err in admitting the statements and rejecting the defendant's motion.

State v. Manzenberger (Tenn. Cr. App. 6/3/21)

## VOLUNTARY CONSENT FOR A BLOOD DRAW: THE TRIAL COURT DID NOT ERR BY GRANTING THE DEFENDANT'S MOTION TO SUPPRESS THE RESULTS OF HIS BLOOD DRAW AS THE FACTS DID NOT PREPONDERATE AGAINST THE TRIAL COURT'S FINDINGS, AS THE TRIAL COURT MERELY FOUND THAT CERTAIN FACTORS WEIGHED IN FAVOR OF FINDING DEFENDANT GAVE CONSENT FOR A BLOOD DRAW AND OTHER FACTORS WEIGHED IN FAVOR OF FINDING THE DEFENDANT DID NOT GIVE CONSENT, CONCLUDING THAT THE STATE FAILED TO MEET ITS BURDEN OF PROOF

**FACTS**: In a case in which the defendant was charged with vehicular homicide by intoxication and driving under the influence, the defendant filed a motion to suppress his blood test results, arguing that he did not voluntarily consent to the blood draw. After holding an evidentiary hearing, the trial court granted the motion, from which the state appeals.
**HELD**: The Court of Criminal Appeals found that the evidence did not preponderate against the trial court's findings, due to the fact that the trial court was in the best position to weigh the evidence.

The Court of Criminal Appeals noted that in weighing the evidence, the trial court found that Trooper Diaz was a credible witness whose testimony partially weighed in favor of finding voluntary consent: (a) the defendant was able to respond to the trooper's questions appropriately; (b) the defendant knew he had been in a car wreck and that his girlfriend had been injured; (c) the trooper spoke with the defendant in a calm voice and did not threaten him; (d) the trooper did not display his weapon; and (e) the

trooper's conversation with the defendant occurred in a hospital room with the curtain open.

The Court of Criminal Appeals also noted that there were portions of the trooper's testimony that weighed in favor of finding the defendant's consent for the blood draw was involuntary:

1. The defendant's speech was quiet and very slurred;
2. His pupils were constricted;
3. The defendant was unable to perform the HGN test because he could not keep his eyes open; and
4. The trooper thought he was impaired.

The Court of Criminal Appeals also noted that the trial court had found that the defendant's signature on the implied consent form was illegible and that he had failed to write the date on the form as required by TCA 55-10-406(g).

In conclusion, the Court of Criminal Appeals noted: "In sum, the trial court determined that while some factors weighed in favor of finding voluntary consent, the state ultimately failed to carry its burden of proving to the trial court that the defendant voluntarily consented to the blood draw. The court simply found that the facts did not preponderate against the trial court's findings and could not say that the trial court had erred by granting the defendant's motion to suppress.

The Court of Criminal Appeals had noted that factors that the court could consider in determining whether consent is voluntary include (a) the time and place of the encounter; (b) whether the encounter was in a public or secluded place; (c) the number of officers involved; (d) the degree of hostility during the incidence; (e) whether weapons were displayed; (f) whether consent was requested; and (g) whether consent or initiated contact with the police. Along with other factors, the court also emphasized that "an individual's knowledge of the right to refuse consent is also a factor in determining the voluntariness of consent." The court noted these factors from the U.S. Supreme Court's case of Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

**PRACTICE POINT**: This is a good case to emphasize the importance of a judge evaluating all of the factors going all the way back to the Schneckloth v. Bustamonte case and the important factor of whether an individual is aware of his or her right to refuse consent, as most officers never advise a defendant of the right to refuse consent to a car search, blood draw or other situations when an officer is requesting consent for a search.

State v. Baumgartner (Tenn. Cr. App. 12/6/21)

## ***EVIDENCE***

### EXCITED UTTERANCE OF THREE 9-1-1 CALLS PLACED BY VICTIM: 9-1-1 CALLS PLACED BY THE VICTIM (ON OCCASIONS SEPARATE FROM THE ACTUAL NIGHT OF THE MURDER) WERE PROBATIVE OF THE "QUERULOUS AND PUGNACIOUS NATURE" OF RELATIONSHIP BETWEEN DEFENDANT AND VICTIM AND OF THE DEFENDANT'S HOSTILITY TOWARD THE VICTIM

**FACTS**: In a case in which the defendant was convicted of second-degree murder, the defendant, prior to trial, moved the trial court to exclude from evidence three 9-1-1 calls placed by the victim in April and May 2016 as inadmissible hearsay and impermissible propensity evidence. The state argued that the calls were admissible pursuant to the excited utterance exception to the hearsay rule to establish the defendant's identity as the perpetrator, his motive for the killing, the nature of the relationship between the defendant and the victim, and the defendant's settled intent to harm the victim.

**HELD**: The Court of Criminal Appeals held that the trial court did not err by admitting the evidence of the 9-1-1 calls made by the victim regarding the defendant. The court noted that in the calls, the victim claimed that the defendant wanted to hit her and kill her, that he had hit her before, and that she was afraid of him. The court noted that the officer who responded to the 9-1-1 calls observed no evidence from which he could conclude that the defendant had struck the victim and he had felt that the incidents were arguments between the parties.

The Court of Criminal Appeals concluded, "In our view, even if the evidence did not clearly and convincingly establish that the defendant committed a violent act against the victim, it was probative of the querulous and pugnacious nature of their relationship and of the defendant's hostility toward the victim, and accordingly relevant to establish his motive for harming the victim and, by extension, his identity as the perpetrator.

The court therefore stated that "the trial court did not err by admitting the evidence, and also noted that the trial court had instructed the jury that if

it concluded that the defendant had committed one or more bad acts other than those for which he was on trial, you may not consider that evidence to prove his disposition to commit crimes such as those for which he is on trial but could consider such evidence only for the limited purpose of the nature of the relationship, identity, motive, and intent."

In regard to these conclusions, the Court of Criminal Appeals stated the following principles of law:

1. Questions concerning evidentiary relevance rests within the sound discretion of the trial court and the court will not interfere with the exercise of this discretion in the absence of a clear abuse appearing on the face of the record.
2. An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is illogical or unreasonable and causes an injustice to the party complaining.
3. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
4. Generally speaking, evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.
5. The court noted that Tennessee Rule of Evidence 404(b) specifies four prerequisites to the admission of such evidence: (1) the court upon request must hold a hearing outside the presence of a jury; (2) the court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; (3) the court must find proof of the other crime, wrong, or act to be clear and convincing; and (4) the court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.
6. Tennessee courts have accepted the use of evidence of a homicide defendant's threats or prior violent acts directed to the homicide victim as a means of allowing the state the opportunity to establish intent, theorizing that such evidence is probative of the defendant's mens rea at the time of the homicide because it reveals a "settled purpose" to harm the victim.
7. The Tennessee Supreme Court has ruled that violent acts indicating the relationship between the victim of the violent crime and the defendant prior to the commission of the offense are relevant to show the defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim.

The court also concluded that if any error did occur it was harmless error based upon the record as a whole.

State v. Salas-Rufino (Tenn. Cr. App. 9/14/21)

**EXCITED UTTERANCE RULE: STATEMENT BY DECLARANT (DAVID REED) TO WITNESS (DAN REED) THAT THE DEFENDANT HAD WARNED DAVID NOT TO PROVIDE ANY INFORMATION ABOUT THE SHOOTINGS TO THE POLICE HELD TO FALL UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE SINCE THE DECLARANT WAS FEARFUL AND SHAKY "AS IF HE HAD SEEN A GHOST"**

**FACTS**: In a case in which the defendant was convicted of two counts of first-degree pre-meditated murder and other charges, the defendant contended that the trial court had erred in admitting Dan Reed's testimony that David Reed informed him that the defendant warned him (David) against providing any information about the shootings to the police. The defendant maintained that Dan Reed's testimony was inadmissible hearsay and did not qualify as an exception to the hearsay rule pursuant to the excited utterance exception.

David Reed testified at trial that the defendant called him after the shooting and while David Reed was with Mr. Dan Reed. David Reed acknowledged telling Dan Reed that he was afraid of the defendant but David Reed testified that he did not recall telling Mr. Dan Reed that the defendant warned him to not tell the police anything about the shooting.

Dan Reed testified that after Mr. David Reed spoke to the police, they returned to Dan Reed's house and were on the front porch when Mr. David Reed received a telephone call. Dan Reed testified that when David Reed answered the call, he had a "s**t look on his face." Dan Reed also added that David Reed seemed fearful, upset, and shaky, and that, "the look on his face was just like he saw a ghost." Dan Reed asked David Reed who was calling and David Reed told him that it was the defendant. Dan Reed testified that he took the telephone from David and argued with the

defendant and that following the phone call David Reed still appeared very frightened and told Dan Reed that the defendant had told him not to tell the police what happened.

**HELD**: The Court of Criminal appeals concluded that the trial court properly found that David Reed's statement to Dan Reed was admissible as an excited utterance.

The Court of Criminal Appeals noted the following key aspects of evidentiary rules in regard to hearsay:

1. Pursuant to Tennessee Rule of Evidence 802 hearsay evidence is generally not admissible, hearsay being a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," as stated in Tennessee Rule of Evidence 801(c).

2. The Court of Criminal Appeals reviews the rulings of trial courts on the basis of an abuse of discretion standard.

3. An exception to the hearsay rule as stated in Tennessee Rule of Evidence 803(2) as being a "statement related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

4. The three elements for the exception to the hearsay rule to apply are: 1. It must be startling event or condition that causes the stress of excitement; 2 The statement must relate to the startling event or conditions; and 3. The statement must be made while the declarant was under the stress of excitement.

5. The rationale behind the exception is that (a) because a statement is made spontaneously in response to a startling event, there is little opportunity for reflection or likelihood of fabrication (b) the statement will accurately reflect events while they are fresh in the declarant's mind.

6. The declarant must also have personal knowledge of the facts and the hearsay statement in order for the exception to apply.

7. The statement ought to be so spontaneous that it precludes the idea of deliberation and fabrication.

8. In determining if declarant is under the stress of excitement of the startling event, the court may consider the interval between the event of the statement, the nature and seriousness of the events, and the appearance, behavior, outlook, and circumstances of the declarant.

9. The length of time between a startling event and the statement does not automatically preclude the statement's being admissible as an excited utterance.

10. The <u>contents of the statement</u> which might indicate the degree of the declarant's stress can also be considered.

<u>The Court of Criminal Appeals concluded that the defendant's calling Mr. David Reed less than twenty-fours after the defendant was alleged to have shot Mr. David Reed's friends, killing two of them, was a startling event that caused the stress of the excitement</u>. Also, David Reed's statement to Dan Reed related to the telephone call. David Reed made the statement shortly after the call while he was still frightened, and David Reed was still laboring under the excitement from the telephone call and made the statement at a time so near the call as to preclude the idea of deliberation and fabrication.

<u>The court therefore concluded that the statement by the declarant was admissible as an excited utterance</u>.

<u>State v. Mobley</u> (Tenn. Cr. App. 8/16/21)

## EXTRINSIC EVIDENCE: TRIAL COURT DID NOT ERR IN EXLUDING EVIDENCE TENDERED BY THE DEFENDANT THAT THE TWELVE-YEAR-OLD VICTIM HAD STATED IN THE PAST THAT SHE LIKED TO LIE TO GET PEOPLE INTO TROUBLE, DUE TO THE FACT THAT WHEN DEFENSE COUNSEL WAS QUESTIONING THE VICTIM ON CROSS-EXAMINATION COUNSEL DID NOT DISCLOSE ENOUGH DETAIL ABOUT THE CIRCUMSTANCES OF THE PRIOR STATEMENT TO ALLOW THE VICTIM THE OPPORTUNITY TO RESPOND INTELLIGENTLY TO THE IMPEACHMENT ATTEMPT

**<u>FACTS:</u>** The defendant in the present case was convicted of aggravated sexual battery and sexual exploitation of a minor by electronic means, and the <u>defendant maintained that the trial court had erred in not allowing the statement of the victim as a prior inconsistent statement pursuant to Rule 613</u>.

At trial, defense counsel questioned the victim on cross-examination as follows:

Q. Have you ever lied to get someone in trouble?

A. Not that I remember.

Q. Okay. Have you ever said that you like to lie to get people in trouble?

A. No.

Q. Do you recall telling any adults or any grownups that you love to lie because … it gets people in trouble?

A. No.

Q. And that's something you never would have said?

A. I wouldn't have said that to an adult.

At a jury-out conference, the trial court found that the evidence was inadmissible but did allow the defendant to make an offer of proof. In the offer of proof, the defense presented evidence that the victim had told Ms. Kayla Ladd that "she enjoys getting people in trouble, that she doesn't get in trouble, and she thinks it's funny." Another witness, Mr. Collopy testified that he overheard the victim state that she liked to lie in order to get people into trouble. A third witness, Mr. Ronald Ladd, the defendant's father, also testified that he heard the victim state that she enjoyed lying to get people into trouble and that she did not get into trouble."

**HELD**: The Court of Criminal Appeals held that the trial court properly "found that the defendant failed to meet the foundational requirements for admission of extrinsic evidence of a prior inconsistent statement pursuant to Rule 613(b). The Court of Criminal Appeals held that the trial court noted that the defense had failed to provide the victim with an opportunity to explain or deny the statement due to the fact that when questioning the victim about the statement on cross-examination, defense counsel "did not draw the victim's attention to when and where she made the statement, who was present, or the circumstances under which the statement was made." The trial court noted that defense counsel "simply asked the then-twelve-year-old victim whether she had ever stated that she liked to lie to get others into trouble."

The Court of Criminal Appeals noted that it is not enough to ask a witness a general question, whether she has ever said "so and so," or whether the witness told the same story.

Tennessee Rule of Evidence 613(b) provides in pertinent part that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise required."

The Court of Criminal Appeals therefore found the trial court had not abused its discretion in excluding the extrinsic evidence.

State v. Ladd (Tenn. Cr. App. 5/25/21)

## FORENSIC INTERVIEWER'S EXPERT TESTIMONY: TESTIMONY BY EXPERT PERTAINING TO FORENSIC INTERVIEWS OF CHILDREN REGARDING CHARACTERISTICS OF CHILD ABUSE VICTIMS, ISSUES REGARDING PARTIAL DISCLOSURES AND RECANTATIONS BY CHILD ABUSE VICTIMS, AND OTHER ATTRIBUTES OF CHILD SEX VICTIMS WERE FOUND TO BE IMPROPERLY ADMITTED BY TRIAL JUDGE SINCE THEY CONSTITUTED TESTIMONY REGARDING "CHILD SEXUAL ABUSE SYNDROME" WHICH HAS PREVIOUSLY BEEN PROHIBITED IN TENNESSEE

**FACTS**: In a case in which the defendant was convicted of attempted aggravated sexual battery, the defendant maintained that the trial court abused its discretion in allowing Sydni Turner to testify as an expert witness regarding the minor child's forensic interview, as defense claimed that was prejudicial to the defense. The defendant asserted that the basis and scope of such claimed expertise was unclear from the record and that the only purpose of the testimony was to "improperly bolster" the credibility of the victim. The state contended that the trial court appropriately limited the testimony to explain the process of conducting a forensic interview and the factors that can affect a minor victim's disclosure.

**HELD**: The Court of Criminal Appeals held that the testimony of the expert witness was closely related to testimony concerning "child sexual abuse syndrome" that had been expressly prohibited in previous cases and therefore the testimony was admitted in error. The court noted that the expert (Turner) provided expert testimony "regarding the characteristics, including partial disclosures and recantation, that are common among child victims of sexual abuse." The Court of Criminal Appeals pointed out that the records showed that "the primary purpose of Sydni Turner's testimony

was to accredit (the victim's) trial testimony, that the defendant actually touched his penis, over the (victim's) statement during the forensic interview, that the defendant asked to touch but never actually touched victim's penis. The Court of Criminal Appeals did go on to find that the error was harmless based upon the abundance of proof in the case.

This is an excellent case to review the nature of this type of proof and the admission of proof regarding forensic interviews as it reviews substantial case law in the State of Tennessee.

The court looked specifically at TCA 24-7-123 which governs the admissibility of forensic interviews. The Court of Criminal Appeals looked closely at the state's emphasis on the fact that the forensic expert had been a forensic interviewer in West Tennessee for three and one-half years and had conducted twelve hundred forensic interviews in cases involving the sexual abuse and physical abuse of children. The state emphasized that the witness had testified about "the structure of forensic interviewing, children with disclosures, child development, and the reluctance of children to disclosure during forensic interviews." The court pointed out that "when asked about the possible outcomes from a forensic interview, Turner stated that some children come in and make full disclosures about … everything that could have possibly happened to them, some children make partial disclosures where they identify that something happened and don't give a lot of detail, some children are reluctant to talk at all, some children make no disclosure, and some children, who have previously made a disclosure, recant while in the forensic interview." The Court of Criminal Appeals also noted that the expert testified that "there's a bunch of different reasons as to why a child might recant," which she explained might be because of the number of times children told their story, how adults or other people reacted to what happened, whether the child was told by someone what to say and what not to say, or due simply to the fact that some children are more reserved than others.

The Court of Criminal Appeals also stated that it appeared the trial court recognized that the expert's testimony was inadmissible to simply bolster the child's credibility, but that the court had allowed the proof after the state had claimed that the defense "opened the door" to the evidence.

The Court of Criminal Appeals also cited the case of State v. Ballard, 855 S.W.2d 557 (Tenn. 1993), noting that the Tennessee Supreme Court held that the admission of an expert's testimony, which explained the symptoms of post-traumatic stress syndrome exhibited by victims with child sexual abuse and concluded that the child victims in that case exhibited the aforementioned symptoms, was reversible error." The court noted there that

the expert asserted that there were groups or "constellations" of symptoms upon which he relied to make a diagnosis and that the behavior traits attributed to the child victims in that case, upon which he concluded that the victims had been sexually abused, were 'bed-wetting, clinging, fear (specifically fear of water and sharks for one child), irritability, nightmares, anxiety and discipline problems at school.'

The Ballard court noted that: "In the context of a criminal trial, expert scientific testimony solicits the danger of undue prejudice or confusing the issues or misleading the jury because of its aura of special reliability and trustworthiness. This 'special aura' of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children, may lead a jury to abandon its responsibility as fact finder and adopt the judgment of the expert." The court goes on to note that this carries a strong potential to prejudice a defendant's cause by encouraging a conclusion that because children have been identified by an expert to exhibit behavior consistent with post-traumatic stress syndrome, brought on by sexual abuse, then it is more likely that the defendant committed the crime.

The Ballard court concluded that "because no consensus exists on the reliability of a psychological profile to determine abuse, expert testimony describing the behavior of an allegedly sexually abused child is not reliable enough to substantially assist a jury in an inquiry of whether the crime of child sexual abuse has taken place."

The basic principle, which probably applies to judges as well as juries, is that there is too great a tendency to credit expert testimony which replaces the decision-making requirements of a judge or a jury.

In a related issue, the Court of Criminal Appeals also concluded that the trial court erred in admitting the forensic interview of the minor child as forensic evidence. The Court of Criminal Appeals found that the trial court never made the finding required by TCA 24-7-123, including that there was no testimony by the victim that the forensic interview was true and correct and the fact there was no testimony by the victim about the recording of the forensic interview at all; the trial court never held that the recording of the forensic interview had "particularized guarantees of trustworthiness;" and that the trial court had failed to make specific findings of fact on the record as to the basis for its entire ruling. The court also found that the forensic interview is inadmissible as a prior inconsistent statement because the trial court failed to make the necessary findings for it to be admitted as such. The bottom line was that the court concluded that the trial court's admission of the forensic interview was in error because of the lack of fact findings

regarding the admission of the forensic interview. The court did conclude that the admission of the forensic interview is harmless error.
**PRACTICE POINT**: This is a good case to look at in regard to the introduction of forensic interviews into evidence and is an excellent statement by the appellate court as to the dangers that are inherent in allowing an expert witness to testify regarding common characteristics of children and/or common characteristics of child sex abuse and forensic interviews themselves. Judgments as to credibility of witnesses and the helpfulness of such a forensic interview should be left to the determination of the fact finders, such as judges and juries.

State v. Martinez (Tenn. Cr. App. 7/14/21)

## HEARSAY OR NOT HEARSAY?: IN A MURDER CASE, TRIAL COURT PROPERLY ALLOWED A STATEMENT BY A FRIEND OF THE VICTIM WHO TESTIFIED THAT THE VICTIM TOLD HER THAT THE DEFENDANT HAD THREATENDED THE VICTIM BY STATING THAT SHE WOULD BE IN A "BODY BAG" IF SHE EVER LEFT HIM

**FACTS**: In a case in which the defendant was convicted of first-degree premeditated murder and especially aggravated robbery, the defendant maintained that the trial court erred in allowing a hearsay statement from witness Elizabeth Guy that the victim had told her the defendant threatened her by saying that she would be in a "body bag" if she ever left him. The state maintained that the statement was not hearsay because it was not offered for the truth of the matter asserted, but rather to show that the victim feared the defendant.
**HELD**: The Court of Criminal Appeals found that since the statement was not admitted for the truth of the matter asserted, it was not hearsay. The court noted that the trial court had allowed the statement by the friend of the victim to show that the victim was afraid of the defendant and to rebut the defense theory that the defendant and the victim were still in a relationship despite their divorce.

The court noted that "hearsay" is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The court stated that the

question of whether a statement is hearsay or fits under one of the exceptions to the hearsay rule are questions of law and subject to de novo review by the Court of Appeals. The admissibility of the evidence under Rule 403 of the Tennessee Rules of Evidence is a matter within the trial court's discretion and will not be reversed on appeal absence an abuse of that discretion.

The Court of Criminal Appeals declared that it was not error by the trial court to admit the testimony and the testimony did not breach a clear and unequivocal rule of law. The evidence was simply not admitted for the truth of the matter asserted.

State v. Enix (Tenn. Cr. App. 5/26/21)

## JAIL CALL RECORDING: DEFENDANT'S CALL FROM JAIL TO HIS SISTER IN WHICH HE REFERRED TO THE VICTIM (GIRLFRIEND) AS A "B---H," AND TOLD HIS SISTER THAT "THE B---H JUST POPPED UP AND NEVER LEFT" WAS RELEVANT TO SHOW THE DEFENDANT'S ANIMOSITY TOWARD THE VICTIM

**FACTS**: In a case in which the defendant was convicted of aggravated assault and domestic assault against the victim which caused serious bodily injury, the defendant contended that the trial court erred by admitting a portion of the defendant's recorded jail telephone call. While talking with his sister, the defendant made the following comments: (1) he referred to the fact that "the b---h just popped up and never left," which related to the victim's anticipated testimony that she was unable to leave the home because she had been beaten badly; (2) that the defendant stated that he contacted the victim because he wanted to "get his rocks off," along with laughter as he made the statement.

The defendant maintained that these comments and his conduct were irrelevant pursuant to Tennessee Rules of Evidence 401 and 402 and further argued that even if it was deemed to be relevant that the probative value of said evidence was substantially outweighed by the danger of unfair prejudice pursuant to TRE 403. The state responded that the trial court did not abuse its discretion by admitting the recording because the evidence showed that the defendant used a derogatory term for the victim, that it reflected the defendant's animosity toward the victim, his statement made

light of the fact that the defendant was unable to leave the home because she had been badly beaten, and the state also argued that the jail call was relevant to provide a contextual background, even though that was an argument made for the first time upon appeal.

**HELD**: The trial court did not abuse its discretion by admitting the evidence because it was relevant to the domestic violence related charges. The Court of Criminal Appeals found that the statements by the defendant showed the defendant's knowledge of the incident that it happened on October 7, 2018; the defendant's statements about what occurred during the incident conflicted with the victim's testimony and showed a lack of remorse for his conduct when considered in light of his defense that only a misdemeanor assault had occurred (due to his conduct), rather than an aggravated assault. The court also agreed with the prosecutor that his statement "get his rocks off" was relevant to show the defendant was referring to the victim during the call as opposed to someone else because the victim and the defendant had been in a romantic relationship and had two children together.

The court also found that the record supported the trial court's determination that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice in light of the victim's testimony about the incident, along with the medical records and photographs related to her injuries. The court noted that the defendant had not disputed that he had assaulted the victim but denied that it rose to the level of a felony.

**PRACTICE POINT**: As reflected in this case, these types of comments which can be argued to be substantially irrelevant and highly inflammatory, because of their flippant and disrespectful nature can also be strong elements of proof in showing ongoing disrespect and animosity toward the victim, along with demonstrating a knowledge of the facts and circumstances which may add to the credibility of the testimony of the victim.

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

## LEADING QUESTIONS: THE FACT A QUESTION ALLOWS FOR A "YES" OR "NO" ANSWER DOES NOT MAKE THE QUESTION LEADING; TRIAL JUDGE HAS WIDE DISCRETION IN CONTROLLING LEADING QUESTIONS; UNLESS THE QUESTION

**WAS NOT ONLY CLEARLY LEADING BUT ALSO CLEARLY PREJUDICIAL, THE COURT OF CRIMINAL APPEALS WILL NOT INTERFERE WITH THE ACTION OF THE TRIAL COURT**

**FACTS**: In a case in which the defendant was convicted of first-degree murder along with other convictions, the defendant maintained that he was denied a fair trial because the state asked the victim's mother (Sarai Ruiz) and the co-defendant (Khwaga), leading questions. The defendant complained that the state was leading the witness by "directly soliciting a yes or no answer," and the defendant insisted that the witness should be allowed to "give a narrative without being asked leading questions."

The records showed that during the state's questioning of Ms. Ruiz, who testified through a Spanish interpreter, the defense objected to the question asked by the prosecution, "And did you and the victim take the car on a test drive to where Jessica Silva was at La Hacienda Restaurant?" The state also asked questions such as: "Did you try calling his girlfriend Jessica Silva?"; and "did you learn that she was at the house?"; "Once you got to work, did somebody come to you with news about what happened?"; and "Did someone take you to your home?"

**HELD**: The Court of Criminal Appeals found that the trial court did not abuse its discretion in allowing the questions to be asked, finding that the questions were not leading but that the questions were asked to facilitate and develop Ms. Ruiz's recount of the events of the morning of the victim's death. The court also noted that even if the questions had been leading, the defendant has not shown the questions were clearly prejudicial and failed to demonstrate plain error regarding this issue in the trial.

The Court of Criminal Appeals noted that Tennessee Rule of Evidence 611 permits the use of leading questions during direct examination when "necessary to develop the witness's testimony." The court stated that a leading question is one that "suggests to the witness the answer desired." The court noted that under previous decisions, the fact a question allows for a "yes" or "no" answer does not make the question leading.

The Court of Criminal Appeals stated that the trial judge has wide discretion in controlling leading questions, and unless the question was not only clearly leading, but also clearly prejudicial, the court will not interfere with the action of the trial court.

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

## NON-HEARSAY DECLARATION: STATEMENT WAS USED TO PROVE THE EFFECT OF THE STATEMENT ON THE HEARER AND WAS NOT USED TO PROVE THE TRUTH OF THE MATTER ASSERTED

**FACTS**: In a case in which the defendant was convicted of rape, the defendant maintained that the trial court had improperly permitted Sergeant Kinsler to testify about the victim's statement to Officer Beaty, which Officer Beaty then relayed to Sergeant Kinsler, to the effect that the victim had just seen the defendant's truck parked at the entrance to the apartment complex. In response to Officer Beaty relaying this information to Sergeant Kinsler, Kinsler testified that he approached the truck and saw the defendant lying there as if he were asleep. The officers then wrestled the defendant to the ground, handcuffed and arrested him. When defense counsel objected to Kinsler's statement at the trial on the grounds that it was hearsay, the court overruled the objection and found that the evidence was not being offered for the truth of the matter asserted but what he did when he received the information. The defendant maintained that the victim's statement was inadmissible hearsay because it was used to show that the defendant was actually sitting inside his truck at the apartment complex and therefore was used to prove the truth of the matter asserted.

**HELD**: The Court of Criminal Appeals held that the statement was "non-hearsay" because it was used to show the statement's effect on the hearer, Sergeant Kinsler. The court found the statement was relevant because without the context provided by the statement it would have been unclear to the jury why Sergeant Kinsler approached defendant's vehicle and arrested him.

The Court of Criminal Appeals pointed out the following principles of law regarding "non-hearsay":

1. Under Tennessee Rule of Evidence 801, "hearsay" is any statement, other than one made by the declarant while testifying at trial or in a hearing, offered into evidence to prove the truth of the matter asserted.
2. Hearsay statements are not admissible unless they fall within one of the evidentiary exceptions or some other law renders them admissible.
3. When a trial court makes factual findings and credibility determinations in the course of ruling on an evidentiary motion, the factual and credibility findings are binding on the review in court unless the evidence preponderates against them.

4. Declarations are considered non-hearsay when they are used to prove the effect on the hearer: "any time the statement is used to prove the hearer or reader's mental state upon hearing the declaration, words repeated from the witness chair do not fall within the hearsay exclusion. The statement fails the test of hearsay because it is not used to prove the truth of the matter asserted in the statement."

The court summarized the proof by stating that Sergeant Kinsler testified that Officer Beaty told him over the radio that the victim had identified defendant's truck parked by the entrance gate of the apartment complex. The trial court found that the statement was non-hearsay and the Court of Criminal Appeals found that from the context of the statement the statement was used to show "the statement's effect on the hearer."

State v. Rainer, (Tenn. Cr. App. 12/7/21)

## PRIOR INCONSISTENT STATEMENT OF TESTIFYING WITNESS: TRIAL COURT WAS FOUND TO HAVE PROPERLY ADMITTED (AS A PRIOR INCONSISTENT STATEMENT OF A TESTIFYING WITNESS) THE RECORDED TELEPHONE CONVERSATION OF MS. HODGES WITH INVESTIGATOR WASHAM AS THE TRIAL COURT PROPERLY FOUND THAT THE STATEMENT WAS MADE UNDER "CIRCUMSTANCES INDICATING TRUSTWORTHINESS"

**FACTS**: The defendants Hartshaw and Emory were convicted of robbery, aggravated robbery, and aggravated burglary. The defendants challenged the "prior inconsistent statement" of Erin Hodge on 10/10/16, where she made a statement to Investigator Michael Washam about the crimes.

At trial, Ms. Hodge testified that she knew the defendants and recalled that on the night of the incident, October 1, 2016, she was drunk and the defendants came inside Mr. Beasley's apartment together. She recalled that defendant Emory identified himself through the closed door so Ms. Hodge had unlocked the door but she claimed that she could not remember anything else that happened after that due to her intoxication. She did recall giving a statement to the police which she claimed occurred while she was intoxicated.

Outside the presence of the jury, Ms. Hodge was asked about a statement she gave to law enforcement after the robbery, which was taken on 10/10/16. Mr. Beasley had called Investigator Washam to say that Ms. Hodge was ready to give a statement. Washam recalled that Ms. Hodge was articulate, did not seem inebriated, and she appeared willing to give the statement. In the interview, which the Court of Appeals recognizes at some points is unintelligible, Ms. Hodge stated that on 10/1/16, she was in Mr. Beasley's apartment and someone threw pebbles at the window of the apartment in order to be granted entry to the complex. Ultimately, Ms. Hodge allowed defendant Emory to enter the apartment. The defendant Emory unlocked the door and the defendant Hartshaw "busted in" through the door. Ms. Hodge went on to give information in her statement that Emory pulled the gun on Ms. Hodge, Ms. Hodge sustained injuries to her face, the defendant Emory threatened individuals with a hammer, and many other details regarding the events leading to the charges of robbery and aggravated burglary.

The defendant contended that Ms. Hodge's recorded telephone conversation with Investigator Washam should not have been admitted as a prior inconsistent statement of a testifying witness pursuant to the hearsay exclusion exception of TRE 803(26). The defendants contended that the statement was not made under "circumstances indicating trustworthiness."

**HELD**: The Court of Criminal Appeals concluded that the statement of Ms. Hodge was properly admitted as substantive evidence, as a prior inconsistent statement pursuant to a proper hearsay exclusion exception.

The court noted that under TRE 803(26) that a prior inconsistent statement is admissible as substantive evidence if the following prerequisites are met:

(A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.

(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

The Court of Criminal Appeals also noted that the rule had been interpreted to apply when a testifying witness claims a lack of memory, just as Ms. Hodge did in the present case due to her claimed intoxication.

The Court of Criminal Appeals noted that Tennessee Rule of Evidence 613(b) permits the use of extrinsic evidence of prior inconsistent statements for the purpose of impeachment. The rule provides that extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until a witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon.

The Court of Criminal Appeals noted that in the present case Ms. Hodge testified that she was intoxicated when she made the telephone call to the Investigator Washam and cannot remember making the statement. She also testified that she was intoxicated the night of the robbery and did not know what happened. The Court of Criminal Appeals found that the trial court appropriately found her testimony not to be credible, the trial court stating that she appeared to be protecting the defendants from prosecution and otherwise showing a "pattern of lying." The Court of Criminal Appeals also noted that, on the other hand, the trial court considered the circumstances of her telephone call to Investigator Washam, including that it was "unprompted," the clarity with which she spoke and her assertion during the call that she was telling the truth. The Court of Criminal Appeals concluded that the evidence did not preponderate against the trial court's credibility determination that Ms. Hodge was being untruthful at trial but that she had given a truthful statement to Investigator Washam. The court concluded that her statement was properly admitted as substantive evidence as a prior inconsistent statement pursuant to a proper hearsay exclusion exception.

State v. Hartshaw and Emory (Tenn. Cr. App. 12/10/21)

**RELEVANCE OF DEFENDANT VOLUNTARILY TURNING HIMSELF IN ON A CHARGE OF MURDER: COURT OF CRIMINAL APPEALS HELD THAT WHETHER OR NOT THE DEFENDANT TURNED HIMSELF IN TO THE POLICE ON THE MURDER CHARGE WAS NOT RELEVANT TO WHETHER DEFENDANT COMMITTED THE UNDERLYING CRIMES AND THEREFORE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION**

**IN SUSTAINING THE OBJECTION TO DEFENDANT'S QUESTION OF THE INVESTIGATING OFFICER**

**FACTS**: In a case in which the defendant was convicted of second-degree murder, felony murder and robbery charges, the defendant maintained that the trial court erred in refusing to allow defense counsel to question a detective about the fact that the defendant turned himself in on the murder charges. The defendant argued that the testimony would have provided some evidence of good character and remorse to the jury deciding the defendant's fate. The state maintained that the trial court properly exercised its discretion in refusing to allow the said proof.

**HELD**: The Court of Criminal Appeals held that the trial court did not abuse its discretion in not allowing proof that the defendant had turned himself in to the police because the same was not relevant as to whether the defendant committed the underlying crimes.

The Court of Criminal Appeals noted that the threshold issue with regard to the admissibility of evidence is relevance. The court noted that relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, pursuant to Tennessee Rule of Evidence 401. The court also noted that Tennessee Rule of Evidence 404(a) states that evidence of a person's character or trait of a character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.

The Court of Criminal Appeals ultimately determined that whether the defendant turned himself in to the police was not relevant to whether the defendant committed the underlying crimes and the court found that this was not an abuse of discretion.

**PRACTICE POINT**: For what its worth, it almost seems unfair to not allow the defense to show that when it came time for charges to be filed against the defendant that the defendant willingly came in and accepted service of the charges and thereby cooperated when it is definitely a factor when the defendant does the opposite and either evades charges or avoids service of process.

State v. Santillan (Tenn. Cr. App. 8/5/21)

## RELEVANT EVIDENCE: THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE AT THE TRIAL THAT THE DEFENDANT WAS PLACED ON THE TBI'S MOST WANTED LIST DUE TO THE FACT THAT THE EVIDENCE WAS RELEVANT TO THE DEFENDANT'S CONSCIOUS AND PROLONGED FLIGHT AND ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE

**FACTS**: In a case in which the defendant was convicted of two counts of first-degree pre-meditated murder and other charges, the defendant maintained that the trial court had erred in admitting evidence that he was placed on the TBI's Most Wanted List, as the defendant maintained that the evidence was irrelevant and also unfairly prejudicial.

**HELD**: The Court of Criminal Appeals concluded that the trial court had properly exercised its discretion in admitting the evidence that the defendant had been placed on the TBI's Most Wanted List.

The Court of Criminal Appeals noted that while the state had argued flight, the defense had argued that the defendant had turned himself in to the police voluntarily. The trial court therefore determined that in light of the defendant's argument, the degree to which there was information in the community about the defendant's charges was relevant and probative. The trial court also had found that the evidence was relevant as to the steps the officers had taken to attempt to locate the defendant. The trial court had also found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice based on the entirety of the circumstances.

The court noted relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, pursuant to Tennessee Rule of Evidence 401.

In reviewing the issue of relevance, the Court of Criminal Appeals noted that the state presented evidence of law enforcement's efforts to locate and apprehend the defendant, while the defense argued that the defendant voluntarily turned himself in to police. The court noted that evidence that the defendant turned himself in to the police a short time after he was placed on the TBI's Most Wanted List, the information about the defendant being

disseminated to the public, and the fact that a reward for information leading to his arrest was offered was relevant to the issue of flight and to rebut the defense's claim that the defendant turned himself in to the police on his own volition. The Court of Criminal Appeals noted that the evidence is "especially probative in light of proof of the defendant's efforts to elude capture prior to his placement on the list."

The Court of Criminal Appeals concluded that while the evidence was somewhat prejudicial, the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and this ruling was a proper exercise of the trial court's discretion in admitting the evidence.

**PRACTICE POINT**: These types of issues should be evaluated carefully by the trial judge as the TBI or FBI placing somebody on the most wanted list could be extremely prejudicial and there should be a careful balance of the rights of the defendant and the true probative value of the information.

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

**SUFFICIENCY OF CONVICTING EVIDENCE: THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE DEFENDANT'S IDENTITY AS THE PERPETRATOR OF THE CRIMES OF EVADING ARREST, DRIVING ON REVOKED LICENSE AND OTHER CHARGES AS THE OFFICER CLAIMED TO BE ABLE TO CLEARLY SEE THE DRIVER DESPITE THE DRIVER ACHIEVING SIGNIFICANT SPEEDS, THE DEFENDANT'S ABANDONED CAR WAS FOUND WITH THE DEFENDANT'S CELLULAR TELEPHONE INSIDE THE CAR AND HIS HAT LYING IN THE FIELD AND THE SEARCH OF THE DEFENDANT'S RESIDENCE RESULTED IN FINDING CLOTHING AND SHOES WHICH WERE WET AND DIRTY FROM BEING SOILED IN THE CORNFIELD**

**FACTS**: In a case in which the defendant was convicted of evading arrest, violation of the open container law and driving on a revoked license, the defendant challenged the sufficiency of the convicting evidence, as the defense argued that the state failed to establish his identity as the driver of the white Town Car. With regard to open container law violation, the defendant maintained that the empty beer bottles did not contain beer that was capable of immediately being consumed.

**HELD**: (1.) In regard to sufficiency of the evidence to establish the defendant's identity as the driver of the white Town Car, the court noted that Constable Stroud testified that when he learned that the tags affixed to the Town Car belonged to a different vehicle, he attempted to effectuate a traffic stop at that point. Instead of stopping, the driver of the Town Car fled and the Town Car reached speeds of sixty miles per hour. The court noted that the officer stated that he could clearly see the driver, whom he described as a white male. The driver drove into a cornfield and abandoned it, and the officers found the defendant's cellular telephone inside the car with his hat lying in the field next to the car. The court also noted that the evidence established that a search of the defendant's residence revealed the defendant's clothing and shoes that were wet, dirty and soiled with the "detritus of the cornfield."

The court noted that sufficient evidence exists to support a conviction if, after considering the evidence – both direct and circumstantial – in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The court concluded that the evidence was sufficient to establish the defendant's identity as the perpetrator based on the direct and circumstantial evidence.

(2.) In regard to the defendant's claim regarding the open container law and the defendant's argument that the evidence was insufficient to support that beer "had recently been consumed," the court noted that TCA 55-10-416 provides that "open container" means any container containing alcoholic beverages or beer, the contents of which are immediately capable of being consumed or the seal of which has been broken. The statute also provides that an open container is "in the possession of the driver when it is not in the possession of any passenger and is not located in a closed glove compartment, trunk or other non-passenger area of the vehicle." The court noted that the proof established that Constable Stroud identified the defendant as the driver, the only occupant of the Town Car immediately before the car was driven into the cornfield, and that the officers found two

open, empty or partially empty beer bottles inside the car. The court found that this established sufficient proof for a rational fact finder to conclude that the defendant violated the open container law.

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

## VIDEO EVIDENCE DEPICTING GRAPHIC VIEW OF DEFENDANT'S PRIVATE PART PENETRATING A SMALL FEMALE CHILD: MERE FACT THAT OTHER SEXUAL CHARGES ARE PENDING INVOLVING THE SAME FEMALE VICTIM AND THE DEFENDANT AND THE FACT THAT THE VIDEO EVIDENCE IS EXTREMELY PREJUDICIAL TO THE DEFENDANT PRESENTS NO VALID CLAIM THAT THE VERY STRONG EVIDENCE OF THE CRIME SHOULD BE EXCLUDED AT TRIAL

**FACTS**: In a case in which the defendant was convicted of rape of a child, the defendant maintained that the trial court erred "when it denied his motion to suppress the video that depicted a penis between the labia and buttocks of a small female child," claiming that the state failed to properly join the charge of the rape of a child with other pending charges for the aggravated sexual exploitation of a minor. The defendant also claimed that the evidence should be excluded because of the extreme nature of the prejudicial impact on his case claiming that the probative value is substantially outweighed by the danger of unfair prejudice.

**HELD**: (1.) The Court of Criminal Appeals first ruled that any contention that the state failed to properly join all charges against the defendant in one trial and therefore that the evidence must be excluded is not well taken. The court noted that under Tennessee Rule of Criminal Procedure 8(a) that all crimes based upon the same conduct or arising from the same criminal episode that are not lesser included offenses must be charged in separate counts. The court noted that failure to do so precludes the state from "later" retrying a defendant for crimes not charged in the original indictment. The Court of Criminal Appeals noted that the Advisory Commission Comments state, "this rule is designed to encourage the disposition in a single trial of multiple offenses arising from the same conduct and from the same criminal

episode, and should therefore promote efficiency and economy." The court noted that the purpose behind Rule 8 is "to avoid piecemeal litigation and to disallow the 'saving back' of charges arising from the same conduct or criminal episode."

The court concluded that the remedy for the defendant if the state has violated the mandatory joinder rule by the "saving back" one or more charges would be dismissal of any "subsequent" indictment based on the first indictment. The court noted that issue is not presently before the court because there had not been any previous prosecution for which charges were allegedly "saved back". The court noted that "the issue of whether the state should have mandatorily joined the sexual exploitation charge will be an issue for a future court to address, if and when the state moves forward on that charge."

(2.) In regard to the issue that the video evidence would unfairly prejudice the defendant, the court found that the video, and the still photograph taken therefrom, was clearly relevant to whether the defendant had in fact committed the act of child rape. The court stated that "while this evidence is prejudicial by its very nature, it is not unduly prejudicial."

In regard to the claim of unfair prejudice, the Court of Criminal Appeals noted the following principles of law that were pertinent to the case: 1.) Evidence is relevant and generally admissible when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 2.) Even relevant evidence, however, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 3.) Questions regarding the admissibility and relevancy of evidence lie within the discretion of the trial court and appellate courts will not interfere with that exercise of discretion unless a clear abuse appears on the face of the record. 4.) Tennessee courts have liberally allowed the admission of photographs in both civil and criminal cases, and accordingly, the admissibility of photographs lies within the discretion of the trial court whose ruling will not be disturbed except upon a clear showing of abuse of discretion. 5.) Notwithstanding the broad interpretation of admissibility, evidence that is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and prejudice the defendant. 6.) Additionally, the probative value of the photograph must outweigh any unfair prejudicial effect that it may have upon the trier of fact. 7.) Photographs and a video of a child rape are

prejudicial by their very nature. Prejudicial evidence, however, is not per se excluded; indeed, if this were true, all evidence of a crime would be excluded at trial. 8.) Rather, what is excluded is evidence which is unfairly prejudicial in other words, evidence which has an undue tendency to suggest a decision on an improper basis, frequently, though not necessarily, an emotional one. 9.) In the present case, the Court of Criminal Appeals stated the following: "The defendant was on trial for child rape. The victim testified that the defendant had touched her vaginal area with his penis. The defendant maintained his innocence. On the defendant's computer, under a username registered to him, computer forensic personnel found a video that depicted a penis going between the labia and buttocks of a prepubescent child. The victim can be heard in the video, and her socks and shoes are depicted in the video. A small mark, scab or scar, on the left hand holding the penis matches other photographs of a mark on the defendant's left hand. We conclude that the trial court did not err when it admitted this video. The video, and the still photograph therefrom, was clearly relevant to whether the defendant had in fact committed the act of child rape. While this evidence is prejudicial by its very nature, it is not unduly prejudicial."

**PRACTICE POINT**: The best evidence of all is evidence that clearly identifies the commission of the crime by the perpetrator. Prejudicial or not.

State v. Gilbreath (Tenn. Cr. App. 9/28/21)

## *JUVENILE TRANSFER HEARING*

### JUVENILE TRANSFER HEARING: COURT OF CRIMINAL APPEALS FINDS THAT THE DEFENDANT'S CLAIM THAT THE ADULT CRIMINAL COURT LACKED JURISDICTION OVER THE DEFENDANT FOR FAILURE OF THE TRANSFER HEARING TO CONFORM TO THE REQUIREMENTS OF TCA 37-1-127 WAS WITHOUT MERIT DUE TO THE FACT THAT THE JUVENILE COURT HAD APPROPRIATELY FOUND THAT THE DEFENDANT COMMITTED THE DELINQUENT ACTS, THAT HE WAS NOT COMMITTABLE TO AN INSTITUTION, AND THAT THE INTEREST OF THE

**COMMUNITY REQUIRED THAT THE DEFENDANT BE PUT UNDER LEGAL RESTRAINT OR DISCIPLINE**

**FACTS**: The defendant was ultimately convicted in adult criminal court in Knox County of two counts of felony murder, one count of second-degree murder, and other counts of aggravated robbery and carjacking etc. The defendant maintained that the criminal trial court did not have jurisdiction over him as the juvenile court had failed to provide a transfer hearing which conformed to the requirements of TCA 37-1-127. The defendant asserted that his transfer hearing "violated the applicable statutes because the state introduced extra judicial statements against him and any statement by non-testifying co-defendant which incriminated the defendant during the transfer hearing was constitutionally prohibited under Bruton." The defendant also maintained that the juvenile court's decision to allow certain hearsay testimony deprived the defendant of his right to confront and cross-examine the declarants regarding the hearsay information. The defendant maintained that as a result the trial court lacked jurisdiction over the defendant's case and the trial court had erred when it refused to dismiss the presentment for want of jurisdiction.

**HELD**: The Court of Criminal Appeals found that there was nothing in the record which indicated that the juvenile court had erred in transferring the defendant to criminal court and therefore jurisdiction was properly bestowed upon the trial court, and the trial court did not err in denying the defendant's motion to dismiss the case in adult criminal court.

In reviewing the trial record, the Court of Criminal Appeals stated that "the record makes clear that the juvenile court conducted a proper transfer hearing during which it heard testimony from Mr. Diaz that established probable cause that defendant Terry committed the especially aggravated robbery and first-degree murder of Mr. Hutchins as alleged in the petitions." The court further noted that the record indicated the juvenile court allowed the investigator to testify about the co-defendant Williams's statement in order to establish probable cause that the co-defendant committed the crimes as alleged. The court then noted that the juvenile court then admitted testimony from Investigator Moran regarding defendant Sims's statement for the limited person of corroborating the statement made by co-defendant Williams.

The Court of Criminal Appeals noted that the CCA agreed with the state's position that "when the juvenile court found reasonable grounds to

believe Defendant Terry committed the delinquent acts as alleged, that he was not committable to an institution for the developmentally disabled or mentally ill, and that the interest of the community required that he be put under legal restraint or discipline," then the transfer to criminal court was mandatory. The court noted that these three elements are the requirements of a transfer of a juvenile to adult court under the provisions of TCA Section 37-1-134(a)(4). The court noted that the hearing as required was conducted by the court without a jury, in an informal but orderly manner. The court also noted that pursuant to the statute the defendant was allowed to cross-examine adverse witnesses and also the trial court had made appropriate rulings on hearsay issues based upon all of the facts.

State v. Terry and Sims (Tenn. Cr. App. 8/9/21)

## ***PRELIMINARY HEARING***

### CAN THE STATE APPEAL A GENERAL SESSIONS JUDGE'S DECISION TO DISMISS A CRIMINAL CHARGE BASED UPON THE STATE'S FAILURE TO PROVE PROBABLE CAUSE?: FOLLOWING DISMISSAL OF DRUG CHARGE IN GENERAL SESSIONS COURT AT A PRELIMINARY HEARING, AND FOLLOWING THE CIRCUIT COURT'S DETERMINATION THAT THE STATE'S APPEAL OF THE RESULT OF A PRELIMINARY HEARING WAS NOT PROPER PROCEDURE, THE COURT OF CRIMINAL APPEALS DISMISSED THE STATE'S APPEAL FOR LACK OF JURISDICTION

**FACTS**: A preliminary hearing on a drug charge was conducted on 3/3/20 by the Madison County General Sessions Court. At the hearing, Deputy Reasons testified that on 1/21/20, he attempted to stop a vehicle which appeared to be in excess of the speed limit in Jackson, Tennessee. Officer Reasons was unable to get the vehicle to stop but twelve minutes later Deputy Cisco advised he had located a vehicle matching the description which was in front of him on the road. Cisco engaged his blue lights and initiated a traffic stop. When he approached the vehicle, he smelled a strong

odor of marijuana. Based on the strong smell of marijuana, the deputy searched the vehicle and found multiple plastic bags of what appeared to be marijuana.

At the conclusion of the preliminary hearing, the general sessions judge noted that the Tennessee Bureau of Investigation has advised that "there is no way under a trained eye or even a trained microscope that you can tell the difference between legal hemp and high-grade marijuana." The general sessions court stated that because it was not possible to distinguish between legal and illegal hemp by sight or smell, there was no probable cause and therefore the search of the vehicle was unlawful.

After the dismissal, the state appealed to the circuit court under TCA 27-5-108, arguing that the statute gave it the right to appeal from the general sessions court's dismissal on the issue of probable cause under the provision of the statute which reads, "Any party may appeal from a decision of the general sessions court to the circuit court of the county within a period of ten days on complying with the provisions of this chapter."

The circuit court noted that it had never seen an appeal of a preliminary hearing and explained that if a general sessions court did not find probable cause, the state could still take the case to the grand jury. Neither the court nor the state were able to find any case law to provide a basis for appealing a preliminary hearing determination on probable cause under TCA 27-5-108(a)(1). The circuit court noted that the statute could be used by the state to appeal from a trial in sessions court where the court had ruled on the merits of the case. The circuit court also expressed concern with the state's ability to "lay back and not even get its witnesses there at the preliminary hearing and just start appealing to circuit court."

The circuit court dismissed the state's appeal, finding that Tennessee Rule of Criminal Procedure 5.1(c) allowed the state to present the case to the grand jury for a probable cause determination even after a general sessions court dismisses a charge, and that is the proper remedy for the state rather than appeal to the circuit court.

The state proceeded to appeal to the Court of Criminal Appeals pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure.

**HELD**: The Court of Criminal Appeals held that the state has no right to appeal to the Court of Criminal Appeals pursuant to Tennessee Rule of Appellate Procedure 3 under the circumstances of this case.

The Court of Criminal Appeals noted that generally the state does not have the right to appeal in a criminal case unless the right is expressly conferred by a constitutional provision or by statute. The Court of Criminal Appeals found that "appealing an order dismissing an appeal for lack of

proper procedure is not a specifically enumerated issue in Rule 3(c). The court therefore stated that "the only possible avenue to appeal under Rule 3(c) is through finding that the substantive effect of the order dismissing the state's appeal results in dismissing an indictment, information, or complaint. The court noted that in the present case there was never an indictment or information and when the state appealed the circuit court's order, the initial complaint had already been dismissed by the general sessions court.

The court stated that "because the charge was dismissed at the general sessions court, and the circuit court's order only dismissed the state's appeal on procedural grounds, the circuit court's order could not result in or be construed as a dismissal of the initial complaint. The court concluded that the Court of Criminal Appeals did not have jurisdiction to hear the appeal and the appeal was therefore dismissed.

State v. McClellan (Tenn. Cr. App. 10/4/21)

## ***RIGHT OF DEFENDANT TO CONFRONT WITNESSES***

### RIGHT TO CONFRONT WITNESSES: THE RIGHT OF DEFENDANT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED WHEN OFFICERS TESTIFIED THAT CO-DEFENDANT ROBINSON'S POLICE STATEMENT WAS CONSISTENT WITH THAT OF CO-DEFENDANT BLAKEMORE

**FACTS**: In a case in which the defendant was convicted of first-degree felony murder and attempted aggravated robbery, the defendant maintained that his right to confront a witness was violated when a police witness referenced a non-testifying co-defendant's statement. Specifically, the defendant contended his right to confront witnesses was violated when agent Pugh testified that co-defendant Robinson's police statement was consistent with that of the co-defendant Blakemore. The state responded that no confrontation rights were implicated because Agent Pugh did not verbatim recount anything co-defendant Robinson said during his police interview.
**HELD**: The Court of Criminal Appeals held that this evidence was inadmissible hearsay due to the fact that when it came to the rights of the defendant to confront witnesses against him, the defendant's right to

confrontation was violated when the officer was allowed to testify that the two co-defendant's statements were consistent.

The Court of Criminal Appeals noted the following principles of law relevant to their decision in this case:

(1) The Tennessee Supreme Court has recounted that under the decisions of the United States Supreme Court, "generally, the use of one co-defendant's confession to implicate the other is violative of the non-confessing co-defendant's Sixth Amendment Right of Confrontation."

(2) Testimonial hearsay statements violated defendant's confrontation rights and are only admissible when (1) the declarant is unavailable and (2) the defendant has had a prior opportunity to cross-examine the declarant.

(3) The court noted that in the present case, "although Agent Pugh testified before co-defendant Blakemore, the substance of co-defendant Blakemore's police statement had been introduced in detail through Chief Baker, Officer Swift, Officer Burkeen, and Agent Pugh. The court noted that when the prosecutor began to ask a question comparing co- defendant Robinson's interview to co-defendant Blakemore's interview, the defendant objected on confrontation grounds as it was not anticipated that co-defendant Robinson would testify. The prosecutor responded that he only sought to inquire about what whether the statements were consistent. The trial court then allowed the prosecutor to rephrase the question to ask whether the statements were consistent, to which Agent Pugh replied that they were "extremely consistent."

The Court of Criminal Appeals noted that the court disagreed with the "state's assertion that no confrontation violation can occur so long as a witness does not directly quote a non-testifying co-defendant's statement." The Court of Criminal Appeals stated, "Were this the case, the right to confrontation would be rendered a nullity ----- the state would only need to produce one credible witness and a slew of police witnesses to opine that other witnesses' accounts were consistent without affording the defendant an opportunity to cross-examine the witnesses and establish their credibility, or lack thereof."

Based on this, the Court of Criminal Appeals concluded that Agent Pugh's assertion that the two police statements were consistent was hearsay. The court noted that "the fact that no quoted language was presented to the jury draws a distinction without a difference because the facts to which Agent Pugh referred were clear."

The Court of Criminal Appeals added, "The content of co-defendant Robinson's interview, particularly his identification of the defendant as the shooter, was not admissible pursuant to any hearsay exception; therefore, the

evidence was inadmissible hearsay. Relative to confrontation, co-defendant Robinson's police statement was testimonial in nature, and the defendant's right to confrontation was violated in this regard."

The court did ultimately conclude that the error was harmless beyond a reasonable doubt due to the totality of proof.

State v. Douglas (Tenn. Cr. App. 9/30/21)

## *RIGHT TO COUNSEL*

### WAIVER OF RIGHT TO COUNSEL: A CRIMINAL DEFENDANT HAS A RIGHT TO BE REPRESENTED BY COUNSEL OR TO REPRESENT HIMSELF AND PROCEED PRO SE, BUT IN ANY PARTICULAR PROCEEDING, A PERSON MAY ASSERT ONE OR THE OTHER, BUT NOT BOTH

**FACTS**: The defendant James McClain was convicted by a jury of aggravated assault and witness coercion, and the defendant ultimately claimed that the trial court had erred by permitting him to represent himself at trial.

The Court of Criminal Appeals noted that the record showed that after the defendant had been appointed counsel, the defendant expressed dissatisfaction with his first appointed attorney, following which the trial court permitted the attorney to withdraw and he appointed new counsel. The defendant continued to file pro se pleadings and at some point expressed a desire to represent himself. The initial request to represent himself was not in the record, but the Court of Criminal Appeals indicated that the trial court's discussion of the issue with the defendant on the first day of trial indicates that the discussion was not the first discussion with the defendant on the issue.

The court on the first day of trial placed the defendant under oath and then asked a series of questions to determine whether or not he could represent himself. The trial court advised the defendant of the nature of the pending charges and warned the defendant that he would be "essentially on your own" and told him he would be responsible for familiarizing himself with the Rules of Evidence and Procedure. The judge cautioned the defendant in very strong language that electing self-representation was a

"horrible idea." The defendant stated that he did want to proceed by representing himself and that he had made the decision voluntarily with the full understanding of what his responsibilities were going to be and the consequences of what happened if he was convicted.

Based upon the defendant's sworn testimony, the trial court concluded that the defendant had knowingly, voluntarily, and intelligently elected to represent himself. The trial court initially appointed elbow counsel to the assist the defendant in representing himself and the defendant ultimately stated that he had told elbow counsel that he intended to sue him and file an ethics complaint against him and that he would do so with every appointed attorney who basically refused to do what he wanted him to. The trial court relieved elbow counsel of his responsibilities to which the defendant objected, but the court overruled the defendant's objection stating that the defendant had created a conflict of interest with elbow counsel by threatening to sue him and accusing him of having a conspiracy with the state.

**HELD**: The Court of Criminal Appeals held that under these circumstances the defendant both explicitly and implicitly waived the assistance of elbow counsel. The court noted that while no written waiver of the right to counsel appears in the record on appeal, the absence of a written waiver does not necessarily preclude a constitutionally valid waiver. The trial court entered a written order finding that the defendant was "well aware of the consequences of his decision to represent himself." The court concluded that the defendant had both explicitly and implicitly waived the assistance of elbow counsel and the court found that the absence of a written waiver does not entitle the defendant to relief under these circumstances.

State v. McClain (Tenn. Cr. App. 8/26/21)

## WAIVER OF RIGHT TO COUNSEL: TRIAL COURT'S INQUIRY INTO THE DEFENDANT'S DESIRE TO REPRESENT HIMSELF AT TRIAL FELL SHORT OF THE KIND OF INTENSIVE HEARING REQUIRED IN ORDER TO ASCERTAIN THAT DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AND KNEW AND FULLY UNDERSTOOD THE CONSEQUENCES OF HIS DECISION TO REPRESENT HIMSELF

**FACTS**: In a case in which the defendant was charged with aggravated assault, the defendant first expressed a desire to represent himself at his arraignment, following which the trial court asked the defendant whether he had studied law to which the defendant replied that although he was not a lawyer, he had studied the law. He indicated he was not very familiar with the Tennessee Rules of Criminal Procedure and when asked about the Rules of Evidence he said, "They're uniform aren't they?" The defendant indicated that he did not think he had a complicated case and that he was innocent of the charge and he was concerned that any appointed attorney would have a big case load and he was afraid he would be put on the back burner. He indicated he would rather "throw himself under a bus than get put on the back burner."

After conviction the defendant asserted that the trial court should not have permitted him to proceed pro se, arguing that the record did not evince a valid waiver of his right to counsel or assertion of the right to self-representation because the trial court did not apprise him of the nature of the charges against him, the potential punishments, and the dangers of self-representation.

**HELD**: The Court of Criminal Appeals found that based upon their examination of the record, "we concluded that the trial court's inquiry into the defendant's desire to represent himself at trial fell short of the kind of intensive hearing required in order to ascertain that the defendant knowingly and intelligently waived his right to counsel and that the defendant knew and fully understood the consequences of his decision to represent himself." The Court of Criminal Appeals noted that the judge's inquiry was more of a "mere routine inquiry" that left the trial court entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel. The defendant's convictions were reversed and the case was remanded for a new trial.

The Court of Criminal Appeals made several key points in regard to self-representation cases:

(1) A criminal defendant has the right to represented by counsel or to represent himself and proceed pro se without the assistance of counsel.

(2) To activate the right of self-representation the defendant must (i) timely assert the right to proceed pro se; (ii) clearly and unequivocally exercise the right; and (iii) knowingly and intelligently waive his or her right to assistance of counsel.

(3) The court noted that under Tennessee Rule of Criminal Procedure 44 that before accepting a waiver of counsel the court should (a) advise the accused in open court of the right to the aid of counsel at every stage of the proceedings; and (b) determine whether there has been a competent and intelligent waiver of such right by inquiry into the background, experience, and conduct of the accused, and other appropriate matters.

(4) To facilitate the determination of whether the defendant has made a competent and intelligent waiver, the Court of Criminal Appeals has recommended that trial courts rely on the questions set forth "in Bench Book for the United States District Judges."

(5) The competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself.

(6) A defendant need not have legal training or experience in order to competently and intelligently elect self-representation. The defendant's technical legal knowledge is not relevant to the determination whether he is competent to waive his right to counsel.

(7) The trial court bears the serious and weighty responsibility of determining whether there is an intelligent and competent waiver by the accused.

(8) To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.

(9) To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

(10) "The Bench Book" recommended by the Court of Criminal Appeals provides a list of questions to be asked which include questions about the following: (a) study of law (b) whether or not the defendant has represented himself or herself in a prior action (c) inquiry in to whether or not the defendant understands the specific charges (d) going over the range of punishments (e) the nature of consecutive sentencing (f) the recognition that if the person represents himself or herself he or she will be on his or her own (g) familiarity with Tennessee Rules of Evidence (h) inquiry into understanding of the Tennessee Rules of Evidence (i) familiarity with the Tennessee Rules of Criminal Procedure (j) questioning about the understanding of how the Rules of Criminal Procedure work (k) realization

that if the person takes the witness stand that he or she must present testimony by asking questions of him or herself (l) advising the defendant that in the court's opinion the person would be far better defended by a trained lawyer than by themselves (m) that in light of all the questions the person still desires to represent himself or herself (n) whether the decision is entirely voluntarily on the part of the defendant (o) a specific finding that the defendant has knowingly and voluntarily waived his right to counsel and that the person would be permitted to represent himself or herself (p) that the defendant should consider the appointment of standby counsel to assist the defendant and to replace the defendant if the court should determine during the trial the defendant can no longer be permitted to represent him or herself.

The Court of Criminal Appeals noted that the trial court did not inform the defendant of the nature of the charges against him beyond reading the indictment and did not address any of the potential defenses or lesser included offenses. The trial court did not discuss any potential punishments with the defendant nor did the trial court warn the defendant that the trial court would not be able to provide him any assistance in trying the case, did not advise the defendant it was the court's opinion he should not proceed pro se due to his unfamiliarity with the law and the rules of evidence and did not ask the defendant whether he had made his decision voluntarily, among other deficiencies of the trial court.

The court noted that even though the defendant had performed admirably at trial considering his lack of legal education, his performance at trial is not relevant as to whether there was a valid waiver made prior to trial. The court noted that "a valid waiver, if there is one, is made prior to trial or not at all." The court did conclude that the defendant's convictions must be reversed and the case remanded for a new trial.

State v. Prince (Tenn. Cr. App. 12/2/21)

## ***SEARCH AND SEIZURE***

### CELL PHONE RECORDS OF DFEFENDANT: DELIVERY OF SEARCH WARRANT BY THE STATE OF TENNESSEE TO A SERVICE ADDRESS IN FLORIDA TO OBTAIN THE DEFENDANT'S CELL PHONE RECORDS WAS DEEMED TO BE

**CONSTITUTIONALLY SOUND BY THE COURT OF CRIMINAL APPEALS AS THE ADDRESS ON THE SEARCH WARRANT IN THIS CASE WAS NOT NECESSARILY THE PLACE TO BE SEARCHED BECAUSE THE ELECTRONIC RECORDS WERE ALSO ACCESSIBLE IN KNOX COUNTY, TENNESSEE**

**FACTS**: In a case in which the defendant was convicted in Knox County for multiple counts of felony murder and other serious charges, the defendant maintained that the trial court erred in denying his motion to suppress cell phone records relating to his cell phone number, as the defendant argued that the warrant was void because the trial court in Tennessee lacked jurisdiction to direct the service of the search warrant on AT&T in North Palm Beach, Florida, for the electronic records stored there. The defendant further contended that the search warrant lacked a nexus between the records searched and the crime being investigated.

The state responded that the trial court did not err by determining that the search warrant was valid on its face, because the state asserted that the delivery of the warrant to a service address in Florida simply complied with AT&T's request to receive all warrants and subpoenas in one location to facilitate its response. The state pointed out that the records were accessible in Florida or in Knox County, Tennessee, but AT&T had requested for the warrant to be presented to Florida in order to accommodate AT&T.

The trial court made findings at the suppression hearing concerning the search warrant, which this outline will quote in its entirety because it is stated well and reflects an appropriate way for us as General Sessions judges to analyze the records in this type of case.

The trial court's findings are as follows:

> "[I}t would appear that search warrant was issued here in Knox County, Tennessee and the records were apparently lodged or were stored, or whatever, in North Palm Beach, Florida. And I'm aware that a Trial Court's jurisdiction to compel anyone to turn over material or to comply with a search warrant is limited to the geographic limitations of the State of Tennessee.

However, what appears to be happening here is that these are - - these communications providing businesses to do business here in - - in Knox County, Tennessee, are in Tennessee and their presence is nationwide, maybe global, I don't know. And what they have in one place, they have in all of their places. It's not like we're talking about specific pieces of paper that can only be in one place or another. This is digital information, which can be accessed from many different places.

So my interpretation of what happened is that the court - - the Knox County Judge issued an order to this business for them to turn over certain records. And the company - - rather than challenge the Court's authority, the company is simply asking for the State to facilitate this process by faxing the warrant to another state, after which they comply and send the records to the - - to the state.

So I don't - - it would not appear that a Tennessee Judge is actually compelling disclosure in Florida. It is simply the way the business has asked for the matter - - for this process to occur, wherein a [S]tate of Tennessee search warrant can be honored even though they digital - - digitally stored materials maybe in a different state. At any rate, I don't see that this is a search conducted in violation of the service provider's rights or the defendant's rights. So the Court would deny the motion to suppress on that ground.

. . . .

Now, with regard to the nexus. It would appear that there was information on the victim's phone that the police looked at. And, of course, there's - - that, in no way, impacts any Constitutional right of the defendant. They just - - they're looking at the victim's phone. And then seeing the victim's phone, they see that the victim made repeated calls to a number that turned out to be the defendant's phone. And from that they, based on their experience as law enforcement officers, believe that these phone calls, happening in close temporal proximity close in time to the crime itself, is a lead, a lead which is based on a probability that there's some connection between the attempted communication with the - - with the defendant and the crime that, ultimately, the defendant had been charged with.

This Court would find that there is probable cause to believe that the fruits of the search would support a finding - - would support a conviction. So the Court will deny the motion to suppress based on the lack of nexus."

**HELD**: The Court of Criminal Appeals held that the trial judge had not committed error in its analysis of the facts and found that the trial court's findings that the warrant was facially valid was accurate, noting that "the address listed on the search warrant was simply a service address and that the trial court had jurisdiction to issue the warrant because the electronic records could be accessed in Knox County, Tennessee."

The Court of Criminal Appeals also held that "the affidavit seeking to establish probable cause for a search warrant must demonstrate a nexus between the criminal activity, the place to be searched, and the items to be seized." The court stated that it agreed with the trial court "that the affidavit provided a substantial basis for finding probable cause," adding that "the evidence of the victim's communication with the defendant's phone number immediately before the murder established a nexus between those communications and the murder.

The Court of Criminal Appeals also distinguished the case of State v. Frazier (Tenn. 2018), in which a General Sessions judge in Franklin County, Tennessee had been held to have no authority to authorize a warrant for the search of the defendant's property in Coffee County, Tennessee, because the records in this case, unlike the Frazier case, could be accessed in Knox County, Tennessee or in Florida whereas in the Frazier case the "service address and the place to be searched were identical and beyond the issuing court's jurisdiction."

The court also found that even if any error had occurred it was harmless beyond a reasonable doubt because the proof at trial of the defendant's guilt was overwhelming.

Also of interest, the Court of Criminal Appeals in a footnote noted that the Tennessee Legislature had recently added a second sentence to TCA 40-1-106, which stated: "The judges of chancery and circuit courts have statewide jurisdiction to issue search warrants pursuant to chapter 6, part 1 of this title in any district." That was effective July 1, 2019, but did not include General Sessions judges.

**PRACTICE POINT**: This is a good case to review for these types of cases to get a good overall view of the law, and the trial court's opinion as quoted at length here is a good straight forward analysis of this type of case.

State v. Hoskins (Tenn. Cr. App. 7/15/21)

## DOES COMMUNITY "CARETAKING EXCEPTION" TO SEARCH WARRANT REQUIREMENT APPLY TO THE HOME?: THE RIGHT OF A PERSON TO RETREAT TO HIS OR HER HOME AND BE FREE FROM UNREASONABLE GOVERNMENTAL INTRUSION MEANS THAT THE COMMUNITY "CARETAKING EXCEPTION" DOES NOT PERMIT POLICE ENTRY INTO A PERSON'S HOME WITHOUT A SEARCH WARRANT

**FACTS**: During an argument with his wife the defendant placed a handgun on the dining room table and told his wife to "shoot him and get it over with." His wife left the home and spent the night in a hotel. The next morning she attempted to reach her husband by phone but was unable to do so, so she called the police to request a "welfare check."

When the police arrived at the home, they encountered the defendant on the porch, and the officers called an ambulance based on their belief the defendant posed a risk to himself or others. The defendant agreed to go to the hospital for psychiatric evaluation on the condition that the officers would not confiscate his firearms. Once the defendant left the scene, the officers located and seized his weapons, following which the defendant sued, claiming that the officers had entered his home and seized him and his firearms without a warrant in violation of the Fourth Amendment.

The District Court granted summary judgment to the officers, following which the First Circuit affirmed, based on the Supreme Court's prior decision in Cady v. Dombrowski, 413 U.S. 433 (1973).

**HELD**: The United States Supreme Court held that neither the holding nor logic of the Cady case justifies a warrantless search and seizure in the home. The court noted that Cady held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. The court in reaching that conclusion noted that the officers who patrol the "public highways" are often called to discharge non-criminal "community

caretaking functions," such as responding to disabled vehicles or investigating accidents.

The Supreme Court noted that searches of vehicles and homes are constitutionally different from each other, the court stating that the Cady opinion repeatedly stressed that fact. The Supreme Court said that the very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or home and "there be free from unreasonable governmental intrusion."

The court concluded that a recognition of the existence of "community caretaking" tasks, like rendering aid to motorists and disabled vehicles, is "not an open-ended license to perform them anywhere."

Caniglia v. Strom (U.S.CT. 5/17/21)

## WARRANTLESS ENTRY INTO DEFENDANT'S GARAGE: PURSUIT OF A FLEEING MISDEMEANOR SUSPECT DOES NOT ALWAYS – THAT IS, CATEGORICALLY – JUSTIFY A WARRANTLESS ENTRY INTO A HOME

**FACTS**: The defendant drove by a California highway patrol officer while playing loud music and honking his horn. The officer began to follow the defendant and soon thereafter turned on his overhead lights to signal that the defendant should pull over. Rather than stopping, the defendant drove a short distance to his driveway and entered his attached garage. The officer followed the defendant into the garage and questioned the defendant, following which the officer observed signs of intoxication and put him through sobriety tests. A later blood test showed the defendant's blood alcohol content was three times the legal limit.

The state charged the defendant with a misdemeanor driving under the influence. The defendant moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The lower courts denied the motion of the defendant, and the California Court of Appeals also affirmed, concluding that the defendant's failure to pull over when the officer flashed his lights created probable cause to arrest the defendant for the misdemeanor of failing to comply with a police signal. The California Court of Appeals held that the pursuit of a suspected misdemeanant is always permissible under the exigent-circumstances exception to the warrant requirement. The California

Supreme Court denied review, and the case was appealed to the U.S. Supreme Court.

**HELD**: The United States Supreme Court held that under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always – that is, categorically – justify a warrantless entry into the home. The court found that the Supreme Court's Fourth Amendment precedents required a "case-by-case assessment of exigency" when called upon to decide whether a suspected misdemeanant's flight justifies a warrantless home entry.

The court held that the Fourth Amendment ordinarily requires the law enforcement officer to obtain a judicial warrant before entering a home without permission. The court noted that an officer may make a warrantless entry when the "exigencies of the situation," considered in a case-specific way, create "a compelling need for official action and no time to secure a warrant." This was based upon the case of Kentucky v. King. The Supreme Court noted that it had found that such exigencies may exist when an officer must act to prevent eminent injury, the destruction of evidence, or a suspect's escape.

The court noted that misdemeanors run the "gamut of seriousness," and they may be very minor situations. The court noted that states tend to apply the misdemeanor label to less violent and less dangerous crimes. The court noted that it has held in the past that when a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify warrantless home entry. The court noted that if you add a suspect's flight to the situation, "the calculus changes," but not enough to justify categorical rule. The court noted that in many cases, flight creates a need for police to act swiftly, but no evidence suggests that every case of misdemeanor flight creates such a need.

The court said that therefore the Fourth Amendment precedents point toward assessing case-by-case the exigencies arising from misdemeanants' flight. The court noted that when the "totality of the circumstances" shows an emergency, a need to act before it is possible to get a warrant, the police may act without waiting. Those circumstances include the flight itself, but pursuit of a misdemeanant does not trigger a categorical rule allowing a warrantless home entry.

The Supreme Court also held that "the common law" in place at the constitution's founding simply does not support a categorical rule allowing a warrantless home entry whenever a misdemeanant flees. The court stated that like the court's modern precedents, the common law afforded the homes strong protection from government intrusion and it generally required a warrant before a government official could enter the home. The court noted

there was an often-discussed exception: <u>an officer, according to the common law treatises, could enter a house to pursue a felon</u>. But, the court concluded, in a misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home. <u>The court stated that "in short," the common law did not have and does not support a categorical rule allowing a warrantless home entry when a suspected misdemeanant flees</u>.

The lower court opinion was vacated and remanded.

<u>Lange v. California</u> (U.S.CT. 6/23/21)

## "FREE AIR SNIFF" PERFORMED BY POLICE DOG: TRIAL COURT SUPPRESSION OF EVIDENCE BASED UPON CANINE'S INABILITY TO DISTINGUISH BETWEEN MARIJUANA AND HEMP FOUND NOT TO BE REVIEWABLE BY COURT OF CRIMINAL APPEALS AS RECORD FAILED TO REFLECT THAT THE TRIAL COURT DISMISSED THE RELEVANT INDICTMENT COUNTS

**<u>FACTS</u>**: On 9/9/19, Officer Dill initiated a traffic stop of the defendant's car for failure to use a turn signal. The defendant gave the officer an incorrect name but consented to the search of her purse after which the officer found out her true identity, ultimately placing her into custody for an outstanding probation violation warrant. <u>The officer also asked the defendant for consent to search her car, which the defendant declined</u>. <u>Another officer arrived at the scene with the police dog, which signaled for the presence of "narcotics" inside the defendant's car. A search of the car revealed digital scales and substances believed to be heroin, methamphetamine, and fentanyl under the driver's seat</u>.

The defendant filed a <u>motion to suppress</u> the evidence found during the search of her car, <u>arguing that the officers lacked probable cause to search her vehicle because the police dog could not distinguish between the smell of hemp, a lawful substance, and marijuana, and that as a result, the dog's signaling for the presence of narcotics was unreliable</u>.

At the suppression hearing, the police dog's handler testified that the dog had received training and that the <u>dog was trained and certified to detect the presence of methamphetamine, marijuana, heroin, and cocaine</u>. When questioned about the ability of the dog to distinguish between hemp and

marijuana, the officer did indicate that the dog might signal for the presence of narcotics even if the substance was hemp, and also stated that officers could not determine which substance the dog signaled during a sweep but that any signal is related to the four substances the dog was trained to detect.

Following the suppression hearing, the trial court entered a written order granting the defendant's motion to suppress, finding that the police dog was trained to detect marijuana, methamphetamine, cocaine, and heroin but was not trained to distinguish between hemp and marijuana. The court found that the dog could have signaled for the presence of either of the controlled substances inside the defendant's car and that the dog would not have known the difference between hemp and marijuana. The trial court concluded: "Based upon the evidence presented of the K-9's training and track record in this matter, the court does not find reliability of the K-9 to support probable cause.

On appeal, the state contended that the trial court erred by granting the motion to suppress, arguing that the police dog was trained to detect four controlled substances and that the dog signaling for the presence of contraband regardless of whether the signal is related to marijuana or hemp provided a sufficient basis to establish probable cause to search the defendant's vehicle.

**HELD**: The Court of Criminal Appeals held that the state was not entitled to an appeal pursuant to Rule of Appellate Procedure 3(c)(1), as the record did not reflect the entry of an order dismissing the relevant indictment counts. The appeal of the state was therefore dismissed by the Court of Criminal Appeals.

**PRACTICE POINT**: Even though this case doesn't give an appellate court precedent because of the dismissal of the appeal, the ruling by the trial court was consistent with the article, "Even Dogs Can't Smell the Difference: The Death of 'Plain Smell,' as Hemp is Legalized" by Cynthia A. Sherwood, Davis F. Griffin and Alexander H. Mills in Tennessee Bar Journal, Volume 55, No. 12 (December 2019). The article points out: "The Tennessee Bureau of Investigation, however, has recognized recently that no law enforcement officer can visually tell the difference between legal hemp and illegal marijuana ----- nor can its officers or its K-9s detect the difference in odor."

The TBI has stated: "There's no way under a trained eye or even a trained microscope that you can tell the difference between legal hemp and high-grade marijuana, so I think that you can only imagine the investigative nightmare or hurdles that would present."

The North Caroline State Bureau of Investigation has stated that legal hemp and illegal marijuana smell the same, "both unburned and burned." These quotes come from the article, "Even Dogs Can't Smell the Difference."

In a similar ruling made in Sevier County General Sessions Court, Judge Stokes pointed out that a dog trained to detect marijuana, methamphetamine, cocaine, and heroin is simply not reliable in establishing probable cause when the dog cannot distinguish between hemp and marijuana. The inability to distinguish between legal and illegal substances "negates" the purpose of the K-9 performing the "sniff."

State v. Major (Tenn. Cr. App. 9/24/21)

## ISSUE OF STALENESS OF SEARCH WARRANT AFFIDAVIT: TRIAL COURT DID NOT ERR IN DETERMINING THAT PROBABLE CAUSE EXISTED FOR ISSUANCE OF SEARCH WARRANT EVEN THOUGH THREE MONTHS HAD PASSED FROM THE TIME OF THE DISCOVERY OF THE ILLEGAL PORNOGRAPHIC DOWNLOADS INVOLVING THE DEFENDANT'S IP ADDRESS AND THE ISSUANCE OF THE SEARCH WARRANT BECAUSE THE COLLECTION AND SHARING OF CHILD PORNOGRAPHY IS OF A "CONTINUOUS AND ONGOING NATURE"

**FACTS**: The defendant was indicted by the Bedford County Grand Jury for multiple counts of sexual exploitation of a minor. The defendant entered guilty pleas to multiple counts but reserved certified questions of law. The Court of Criminal Appeals found that there was only one certified question that was dispositive of the case and it related to the issue of staleness of the information supporting the search warrant. The issue is whether the information obtained in early April 2015 was too stale for the issuance of a search warrant on July 23, 2015, absent some proof of continuing conduct by the defendant.

**HELD**: The Court of Criminal Appeals concluded that the trial court did not err in determining that probable cause existed to believe that defendant possessed child pornography three months after the illegal activity involving

the defendant's IP address occurred. The court noted that in the time between discovering the downloads and securing a search warrant, the officers verified the defendant's address and identity.

The court identified several key principles in its decision:

1. The question of staleness of the information in the affidavit accompanying a search warrant is made on a case-by-case basis.
2. In determining whether the lapse of time between criminal activity and the issuance of a warrant may affect the likelihood that incriminating evidence will be discovered if a warrant is issued, the judge or magistrate "should consider whether the criminal activity under investigation was an isolated event or of a protracted and continuous nature, the nature of the property sought, and the opportunity those involved would have had to dispose of the incriminating evidence."
3. As a general principle, information regarding ongoing criminal activity does not become stale due to the passage of time.
4. The Appellate Courts of the State of Tennessee have observed that "child pornography is not fleeting or isolated. Rather, the collection and sharing of child pornography is of a continuous and ongoing nature and typically remains in possession of the user for an extended period of time."
5. The court noted previous cases involving periods of four months in one case and three months in another case and even seven months in a case involving child pornography, all of these cases resulting in a determination that the evidence was not stale.
6. In the present case, the affidavit in support of the issuance of the search warrant stated that multiple files containing videos and images depicting sexual exploitation of children were downloaded between April 1 and April 15, 2015. It was not an isolated incident and the Court of Criminal Appeals agreed with the trial court that the nature of child pornography is continuous and ongoing.

State v. McBride (Tenn. Cr. App. 8/31/21)

## SEARCH OF CELLULAR PHONE: DEFENDANT'S MOTION TO SUPPRESS THE RESULTS OF SEARCH OF HIS CELLULAR PHONE FOUND TO BE NOT WELL TAKEN AS DEFENDANT FAILED TO PROVIDE ANY PROOF THAT HE WAS NOT SERVED WITH THE SEARCH WARRANT; AND IN THE ALTERNATIVE THE DEFENDANT HAD

**"ACTUAL KNOWLEDGE" OF THE SEARCH OF HIS CELLULAR PHONE WHICH IS A PERMISSIBLE "GOOD FAITH" EXCEPTION TO RULE 41'S TECHNICAL REQUIREMENT THAT THE OFFICER GIVE A COPY OF THE SEARCH WARRANT TO THE PERSON AFFECTED**

**FACTS**: In a case in which the defendant was charged with two counts of especially aggravated sexual exploitation of a minor along with other charges, the defendant moved to suppress the results of the search of his cell phone arguing that he was not properly served with a warrant for the search of his cellular telephone.

The facts established that Detective Fillyaw pursuant to his investigation interviewed the defendant on 10/12/17, at which time the detective advised the defendant that he would be obtaining a search warrant to complete a forensic download of any evidence on the defendant's cellular telephones. The detective thereafter obtained three signed copies of the warrant for the search of the cellular telephones and made a fourth photocopy of the search warrant for his file. Later, on 10/16/17, Detective Fillyaw again interviewed the defendant, at which time he advised the defendant that he had obtained a search warrant and told the defendant about the evidence the police had discovered on the cellular telephones. The detective testified that evidence from the cellular telephones was partially responsible for the charges against the defendant but that other evidence was discovered during the consensual search of the defendant's residence. Detective later could not "recall clearly" whether he served the defendant with the warrant but testified that his regular procedure was to serve the warrant and that he could not ever recall failing to serve a copy of the search warrant. He explained his failure to recall to the fact that the search occurred almost two years earlier.

The trial court accredited Detective Fillyaw's testimony and found that there was no evidence presented at the suppression hearing to support the defendant's argument that he did not receive a copy of the search warrant. The trial court further found that the defendant had actual knowledge both before and after the search that the state had obtained a search warrant and thereby denied the motion to suppress.

The cell phone search yielded approximately 6,000 photographs, 1,300 of which depicted the victim, including showing the victim in

provocative poses and performing sexual acts and some pictures actually included screen shots of the victim's private parts.

**HELD**: The Court of Criminal Appeals held that the trial court did not err in denying the motion to suppress due to the fact that the Tennessee Supreme Court has recognized that "actual knowledge" is a permissible "good faith exception to Rule 41's technical requirement that the officer executing a search warrant leave a copy of the warrant with the person searched."

The Court of Criminal Appeals also noted that the trial court had accredited Detective Fillyaw's testimony and found that there was nothing before the court upon which it could even find that the defendant wasn't delivered a copy of the search warrant and therefore that the defendant had failed to meet his burden of demonstrating that the service of the search warrant did not comply with the technical requirements of Rule 41.

The Court of Criminal Appeals quoted the Tennessee Supreme Court by saying "when a defendant has demonstrated that a search warrant or its supporting affidavit is non-compliant with the technical requirements of Rule 41 or other relevant statutes, the burden shifts to the state to establish by a preponderance of the evidence that (1) the technical non-compliance was the result of a good faith error and (2) the error did not result in any prejudice to the defendant. The court found that the proof established that any technical non-compliance would be the result of a good faith error and that clearly the error did not result in any prejudice to the defendant under all of the underlying circumstances.

The court further noted that in State v. Daniel, 552 S.W. 3rd 832 (Tenn. 2018), the Tennessee Supreme Court "acknowledged that Rule 41(g) provided that a person aggrieved of an unlawful or invalid search may move to have the evidence suppressed" as a result of the serving officers failing to serve a copy of the warrant. But in the Daniel case, the Supreme Court demonstrated a "willingness to create narrow good-faith exceptions to Rule 41's exclusionary rule where the deviations from the rules of stringent requirements are inadvertent, inconsequential, and clearly resulted in no prejudice to the defendant."

State v. Turchin (Tenn. Cr. App. 12/9/21)

## SUFFICENCY OF SEARCH WARRANT: FACT THAT THE SEARCH WARRANT OMITTED THE WORD "SEIZE" DID NOT RENDER SEARCH WARRANT

## INVALID OR THE SEIZURE OF THE TRUCK AND ITEMS INSIDE IT ILLEGAL

**FACTS**: In a case in which the defendant was convicted of first-degree murder, aggravated robbery and other charges, the defendant maintained that the trial court erred in denying her motion to suppress as she claimed that the search warrant did not authorize the officers to seize and conduct chemical testing on her truck and contents. The defendant maintained that although the warrant named the property to be searched, it failed to specifically name her or describe the property to be seized. The defense reasoned that the search warrant's failure to specifically state that the officers were authorized to seize the truck and its contents meant that the officers were limited to a "basic search of the vehicle."

**HELD**: The Court of Criminal Appeals concluded that the trial court properly overruled the motion to suppress, finding that the fact that the search warrant omitted the word "seize" did not render the search invalid or the seizure of the truck or the items inside it illegal, due to the fact that a logical, common sense reading of the warrant, which described in great detail objects that would necessarily require laboratory analysis, showed that the warrant was meant to authorize the search and seizure of the items.

The court noted that the search warrant described in great detail the property to be searched, authorizing the officers to search the defendant's pickup truck, which was identified by make, model, color, registered owner and vehicle identification number. The warrant reflected that the vehicle and contents were to be searched for (1) Any blood, hair, fiber, DNA or trace/transfer evidence, keys to pawn shop, cell phones, any fire arms, … or any other physical evidence related to the homicide of the victim believed to be Jerry Ridge. (2) Any evidence or items that would be used to conceal the foregoing or prevent its discovery. The court noted that the search warrant did not specifically state that the officers were authorized to seize items found in the search or the truck itself.

The court noted that prior case precedents had concluded that a commonsense approach showed that a search warrant which omitted the phrase "boxes and containers" was meant to authorize the search of the truck's contents nevertheless. The court concluded that a commonsense reading authorized the search and seizure of the items.

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

**VEHICLE STOP: OFFICER'S SUBJECTIVE MOTIVATION FOR MAKING A TRAFFIC STOP DOES NOT INVALIDATE A STOP, THE COURT FINDING THAT THE OFFICER HAD REASONABLE SUSPICION TO STOP THE DEFENDANT BASED UPON SPEEDING OR IN THE ALTERNATIVE DUE TO EVIDENCE GATHERED DURING A TWO-DAY SURVEILLANCE OF AN APARTMENT FREQUENTED BY THE DEFENDANT**

**FACTS**: A narcotics task force had received information that drugs were being sold in an apartment complex near a community college campus. Law enforcement observed suspicious patterns of activity at the residence over a two-day period of time, including the officers observing the defendant at the residence multiple times. Testimony was that each time the defendant left the residence there was a steady increase in the number of people to and from the residence. Based upon the observations, law enforcement decided to stop the defendant's vehicle, and Officer Barber was instructed to follow the defendant's vehicle as he left the apartment complex. The officer believed he had reasonable suspicion to stop the defendant at this point based upon the defendant's suspected involvement in the drug operations, but he wanted to observe a traffic violation before stopping the defendant. The officer paced the defendant and determined that he was driving sixty miles per hour in a fifty-five mile per hour zone but continued to observe him until he was traveling sixty in a fifty mile per hour zone.

After the officer's stop, the defendant provided the officer with a driver's license and proof of insurance immediately but was unable to provide his registration. After a period of time, the defendant found his registration, following which the officer asked for consent to search the vehicle. The defendant denied consent, following which a K-9 performed a "sniff" search which led to officers finding five small bags of cocaine inside a larger bag totaling 30.92 grams of cocaine.

**HELD**: (1.) The Court of Criminal Appeals found that Officer Barber had reasonable suspicion to stop the defendant's vehicle based upon evidence gathered during the two-day surveillance of an apartment that the defendant had frequented.

(2.) The court also found that the officer had reasonable suspicion to stop the defendant's vehicle for speeding. The court noted that the officer chose to

wait and make a traffic stop and subsequently was able to observe the defendant traveling sixty miles per hour in a fifty mile per hour zone. The court noted it is an offense for a motorist to exceed the applicable speed limit and that when the officer observed speeding, he had probable cause to believe the defendant has committed a traffic offense.

The court also found that the defendant's complaint that the stop was merely a pre-text for a narcotics investigation was not well taken because "an officer's subjective motivation for making a traffic stop, however, does not invalidate a stop." Probable cause based upon speeding is sufficient in and of itself regardless of the officer's motivation.

(3.) The court also found that the defendant's complaint about the stop being outside of the officer's municipal jurisdiction at the time of the stop was not well taken. The court noted that TCA 40-7-109 provides authority for a private person to make an arrest and that the appellate court had determined in the past that officers have the authority to arrest defendants under the private arrest statute, noting that "a police officer does not give up the right to act as a private citizen when he is off duty or out of his jurisdiction."

(4.) The Court of Criminal Appeals also found that the duration of the traffic stop was not unreasonably prolonged. The court noted that if an officer's initial stop of an individual is justified, then it must be determined whether the seizure and search of the individual is "reasonably related in scope to the circumstances which justified the interference in the first place." The court noted that in such a situation the detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." The court noted that the proper inquiry is "whether during the detention, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."

The court pointed out that requests for driver's license and vehicle registration documents and other steps are "investigative methods or activities consistent with the lawful scope of any traffic stop." The court noted that when Officer Barber returned the documentation to the defendant and the defendant had found his registration, he issued a warning and then asked for a consent to search the vehicle. When the defendant declined the officer informed him that a K-9 officer was present and would circle his vehicle. The dog then indicated that there were illegal drugs inside the vehicle which provided probable cause for a search that subsequently revealed cocaine, marijuana, and a handgun.

The court found that under the circumstances the trial court properly concluded that there was no unreasonable delay in the K-9 circling the vehicle. The court also noted that the officer had detected overall nervous

demeanor on the part of the defendant and that the defendant had lied to one of the officers by telling him he had come from Buffalo Wild Wings when Officer Barber knew that was not true since he had followed him to the place of the stop from the apartment complex.

The court then concluded that there was probable cause for the traffic stop and that the defendant was not unreasonably delayed due to the use of the K-9 officer.

**PRACTICE POINT**: The trial court had denied the defendant's motion to suppress the evidence but did state that the case was "the most extreme example of a pre-textual stop that this judge has ever seen where an officer in a marked car along with one or two additional city officers follows a suspect fifteen or twenty miles beyond the municipal limits of the City of Columbia and finally stops the car within a quarter of a mile of leaving the county." The trial court also noted that he was not particularly "impressed with a separate indicia of suspicion relied upon by Officer Barber" based on the K-9 but he did find that the nine-minute period of detention of the defendant was not unreasonable under the circumstances.

The Court of Criminal Appeals would probably have had a basis to sustain the trial judge's determination that the timing was not reasonable if the court had decided to conclude differently.

The court should carefully look at these types of circumstances and make decisions based upon the credibility of all witnesses involved and understand possible ramifications of decisions of officers who should not have carte blanche to take any action they desire.

State v. Forest (Tenn. Cr. App. 5/18/21)

## ***SENTENCING***

### IMPOSITION OF FINES: THE TRIAL COURT'S IMPOSITION OF A FINE MUST BE BASED UPON THE FACTORS PROVIDED IN THE STATUTORY SENTENCING ACT, INCLUDING THE DEFENDANT'S ABILITY TO PAY THE FINE, AND OTHER FACTS OF JUDGMENT INVOLVED IN SETTING THE TOTAL SENTENCE

**FACTS**: In a case in which the defendant was convicted of the sale of heroin, the delivery of heroin, the sale of fentanyl, and the delivery of fentanyl, the trial court assessed fines of $50,000.00 for the heroin convictions and $25,000.00 for the fentanyl convictions.

On appeal, the defendant contended that the fines assessed against him were excessive and the defendant urged the Court of Criminal Appeals to conduct a de novo review of the issue and reduce the amount of the fines. The state conceded the trial court failed to make any findings in upholding the fines and asked the appellate court to remand the matter to the trial court for findings.

**HELD**: The Court of Criminal Appeals reversed the trial court's imposition of the fines and remanded the case for further findings based upon the consideration of statutory relevant factors. The Court of Criminal Appeals noted that the defendant was subject to minimum fines of $2,000.00 and maximum fines of $100,000.00 for each of his convictions of selling and delivering heroin and fentanyl.

The Court of Criminal Appeals noted the following principles in setting a fine:

(1) The trial court's imposition of a fine, within the limits set by the jury, must be based upon the factors provided in the statutory sentencing act, including the defendant's ability to pay that fine, and other facts of judgment involved in setting the total sentence.
(2) Although the defendant's ability to pay should be considered, it is not a controlling factor.
(3) The trial court must also consider other factors including prior history, potential for rehabilitation, financial means, and mitigating and enhancing factors that are relevant to an appropriate, overall sentence.
(4) The appellate court reviews the fines imposed by a trial court under an abuse of discretion standard with a presumption of reasonableness.
(5) Since the trial court made no findings in imposing the total fine of $75,000.00 in the present case, the trial court's decision is not entitled to a presumption of reasonableness, and the Court of Criminal Appeals found that it could not defer to the trial court's exercise of its discretionary authority.
(6) When the trial court fails to place on the record any reason for a particular sentencing decision, the most appropriate action is to remand the case to the trial court for reconsideration.

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

**TRIAL COURT'S ORDER REGARDING RESTITUTION: THE TRIAL COURT ABUSED ITS DISCRETION BY NOT MAKING APPROPRIATE FINDINGS REGARDING THE VICTIM'S PECUNIARY LOSS OR THE DEFENDANT'S FINANCIAL RESOURCES AND FUTURE ABILITY TO PAY AND BY NOT BASING THE TOTAL RESTITUTION AWARD ON WHAT THE DEFENDANT CAN REASONABLY PAY DURING THE TIME PERIOD HE IS ON PROBATION**

**FACTS**: The defendant entered into a plea agreement on the charge of arson, whereby he was sentenced to serve six years, with the defendant to serve three hundred sixty-four days in jail before serving six years on supervised probation. The trial court also ordered the defendant to have no contact with the victim or her property and set the restitution issue to be determined at a later date. Later, the trial court entered a restitution order requiring the defendant to pay restitution in the amount of $99,017.78 with a payment schedule of $50.00 per month for the length of his probationary sentence, which the trial court determined to be six years.

On appeal the defendant argued: (1) the trial court erred in ordering him to pay nearly $100,000.00 in restitution and to pay $50.00 per month over the term of his probation; and (2) that no amount of restitution is appropriate because his social security benefits are exempt from court order collection under federal law.

**HELD**: The Court of Criminal Appeals concluded that the trial court abused its discretion by not making appropriate findings regarding the victim's pecuniary loss. Specifically, the Court of Criminal Appeals noted that "the trial court simply accepted, without question, Ms. Hawkins' testimony regarding her pecuniary loss, even though no documentation was presented regarding an appraisal of the barn's contents or any insurance payments received for the barn's contents.

The trial court also did not make appropriate findings of fact regarding the defendant's financial resources and future ability to pay, particularly taking into consideration the defendant's social security benefits. The trial court simply did not base the total restitution award on what the defendant could reasonably pay during the time period that he is under the

trial court's jurisdiction. The court noted that the trial court set the total restitution award at nearly $100,000.00 without basing this figure on what the defendant could be reasonably expected to pay over the time period that he is under the court's jurisdiction.

The Court of Criminal Appeals therefore concluded that the trial court abused its discretion in entering the defendant's restitution order. The Court of Criminal Appeals therefore reversed the trial court's restitution order and remanded the case for a new restitution hearing. In regard to the defendant's claim that his monthly social security benefit, as his only source of income, is exempt under federal law from court order collection efforts and the trial court's restitution order, the Court of Criminal Appeals concluded that under the circumstances of the present case, federal law did not prevent a trial court from considering social security benefits in determining whether to impose a restitution obligation, even though the law does preclude a trial court from using legal process to reach a person's social security benefits in order to satisfy restitution obligation.

The court stated, "In other words, while Section 407(a) does not immunize recipients of social security benefits from the imposition of a restitution obligation, it does provide protection against a trial court targeting social security benefits to enforce or collect a restitution obligation. Accordingly, we conclude that a trial court may consider a defendant's social security benefits when making an ability to pay determination because consideration of these benefits helps provide a clear picture of the defendant's complete financial status.

The court also noted that as to the defendant's contention that he lacks the ability to make restitution payments even if his social security benefits are not subject to court-ordered collection, the Court of Criminal Appeals concluded that a remand for a new restitution hearing is appropriate in this case.

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

## WITHDRAWAL OF GUILTY PLEA: TRIAL COURT ABUSED DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA AS THE LAW IN TENNESSEE IS THAT A TRIAL JUDGE SHOULD ALWAYS EXERCISE DISCRETION WITH CAUTION IN REFUSING TO SET ASIDE A PLEA OF GUILTY AND

**BASED UPON THE FACT THAT THE DEFENDANT HAD REASONABLY RELIED ON HIS ATTORNEYS' REPRESENTATIONS REGARDING HIS ELIGIBILITY FOR DIVERSION**

**FACTS**: The defendant in the present case entered a guilty plea to one count of theft of property valued at more than $1,000.00 but less than $2,500.00 and one count of misdemeanor theft. The guilty pleas were entered by the defendant pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). After entry of the guilty pleas but prior to sentencing, the defendant discovered that, contrary to what he had been told by the two attorneys representing him, that he was not eligible for judicial diversion. The defendant moved to withdraw his guilty plea but the trial court denied the motion.

**HELD**: The Court of Criminal Appeals concluded that the trial court abused its discretion in denying the motion, and the Court of Criminal Appeals reversed and remanded the case for an entry of an order permitting withdrawal of the guilty pleas and further proceedings.

The Court of Criminal Appeals concluded that the trial court erred in determining that there was no fair and just reason for the withdrawal of the pleas.

The Court of Criminal Appeals noted the following principles in regard to withdrawal of guilty pleas:

1. A trial court's decision regarding a defendant's motion to withdraw a plea is reviewed for an abuse of discretion.
2. A trial court is guilty of an abuse of discretion if the record lacks substantial evidence to support the trial court's conclusion or when the trial court applies an incorrect legal standard, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.
3. A defendant who has entered a guilty plea does not have a right to unilaterally withdraw the plea.
4. The Tennessee Supreme Court has recommended that trial courts use the factors considered by federal courts in determining whether to permit a defendant to withdraw a plea, including: (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings: (3) whether the defendant has asserted or maintained his innocence: (4) the circumstances underlying the entry of the guilty plea; (5)

the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; (7) potential prejudice to the government if the motion to withdraw is granted.
5. No single factor is dispositive and the relevance of each factor varies according to the circumstances surrounding both the plea and the motion to withdraw.
6. The defendant bears the burden of establishing grounds for withdrawing his plea.
7. The purpose of the "any fair and just reason" standard is to allow a hastily entered plea made with "unsure heart" and "confused mind" to be undone.
8. A defendant should not be allowed to pervert the process into a tactical tool for purposes of delay or other improper purpose.
9. In the present case, the Court of Criminal Appeals noted that the trial court did not address every factor or make findings of fact relevant to each factor and the trial court did not indicate the weight it assigned to the factors. The court found that the failure to conduct the relevant analysis on the record is an abuse of discretion.
10. The court held that the record established that the defendant believed he was eligible for diversion and that he immediately sought to withdraw his pleas when he learned he was not. The counsel for the defendant had conducted research on the defendant's criminal background and had told the defendant that she believed he was eligible for diversion. Trial counsel did not file a request with the TBI to determine the defendant's eligibility prior to the defendant's entering his pleas. The Court of Criminal Appeals stated that the record established that the defendant's two attorneys both believed he was diversion eligible despite having investigated the petit larceny matter at issue.

In looking at the seven factors, the court concluded that the factors weighed in favor of the defendant being allowed to withdraw his plea, including the fact that he had filed a timely motion, the defendant made it clear that he did not want to have the conviction on his record, circumstances underlying the entry of the guilty plea were clear and the attorneys felt like he would be diversion eligible; the defendant stated he would not have agreed to enter the pleas if he had known he was not eligible for diversion; the defendant had entered an Alford plea and indicated he felt that he was maintaining his innocence by using the Alford plea; and the proof indicated that the defendant clearly relied on the advice of his counsel.

The Court of Criminal Appeals concluded that the testimony of all parties was that the diversion eligibility was a key factor in the defendant's decision to plead guilty and defendant reasonably relied upon his attorney's

advice, and therefore the defendant accordingly established a fair and just reason to be allowed to withdraw his guilty pleas. The decision of the trial court was reversed and the case remanded for an order permitting the defendant to withdraw his plea.

State v. Ruben (Tenn. Cr. App. 12/9/21)

## ***SPEEDY TRIAL***

### RIGHTS TO A SPEEDY TRIAL: DEFENDANT'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED EVEN THOUGH A WARRANT FOR VIOLATION OF PROBATION WAS ISSUED ON 7/2/13 AND WAS NOT SERVED UNTIL SEPTEMBER 18, 2020

**FACTS**: In 2012, the defendant entered a guilty plea to theft of property valued over $1,000.00 and received a sentence of four years, suspended to probation. On 7/2/13, a warrant was issued, alleging the defendant violated the terms of his probation. The warrant was not served on the defendant until September 18, 2020. The defendant moved to dismiss the prosecution, maintaining that his right to a speedy trial had been violated. The trial court refused to dismiss the proceedings and found the defendant to have violated the terms of his probation, ordering the defendant to serve his sentence in confinement.

The defendant appealed the trial court's refusal to dismiss the charges to the Court of Criminal Appeals.

**HELD**: The Court of Criminal Appeals concluded that the defendant's right to a speedy trial was not violated. The court noted that the only proof presented at the hearing tended to establish that the delay in prosecution was the "result of the defendant's absconding." The court also noted the defendant presented no proof that the state delayed prosecution through negligence or bureaucratic indifference and further did not allege any particular prejudice.

The court presented the following principles in its opinion:

1. The United States and Tennessee Constitutions provide for the right to a speedy trial in a criminal prosecution.

2. This right is intended to protect the accused from oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that the accused's defense will be impaired by dimming memories or lost evidence.
3. A probation revocation proceeding is a criminal prosecution triggering the right to a speedy trial.
4. In evaluating a claim that the accused was denied the right to a speedy trial, the court considers the following four-factor balancing test: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice suffered by the defendant from the delay. The court must evaluate, on a case-by-case basis, whether the circumstances indicate that the accused was deprived of the right to a speedy trial.

In this case, the Court of Criminal Appeals decided the four-factors as follows: (1) The seven-year delay in prosecuting a simple probation violation appropriately triggers the inquiry in this case as conceded by the state. (2) In regard to reason for delay, the court noted that the seven-year delay occurred when the defendant stopped reporting for probation in Tennessee. The defendant argued that every time he was released from jail, he became available to Tennessee, and he asserts that the sheriff's office did not pursue the warrant. The court concluded after examining all of the record that the "record as a whole demonstrates that the delay is mainly attributable to the defendant's own misconduct in absconding."

As to the third factor, the assertion of the right to a speedy trial, the court noted that the defendant did assert his right to a speedy trial approximately one month after he was served with the warrant and that this factor weighed in favor of the defendant.

As to the fourth factor, prejudice to the defendant, the court considered this as the most important factor in the speedy trial violation inquiry. The court noted that the defendant testified that he assumed he would not be prosecuted on the probation violation so the anxiety and concern accompanying a pending charge was not present in the case; the defendant did not articulate any particular manner in which the delay hampered his ability to defend the allegations; the defendant admitted that he had absconded in 2013 and acknowledged that he could not point to any particular prejudice but argued that the length of the delay made it "presumptively prejudicial." The court concluded that the fourth factor weighed against the defendant as the defendant had not articulated prejudice.

Based upon the four factors, the Court of Criminal Appeals concluded that the trial court did not err in denying the motion to dismiss.

State v. Herl (Tenn. Cr. App. 10/22/21)

## *VIOLATION OF PROBATION*

### FAILURE TO CONDUCT HEARING: EVEN THOUGH DEFENSE COUNSEL INDICATED THAT DEFENDANT WAS WILLING TO STIPULATE TO TWO PROBATION VIOLATIONS IF HE RECEIVED PERMISSION TO APPLY TO THE COMMUNITY ALTERNATIVE TO PRISON PROGRAM (CAPP), NO STIPULATION WAS ACTUALLY ENTERED AS TO VIOLATION OF PROBATION AND THERE WAS NO PROOF ACTUALLY PRESENTED BY THE STATE, REQUIRING THE VIOLATION OF PROBATION TO BE SET ASIDE

**FACTS**: On 2/8/16, the defendant plead guilty to robbery and received an eight-year sentence suspended to supervised probation after serving one year in confinement. After being placed on probation, a violation of probation warrant issued on 1/13/17, alleging that defendant was discharged from his program, the defendant failed to inform probation officer of his new address, and the warrant was further amended on 8/3/17 to include the defendant's recent arrest for a felony escape.

A revocation hearing was set but the defendant absconded from his halfway house following a positive drug screen, resulting in an amended violation warrant including that the defendant had been charged with evading arrest and possession of controlled substances in Sevier County.

A revocation hearing was scheduled for 8/14/20, at which time defense counsel indicated the defendant was willing to stipulate to the probation violations if he received permission to apply to the Community Alternative to Prison Program (CAPP). No stipulation was actually entered because it was determined by the trial court and the parties that the defendant did not qualify for the CAPP program, but there was also a failure for the state to present any proof regarding the violation and the defendant did not testify. At the conclusion of the hearing and discussions, the trial court revoked the defendant's probation and reinstated his original eight-year sentence in the Tennessee Department of Correction.

The defendant appealed the violation of probation.

**HELD**: The Court of Criminal Appeals found that the trial court had failed to conduct a full and proper hearing and therefore the case had to be remanded to the trial court for a new hearing. The court noted that at the revocation hearing, the state failed to present any evidence that the defendant violated his probation and the defendant did not personally plead guilty to any probation violations. The court noted that the state had the opportunity to present proof of the grounds but had failed to do so. The court noted that the parties had discussed the defendant stipulating to the violations in exchange for permission to apply to the CAPP program but such stipulation was not actually entered and no proof was actually admitted.

The judgment of the trial court was reversed due to the failure of the state to present any proof about the actual violation of probation. The court also found that the stipulation to the violation of probation never actually occurred.

State v. Varnell (Tenn. Cr. App. 7/1/21)

## "SUBSTANTIAL EVIDENCE" OF VIOLATION OF PROBATION: THE COURT OF CRIMINAL APPEALS FOUND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REVOKING DEFENDANT'S PROBATION DESPITE THE DEFENDANT'S CLAIM THAT THERE WAS NO "SUBSTANTIAL EVIDENCE" OF HIS VIOLATING HIS PROBATION

**FACTS**: The defendant was indicted for aggravated assault by strangulation or attempted strangulation and domestic assault for events that occurred on 10/3/18. On 4/16/19, the defendant plead guilty to the crimes and pursuant to the plea agreement received a six-year sentence to be served on probation. A condition of the defendant's probation was that he not have contact with the victim, who was his wife.

The probation officer for the defendant took out a warrant against the defendant for violation of probation and subsequently amended the warrant, claiming that the defendant violated probation by violating his order of

protection to not contact the victim and also that he had failed to notify the officer of a change of address.

The defendant maintained that the proof at the hearing presented no "substantial evidence" that he violated his probation.

**HELD**: The Court of Criminal Appeals held that the trial court did not abuse its discretion by revoking the defendant's probation and ordering him to serve the balance of his six-year sentence in confinement. The court found that the victim had testified at the revocation hearing that the defendant had texted her and also had telephoned her and told her, "I got you again B-I-T-C-H." The trial court accredited the victim's testimony that the defendant had contacted the victim. The Court of Criminal Appeals also found that the defendant's probation officer had testified that when he went to the address provided by the defendant, on Broadway Road, the defendant was not there and information was given that the defendant had been evicted two weeks earlier.

Accordingly, the Court of Criminal Appeals found that there was substantial evidence that the defendant violated his probation by contact with the victim and in regard to his not living at the address provided to the probation officer.

State v. Arnold (Tenn. Cr. App. 9/2/21)

**THREATENING BEHAVIOR OF DEFENDANT: SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTED A FINDING THAT THE DEFENDANT HAD VIOLATED THE CONDITIONS OF HIS PROBATION BECAUSE THE EVIDENCE ESTABLISHED THE DEFENDANT MADE THREATS TOWARD THE VICTIM WHICH WERE THREATENING AND INTIMIDATING, AND THE DEFENDANT FAILED TO PRESENT EVIDENCE AT THE REVOCATION HEARING THAT INTOXICATION OR MENTAL HEALTH ISSUES DEPRIVED HIM OF THE MENTAL CAPACITY TO INTENTIONALLY OR KNOWINGLY PLACE ANOTHER IN FEAR**

**FACTS**: Defendant was charged with violation of probation based upon domestic assault charges brought against the defendant because of his threatening behavior toward his mother. The defendant maintained that the trial court erred by finding he violated the terms of his probation because the domestic assault charges serving as the basis for the revocation were unsupported by substantial evidence in the record. The state responded by arguing that the trial court did not abuse its discretion by revoking the defendant's probation because the testimony about the defendant's "threatening behavior" constitutes sufficient evidence that he violated the terms of his probation.

**HELD**: The Court of Criminal Appeals found that evidence sufficiently supported the trial court's conclusion that the defendant violated his probation by preponderance of the evidence based upon the testimony which included his mother's testimony that she was afraid the defendant would bite her when he stood close to her and threatened her. The trial court had found that the mother's fear was reasonable because she believed the defendant was under the influence of methamphetamine and the trial court determined the state had put on sufficient proof to support the violation.

The Court of Criminal Appeals noted the following principles when it comes to evaluating these types of cases:

1. A person acts "intentionally" with respect to the nature of the conduct or to result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the assault. A person acts knowingly, the minimum standard for assault, when the person is aware of the nature of their conduct or that the circumstances surrounding their conduct exists or when the person is aware that their conduct is reasonably certain to cause a result.
2. When a criminal offense requires the defendant to act intentionally or knowingly, as is the case for assault, evidence of the defendant's mental defect or voluntary intoxication is relevant to negate his culpable mental state.
3. Proof of a mental defect or intoxication alone is not a defense to prosecution for a charged offense.
4. Rather, there must be evidence that the mental defect or intoxication deprived the accused of the mental capacity to form the culpable mental state and the weight given to such evidence are matters resolved by the fact finder.

5. In the present case, the defendant failed to present evidence at the revocation hearing that either his intoxication or unspecified mental health issues deprived him of the mental capacity to intentionally or knowingly place his mother in fear when he yelled at her and told her he was going to "eat her." The court noted that the only evidence presented during the hearing regarding the defendant's mental health was his mother's testimony that the defendant was "very sick" and that two years prior to the assault he had been admitted to a mental institution for four days. The court noted that neither of these facts provides evidence of a specific mental defect or show that the defendant did not possess an awareness that his threat could make his mother fearful of an eminent harmful contact.

6. The court further found that there was substantial evidence in the record to support a finding that the defendant violated Rule 14 of the conditions of his probation. Under Rule 14, the defendant had agreed that he would "not engage in any assaultive, abusive, threatening, or intimidating behavior" and that he would not "behave in a manner that poses a threat to others or himself."

In conclusion, the Court of Criminal Appeals found that the trial court did not abuse its discretion by revoking the defendant's probation.

State v. Sarkozy (Tenn. Cr. App. 12/8/21)

# JUDICIAL ETHICS

## *ABUSE OF CONTEMPT POWER*

### WOMAN'S SCREAM OUTSIDE COURTROOM: THE OHIO SUPREME COURT FOUND THAT A WOMAN WHO SCREAMED OUTSIDE A COURTROOM WAS AT BEST A "MOMENTARY INTERRUPTION TO THE PROCEEDINGS" AND THAT THE JUDGE'S CONDUCT OF ORDERING HER INTO CUSTODY WAS OUTRAGEOUS AND APPALLING AND IN VIOLATION OF THE CODE OF JUDICIAL CONDUCT

**FACTS**: On 9/4/18 at approximately 7:45 a.m., a woman (K.J.) arrived at the court to file a petition for a civil protection order. She completed the paperwork at which time a clerk's office employee told her that she had missed the 8:10 a.m. filing deadline to be heard that day and she would have to return the following day. K.J. went to the courtroom, hoping to have her case heard that day. As she walked toward the exit, K.J. screamed so loudly that she was heard in the courtroom. The magistrate judge who was conducting a hearing immediately stopped the trial.

The video footage of the judge's actions was described as follows: "It shows [the judge] exiting the courtroom in his robe and running down the hallway in pursuit of K.J. He accosts her at the elevators and returns her to his courtroom. Once there, Bachman walks her through the crowded courtroom with his hand on her shoulder, places her in a seat in his jury box, and orders her not to move just before summoning the sheriff. Multiple sheriff's deputies soon arrive, and Bachman orders them to take K.J. into custody and to jail for three days for contempt, causing her to cry and attempt to leave the jury box." The Ohio Supreme Court described that "the next twenty minutes of the video are difficult to watch.", the Court describing what transpired as follows: "While K.J. resists being arrested and pleads with Bachman to explain why she is being jailed for three days, she is physically subdued by two deputies, threatened with being tased, and ultimately dragged from the jury box by several deputies. Bachman's only

response is to increase her jail sentence to ten days. Bachman then congratulates a deputy on an award the deputy had recently received and resumes the proceedings as if nothing out of the ordinary has just transpired. Meanwhile, the video footage shows, while K.J. continues protesting her arrest, she is dragged, yanked, pinned to a wall, and handcuffed to a chair. Before the video ends over 20 deputies and members of the court staff are involved in jailing K.J. – all because of a scream of frustration in the hallway that lasted one second."

**HELD**: The Ohio Supreme Court held that the sentencing of K.J. to ten days in jail for a one second scream in the hallway was outrageous. The Court said that "the spectacle his conduct created was even more appalling and demonstrates his utter indifference to the harm he caused K.J. and the integrity of the judiciary." The Court stated that sending someone to jail is not the adult equivalent to sending a child to his or her room for a time-out. The court added, "not only was Bachman's jailing of K.J. unauthorized under the contempt statute, but he exhibited a total disregard for the reason she was at the courthouse in the first place – to get a civil protection order." The Court also noted that the judge showed a "complete indifference to the circumstances of her life" including whether or not she had children or other family members to care for, the employment she might lose, or any other harm she might suffer.

The Ohio Supreme Court suspended the magistrate judge from the practice of law for six months.

The Court found as follows:

> "Bachman's sentencing K.J. to ten days in jail for a one-second scream in the hallway as she was leaving his courtroom area and for questioning why she was being jailed is outrageous. The spectacle his conduct created was even more appalling and demonstrates his utter indifference to the harm he caused K.J. and the integrity of the judiciary . . . .
>
> Sending someone to jail is not the adult equivalent to sending a child to his or her room for a time-out. Yet Bachman and other judicial officers who have been sanctioned for similar conduct seem to equate the two. Not only was Bachman's jailing of K. J. unauthorized under the contempt statute, but he exhibited a total disregard for the reason she was at the courthouse in the first place - - to get a civil protection order. He also showed a complete indifference to the circumstances of her life (e.g. whether she had children or other family members

to care for, employment she might lose, or any other harm she could suffer), to the indignity she endured by being physically restrained in a crowded courtroom and ultimately, to the loss of her liberty."

**PRACTICE POINT**: Time and time again, cases demonstrate that a judge is much better off in contempt matters to have charges issued against the person who is allegedly in contempt, giving the person notice of the charges, scheduling a date for a hearing, giving an opportunity for the person to be represented by counsel, and granting the person an opportunity to have a full hearing with due process rights, including cross-examination of witnesses in the hearing, opportunity to present witnesses on behalf of the person being charged with contempt, and otherwise a hearing which demonstrates a fair and efficient hearing under courtroom control.

In Re Disciplinary Council vs. Bachman, 168 N.E.3d 1178 (Ohio Supreme Court 2020)

## *DUTY TO REPORT PERCEIVED JUDICIAL MISCONDUCT*

### FACEBOOK ACTIVITY WHICH APPEARS TO VIOLATE CODE OF JUDICIAL CONDUCT: DUTIES TO REPORT PERCEIVED VIOLATION OF ETHICS RULES

**FACTS**: A judge in Massachusetts inquired of the committee on judicial ethics of the Massachusetts Supreme Judicial Court seeking guidance from the Committee on Judicial Ethics (CJE) regarding what actions the judge needed to take upon observing that a judge's Facebook activity appeared to violate the Massachusetts Code of Judicial Conduct.

Specifically, the judge advised that around the time of the 2020 presidential election, while engaging his personal Facebook profile and various links, the judge viewed the personal Facebook profile of a person the judge recognized as a sitting Massachusetts judge. The judge was not Facebook "friends" with the judge but was able to view the judge's profile, an indication that it was publicly accessible. The judge observed posts regarding the 2020 presidential election and included posts on the judge's profile between 10/6/20 and 11/14/20, including: (a) expressions of support

for one of the major party candidates for president; (b) references and links to negative coverage of the opposing major party's candidate; (c) statements that the opposing party's candidate and his family are "corrupt"; (d) post ridiculing and demeaning two female politicians of the opposing party; (e) derogatory comments about immigrant parents who are separated from their children at the southern border; (f) complaints about media bias in election reporting; and (g) ten days after the election, a statement that the election was a "mess" along with a link to commentary by a media personality claiming that the election was fundamentally unfair, compromised by the alleged voting irregularities, and manipulated for the political benefit of the opposing party.

**HELD**: The Massachusetts Committee on Judicial Ethics held and concluded that the requesting judge had the requisite knowledge that a sitting Massachusetts judge had acted in a manner that was inconsistent with the requirements of the Code of Judicial Conduct and therefore concluded that the judge had the duty to report the judge's conduct in accordance with the rules.

The Board of Judicial Conduct noted that the duty to report turns on three inquiries: (1) whether you have actual knowledge of the conduct in question or such knowledge may be inferred from the circumstances; (2) whether the conduct in question constitutes a violation of the code; and (3) whether such violation raises a substantial question regarding the judge's honesty, integrity, trustworthiness, or fitness as a judge.

The Board noted that in this particular case the court had to answer each of the cases in the affirmative in regard to the person making the inquiry.

On the first question, the Board found that the inquiring judge had the requisite knowledge that the judge engaged in conduct in violation of the rules that the judge posted materials in question that violated the rules of judicial conduct.

Secondly, the content on the judge's Facebook profile violated several provisions of the code that require judges to avoid conduct in their personal and professional lives that creates an appearance of bias; the posts failed to promote confidence in the judiciary; that the posts of the judge reflected external influences on judicial conduct; that the posts involved political and campaign activities that were prohibited and violated restrictions against the conduct of a judge from "engaging in any display in support of or opposition to a political candidate or organization."

Thirdly, the violations raised a substantial question regarding the judge's fitness as a judge because, "by publicly posting and/or tolerating the

presence of the materials in question, the judge failed to act in a manner that upholds the public's confidence and the impartiality of the judiciary and maintains the dignity of judicial office. The judge's actions cast doubts upon his independence, fairness, and impartiality which are cornerstones of and indispensable to our system of justice." The court also found that the conduct of the offending judge provided several examples of offending conduct, including jokes or other remarks that demean individuals based upon characteristics such as their race, color, sex, gender identity or expression, ethnicity, citizenship or immigration status, or political affiliation.

**PRACTICE POINT**: This ruling points out that a judge who frequents social media, such as Facebook, can expose himself or herself to the need to make a report. This could give judges pause to frequent such social media sites and put oneself in a position to view these types of situations and have a duty to report.

CJE Opinion No. 2021-01, Massachusetts Supreme Judicial Court (3/18/21)

## ***FUNDRAISING AND THE JUDGE***

### CASA (COURT APPOINTED SPECIAL ADVOCATE): MERE ATTENDANCE AT A CASA EVENT, WHETHER OR NOT THE EVENT SERVES A FUNDRAISING PURPOSE, DOES NOT CONSTITUTE A VIOLATION OF ETHICS RULES

**FACTS**: CASA is a legislative creation by the Court Appointed Special Advocate Act. A CASA volunteer conducts independent examinations, reviews the permanency plan for a child, makes recommendations to the court with the best interest of the child and the child's family by a written report, monitors the case to ensure the child's best interest are being met, and makes every effort to attend all hearings, meetings, and other proceedings concerning the case. A CASA volunteer may be called as a witness by any party or the court.

Issues were submitted to the Nebraska Judicial Ethics Committee requesting an advisory opinion about what judges could do or not do in regard to the CASA program.

**ADVISORY OPINION**: (1.) The Code of Judicial Conduct does not prohibit the judge from allowing his or her picture taken and posted by CASA, nor does it prohibit the judge from allowing CASA to quote the judge.
(2.) The judge, in considering and determining whether to give CASA permission to post a picture or quote the judge, should consider that the judge does not control the content of the CASA program's website, social media, newsletter, etc. or the ultimate use of the picture or quote. The comments to the Nebraska Ethics Rules states that a judge should consider whether the membership and purpose of the organization, or the nature of the judge's participation or association with the organization would conflict with the judge's obligation to refrain from activities that would reflect upon a judge's independence, integrity, and impartiality.
(3.) The judge may attend the CASA program's annual fundraising event and dinner with the judge paying for the expense of the dinner. Under the rules, "mere attendance at an event, whether or not the event serves a fundraising purpose, does not constitute a violation" of the ethics rules.
(4.) A judge may not submit written correspondence to the local county board for purposes of supporting funding of the CASA program by the local county board.
(5.) A judge may not speak at the CASA program's annual fundraiser event and dinner in support of the CASA program.

The code permits a judge to speak at an event of an educational, religious, charitable, fraternal, or civic organization, but if the event serves as a fundraising purpose, the judge may participate only if the fundraising is incidental, or the event concerns the law, the legal system, or the administration of justice, provided participation does not reflect adversely on the judge's independence, integrity, or impartiality.
(6.) A judge may speak at educational sessions for volunteers to the CASA program regarding the court's expectations of a CASA volunteer.
(7.) A judge may speak, write, lecture, teach, and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice, and nonlegal subjects, subject to the requirements of the Code of Judicial Conduct. Speaking to volunteers at educational sessions regarding the court's expectations of the CASA volunteer is permitted.
(8.) A judge may be a resource, provide factual information, and appear and answer questions as permitted under the rules.

(9.) A judge may testify at legislative or executive branch hearings or communicate with government officials less informally on matters affecting the courts.

Nebraska Judicial Ethics Committee Opinion 21-1 (4/23/21)

## ***IMPROPER TOUCHING OR ABUSIVE CONDUCT***

### IMPROPER TOUCHING BY GRABBING LEGAL ASSISTANT BY THE ARM: JUDGE, WHO IN OPEN COURT GRABBED A LAWYER'S LEGAL ASSISTANT BY THE ARM AND ANGRILY TOLD HER THAT SHE WAS NOT WELCOME TO SIT IN THE WELL OF THE COURTROOM HELD IN VIOLATION OF CANONS OF ETHICS AND GIVEN A PUBLIC ADMONITION

**FACTS**: In Harris County, Texas, Sarai Garza, a legal assistant for eleven years, testified that she had always sat in the well of the courtroom of the county criminal court along with other attorneys, interpreters, and legal assistants. On 1/29/19, Garza was sitting in the well as Judge Wilson called the docket and said, "Lady interpreter, are you ready?" Garza was not the interpreter and did not realize that Judge Wilson was speaking to her and responded that she was a legal assistant to a certain attorney but that she would be glad to help. Judge Wilson stood up, left the bench, and walked to the well of the courtroom where he saw Blasa Lopez, and grabbed her by the arm. Garza was walking toward Judge Wilson and Lopez to settle the confusion regarding the interpreter and then Judge Wilson grabbed her arm and told her in an angry and very upset voice that she could not sit in the well. Garza testified that the touching was painful and that she never expected the judge to grab her in such a manner and that she was speechless. Garza testified that she feared Judge Wilson and had never received an apology from him and had nothing to gain by testifying in the matter. Lopez, a contracted interpreter for Harris County, testified Judge Wilson grabbed her by the arm as she stepped into the court room and then when Garza walked up he grabbed her by the arm and told her she could not sit in the well. Garza was later seen to be crying and she had felt humiliated and traumatized by the incident. The Commission on Judicial Conduct issued a

public admonition against the judge, and the judge requested a trial de novo by the Special Court of Review.

**HELD**: The Court of Review found that the evidence clearly demonstrated that Judge Wilson intended to engage in the conduct – touching Garza without consent and admonishing her as a robed judge in a crowded and public courtroom. The court found that Judge Wilson violated Canon 3B(4) by touching Garza on the arm and admonishing her while acting in an official capacity in his public courtroom. Canon 3B(4) states: "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity." The reviewing court also found that Judge Wilson "cast public discredit upon the judiciary or administration of justice," in violation of the Texas Constitution.

The special court found that it was appropriate to issue a public admonition to Judge Wilson for his conduct. The court found that the preponderance of the evidence showed that the judge's behavior showed no regard or respect for Garza and caused her to be publicly embarrassed and ordered him to training in ethics in the area of judicial decorum.

In Re Inquiry Concerning the Honorable Lee Harper Wilson CJC 19-0755 (Opinion issued 5/4/21)

## ***RECUSAL***

### SUA SPONTE RECUSAL: WHILE SOME CIRCUMSTANCES MAY REQUIRE A JUDGE TO RECUSE HIMSELF/HERSELF EVEN WITHOUT A RECUSAL MOTION, THE ALLEGATIONS OF THE DEFENDANT THAT THE JUDGE WAS BIASED AGAINST HIM DUE TO HIS PREVIOUS DRUG COURT EXPERIENCE DID NOT RISE TO SUCH A LEVEL

**FACTS**: The defendant was placed on a suspended sentence for ten years of supervised probation after pleading guilty to possession of methamphetamine for resale. The trial court later revoked the defendant's probation following a revocation hearing. The defendant contended for the first time on appeal that the trial court should have sua sponte recused himself from the probation revocation hearing, claiming that the trial court

was prejudiced against him due to his prior drug court participation. The defendant had not filed a motion for the judge to recuse himself but claimed that statements made by the trial court during the probation revocation hearing indicated the trial judge was prejudiced against him.

The trial court stated the following during the hearing:

"He knew where the probation officer was because, the Court would find as he testified to, he was a participant … he testified to this in examination questioned by his counsel. That he was in drug court. He knew where probation was. He knew that he had to follow the terms and conditions because, candidly, he very successfully completed Anderson County Drug Court. The court would further find that by his testimony it was either in 2016 or [20]17 that he graduated."

The judge later stated: "There is no question that the defendant, the court dealt with the defendant, as I said, and has been brought out today, he was in drug court and he did very well. But when you, either the same year or a year later, get out of drug court and you violate again and you know what you are supposed to do, you know where your probation officers are, obviously, he had prior felony convictions or he wouldn't have been in drug court."

**HELD**: The Court of Criminal Appeals found that under the facts of the case the defendant had failed to demonstrate how the trial court was unfairly biased. The CCA stated, "In the instant case, we cannot conclude that a person of ordinary prudence, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. The defendant testified that he was successfully able to complete drug court. The trial court referenced this testimony in the context of the defendant's current failure to abide by the terms of his probation. There is no indication in the record that the trial judge participated in the defendant's previous involvement in drug court." The Court of Criminal Appeals noted that "it appears that the trial court only referenced the defendant's successful completion of drug court to demonstrate that despite the defendant's testimony that he was unsure of which county he lived in and therefore which county he is supposed to be supervised in, he was previously able to successfully report to his probation officer."

The Court of Criminal Appeals also enunciated the following principles regarding whether a judge should recuse herself or himself: (1) Whether a judge should recuse herself or himself from a legal proceeding

rest within the sound discretion of the judge. (2) An objective test is applied to determine if recusal is proper because the appearance of bias is just as injurious to the integrity of the court's actual bias. Therefore, recusal is warranted (1) if a judge has any doubt concerning his or her ability to preside over a case impartially or neutrally, or (2) when 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. (3) Adverse rulings are rarely sufficient grounds to establish bias. The court will not interfere with the trial court's decision on appeal unless the record clearly shows an abuse of discretion. (4) In some circumstances, judges have an obligation to recuse themselves even if litigants do not file recusal motions. (5) Normally, the defendant should file a motion for recusal. (6) The court ultimately concluded that while circumstances may arise which require a judge to recuse himself or herself even when a motion has not been filed, the facts of this case do not constitute one of such situations.

**PRACTICE POINT**: There can be occasions when a judge becomes aware of information about a defendant outside the context of a court proceeding, and such situation may avail itself when a court is involved in a problem-solving court such as drug court and where informal discussions are held about a defendant. The judge can become aware of factual circumstances which are not brought out within an evidentiary hearing, and such facts should not be used to impact the case that is in front of the court. There also may be occasions that arise where information known by the judge would require the judge to recuse himself or herself from the proceeding based upon having knowledge that otherwise would not be known and should not be known.

State v. Duncan (Tenn. Cr. App. 8/4/21)

## ***REJECTION OF PLEA AGREEMENTS OR DISPOSITIONS***

### REJECTING PLEA AGREEMENTS: A JUDGE MAY ACCEPT OR REJECT PLEA DISPOSITIONS, BUT IN DOING SO MAY NOT ADOPT A BROAD POLICY THAT OMITS INDIVIDUALIZED DETERMINATIONS IN EACH CASE

**FACTS**: A judge in New York made an inquiry of the New York Board of Judicial Conduct if it is ethically permissible to "refuse to accept a disposition to a violation, from a misdemeanor, where the court does not feel comfortable with the entirety of the plea agreement.

**HELD**: A judge may, where legally appropriate on the facts presented, exercise their discretion to "refuse to accept a plea disposition;" however, the judge should not adopt a broad policy that omits making an individualized determination in each case.

The Board noted that it was important at all times for a judge to respect and comply with the law and always act in a manner that promotes public confidence in the judiciary's integrity and impartiality.

The Board did emphasize a few general principles relevant to questions presented on this issue:

(1) "First, we understand prosecutors have nearly absolute discretion in determining whether charges are to be preferred, amended or reduced."

(2) Second, a judge, as an exercise of discretion, may accept or reject criminal plea dispositions, but the judge is required to make good faith, individualized determinations regarding the law and its application.

(3) Third, a judge who makes a good faith legal determination based on the apparently controlling statutes and/or case law "is necessarily acting ethically".

(4) Thus, a judge acting in good faith does not commit an ethical infraction merely because their decision is challenged and reversed on appeal or otherwise found to be legally incorrect.

The Board of Judicial Conduct of New York concluded that the judge may, where legally appropriate on the facts presented, exercise their discretion to "refuse to accept a plea disposition." The Board did state: "However, the judge should not adopt a broad policy that omits individualized determinations."

**PRACTICE POINT**: Tennessee law and ethics principles coincide with this opinion, in that Tennessee's decisions from the Tennessee Supreme Court have recognized that prosecutors have nearly absolute discretion in determining whether charges are to be prosecuted, reduced, or pursued. Tennessee has also been clear in allowing for judges to look at plea agreements in good faith and make individualized determinations regarding the law and the application of the law. Tennessee law makes clear that a judge does not have the unbridled discretion to overrule prosecutors in their

determinations, but that a court in good faith can reject a plea agreement based upon their good faith determination of the law and its application.

New York Opinion 21-46 (3/11/21)

## *RUDE AND ABRASIVE CONDUCT TOWARD PUBLIC DEFENDER*

### DISCOURTEOUS AND RUDE CONDUCT TOWARD PUBLIC DEFENDER: IN A HEARING INVOLVING A NO-KNOCK SEARCH WARRANT, THE CONDUCT OF THE JUDGE LEAVING THE BENCH WHILE THE PUBLIC DEFENDER WAS ASKING A QUESTION, REFUSING TO LET THE PUBLIC DEFENDER MAKE A RECORD OF HER OBJECTION, THE TONE OF VOICE AND THE USE OF FACIAL EXPRESSIONS ON THE PART OF THE JUDGE CLEARLY SUBSTANTIATED A COMPLAINT FOR VIOLATIONS OF THE CODE OF JUDICIAL CONDUCT

**FACTS**: On 4/15/19, Judge Barry Sims was an elected judge in the State of Arkansas and was conducting a hearing regarding a no-knock search warrant. During the course of the hearing, the judge engaged in the following conduct: (1) leaving the bench while the public defender was asking a question of a witness; (2) when the public defender was attempting to respond to an objection, the judge refused to let her make her record; (3) the tone of voice of the judge was curt and the facial expressions and demeanor and actions of the judge alarmed other attorneys and members of the gallery.

**HELD**: The Judicial Discipline and Disability Commission found that the actions and demeanor of the judge created an "injudicious atmosphere" in the judge's courtroom. The Commission found that the judge did not act in a way that promoted public confidence of the independence, integrity and impartiality of the judiciary.

The Commission also noted that, in a separate incident involving the public defender, the judge called the attorneys to the bench and made

statements regarding the way the public defender was conducting voir dire, asking her if her client had a defense and further indicating that the judge would still accept a guilty plea.

For this incident, the Commission found that the comments and demeanor of the judge were inappropriate, rising to the level of undignified treatment of attorneys in the court and gave the appearance, whether intentional or not, of an attempt to coerce a settlement. The Commission noted that the case ended up an acquittal of the public defender's client.

In another separate incident occurring on 10/21/19, the judge asked the public defender about whether she was going to file "another judicial complaint" against the judge if the judge did not accept a plea agreement.

The Commission noted this incident was on the record in open court and in front of the public defender's client. The Commission noted that the public defender had in fact not filed a complaint against the judge and that the "words, tone and demeanor" of the judge were "intimidating and improper." The Commission also noted that making the statements toward the public defender in the way and manner in which it was done caused others to believe that the judge was "going to retaliate, directly or indirectly, against actual and potential complainants.

The Commission found that the judge had violated relevant Canons of the Code of Judicial Conduct as follows:

Rule 1.1: A judge shall comply with the law, including the Code of Judicial Conduct.

Rule 1.2: A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of judiciary and shall avoid the appearance of impropriety.

Rule 2.2: A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.

Rule 2.3: A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

Rule 2.8: A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity.

The Commission found that a censure was a proper sanction and the Commission approved a suspension without pay for ninety days, with sixty of those days held in abeyance for one year. The judge was also ordered to undergo remedial measures, including attending a class on mindfulness, patience, or civility through the National Judicial College and to hire a counselor or life coach to help consult with the judge about how to treat professionals appearing in court.

In Re Judge Barry Sims, JDDC Case No. 19-202 (5/21/21)

## ***TAKING CASE UNDER ADVISEMENT***

### PERFORMING JUDICIAL DUTIES PROMPTLY AND DILIGENTLY: ABSENT COMPELLING CIRCUMSTANCES RULINGS ON CASES ARE NOT TO BE HELD UNDER ADVISEMENT IN EXCESS OF SIXTY DAYS AND MOTIONS NOT TO BE HELD UNDER ADVISEMENT IN EXCESS OF THIRTY DAYS "ABSENT THE MOST COMPELLING OF REASONS"

**FACTS**: (1) On March 19th and 20th 2019, Judge Crozier conducted a bench trial in a termination of parental rights and adoption case. On February 5, 2020, the judge rendered his decision which was more than ten months later. The judge later in disciplinary proceedings indicated that the case was "a fairly easy call" and that the outcome was not "close." The judge also indicated that he knew what the outcome would be at the conclusion of the hearing.
(2) In an unrelated divorce and custody matter, Judge Crozier heard the case on June 29, 2021, and no orders were entered ruling on the motions. On 8/3/21, the moving party filed a motion asking the court to rule on the previously filed motions, but no orders were forthcoming. In disciplinary procedures, the judge explained that he orally denied the motions and requested that an attorney prepare the orders but no orders were forthcoming disposing of the motions.
**HELD**: The State of Tennessee Board of Judicial Conduct found that in both cases, the judge failed to enter orders within the appropriate time frames and that there were not compelling reasons not to do so. The Board of Judicial Conduct therefore issued a public reprimand, as the delayed rulings prevented the parties from moving on from their litigation and served to undermine public confidence in the proper administration of justice.

The Board noted the following principles under which judges operate:
1. Ethics rules require that judges perform judicial and administrative duties competently, promptly and diligently. Tennessee Supreme Court Rule 10, RJC 2.5(A). This directive includes the specific responsibility of promptly disposing of cases.
2. Specifically, in non-jury cases like the present matters, judges are expected to render a decision and enter a judgment within sixty days of when the case was heard. TCA 20-9-506.
3. A case may not be held under advisement in excess of sixty days "absent the most compelling of reasons." Tennessee Supreme Court Rule 11, section III(d).
4. Similarly, a motion may not be held under advisement in excess of thirty days "absent the most compelling of reasons." Failing to make timely rulings also implicates Tennessee Supreme Court Rule 10, RJC 1.1, under which a judge shall comply with the law. It also implicates RJC 1.2, which requires a judge to promote confidence in the judiciary.

The Board of Judicial Conduct noted in both cases the judge failed to enter orders within the required time frames even though compelling reasons for a delay were absent.

In Re: Judge Crozier, Board of Judicial Conduct (January, 2022)

## ***THE SPECTER OF RACIAL PREJUDICE***

### THE SPECTER OF RACIAL PREJUDICE: JUDGES AND JURORS MUST BE, AND MUST BE PERCEIVED TO BE, DISINTERESTED AND IMPARTIAL AND THE EXPOSURE OF THE JURY IN A CRIMINAL CASE TO THE "SPECTER OF RACIAL PREJUDICE" THAT IS COMMUNICATED TO THE JURY BY THE DISPLAY OF A LARGE CONFEDERATE FLAG "IN A ROOM FESTOOMED WITH CONFEDERATE MEMORABILIA," IMPROPERLY EXPOSED THE JURY TO "EXTRANEOUS PREJUDICIAL INFORMATION" ENTITLING THE DEFENDANT TO A NEW TRIAL

**FACTS**: In a case in which the defendant was convicted of aggravated assault, reckless endangerment, and other charges, the defendant contended that having the grand and petit juries deliberate "in an inherently prejudicial Confederate Jury Room violated his constitutional right to a fair trial, his right to an impartial jury, his right to due process, and his right to equal protection of the law.

The state argued that the defendant had waived review of the issue by failing to challenge the conditions of the jury room prior to trial. In an amicus brief, the Tennessee Association of Criminal Defense Lawyers ("TACDL") noted that "multiple courts have recognized the racially hostile and disruptive nature of the Confederate flag," and argued that the jury's exposure to the Confederate icons denied the defendant a fair trial free of extraneous prejudicial information and improper outside influence.

The facts established the room where the jury deliberated had a large, framed flag hanging on a wall noted as being a room used by the United Daughters of the Confederacy (U.D.C.) and also a substantial amount of other Confederate memorabilia. The display included a framed portrait of Jefferson Davis, President of the Confederacy, and other items of memorabilia. The defendant also argued that having the jury deliberate in this room implied that the court "subscribes to the confederate principles" and that to many, "the confederacy and racism go hand in hand." The defendant argued that "the symbols on that wall do nothing but embolden" jurors to act on racial animus. The defendant claimed that the constitution required that juries conduct deliberations in "an impartial environment, free from distractions."

**HELD**: The Court of Criminal Appeals ruled that the jury was improperly exposed to extraneous information by having to conduct its deliberations in the U.D.C. Room and also due to the fact that the state had failed to sufficiently rebut the presumption that the defendant was prejudiced by the jury's exposure to the Confederate memorabilia in the room. The judgments of the trial court were reversed and the court ruled that the defendant was entitled to a new trial.

The Court of Criminal Appeals referred to several key principles in regard to its ruling:

1. Both the United States and Tennessee Constitution guarantee criminal defendants the right to a trial by an impartial jury.
2. The Tennessee Supreme Court has defined an "unbiased and impartial jury" as "one that begins the trial with an impartial frame of mind, that is influenced only by the competent evidence admitted during the trial, and that

bases its verdict on that evidence." As part of that definition, "jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge."

3. The validity of a verdict returned by a jury that has been subjected to either extraneous prejudicial information or an improper outside influence is questionable. Extraneous prejudicial information has been broadly defined as information coming from without.

4. A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence.

5. "Extraneous judicial information" encompasses "the form of either fact or opinion that was not admitted into evidence but never the less bears on a fact at issue in the case," and improper outside influence is considered "any unauthorized private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury."

6. Upon a showing that the jury was exposed to extraneous prejudicial information or an improper outside influence, "a rebuttable presumption of prejudice arises and the burden shifts to the state to introduce admissible evidence to explain the conduct or demonstrate that it was harmless."

7. The court noted specifically that the challenged information in the present case consisted of a large, framed Confederate flag, two portraits of Confederate leaders, and a framed letter from the national leader of the U.D.C. The court stated that "the use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." The court pointed out that "flags themselves have the capacity to communicate messages pertaining to, say, of government's identity, values, or military strengths." The court noted that the flag displayed in the jury room was no different, as "its original purpose was to knit the loyalty of those in the Confederate states to a flag that conveyed the political ideas of the Confederacy."

8. The Court of Criminal Appeals concluded in this case that documents associated with the Confederacy "established that slavery and the subjugation of black people are inextricably intertwined with the Confederacy and the symbols thereof. Such ideas, however, are antithetical to the American system of jurisprudence and cannot be tolerated. Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."

The Court of Criminal Appeals noted that "as a symbol of the Confederacy, the Confederate flag represents, at least in part, the attempt to perpetuate the subjugation of black people through chattel slavery. The defendant and TACDL argue that the Confederate flag has become a symbol of racism and white supremacy, particularly given its adoption by groups such as the Ku Klux Klan.

9. Significantly, the Court of Criminal Appeals noted that "the location of the flag and the other items within the courthouse in a room used on a regular basis, which location has not been historically viewed as a public forum, clothes all of the items, including the flag in particular, with the imprimatur of state approval." The court added that "when a government creates or permits the creation of a permanent display by a private organization, it has engaged in government speech."

The Court of Criminal Appeals noted that "the communication at issue in this case is best understood as government speech, giving it great weight and influence."

10. The Court of Criminal appeals thereby declared that "any communication perceived to originate from the court in its official capacity will carry great weight in the eyes of the jury." The court stated that "in the context of court proceedings both judges and jurors must be ----- and must be perceived to be ----- disinterested and impartial."

The court emphasized that "the specter of racial prejudice that might be ascribed to the flag in the U.D.C. Room is particularly troublesome given that the jury is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice." The CCA noted that the Supreme Court of the United States has observed that "permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the state."

The Court of Criminal Appeals therefore concluded that "because Giles County may not convey any message to the jury, we conclude that permitting the jury to deliberate in a room filled with Confederate memorabilia exposed the jury to extraneous information or improper outside influence." The court noted that the extraneous information raised a presumption of prejudice and shifted the burden to the state to show the information was harmless.

The court noted that the state presented no proof to rebut the presumption of prejudice raised by the defendant.

The court further explained that since the court had concluded that the defendant was entitled to a new trial based upon the jury's exposure to

extraneous prejudicial information, the court did not need to consider the further claims that principles of due process or equal protection entitled him to a new trial and therefore those issues were not addressed.

The court also made a distinction with display of the American flag and the Tennessee flag in courtrooms by stating: "Display of the American flag and the Tennessee flag in the courtroom did not constitute extraneous communications because lawyers and judges take an oath to uphold the state and federal constitutions and the laws of both the United States and the State of Tennessee. Jurors compose the very backbone of the American system of jurisprudence and are sworn to apply the law. The presence of these flags (American flag and Tennessee flag) serves as a constant reminder of these weighty duties."

**PRACTICE POINT**: It is important for us as General Sessions judges, as well as all judges, to understand that a strong point comes out of this case which emphasizes that judges must be, and must be perceived to be, disinterested and impartial and further we should not allow any conduct or symbols in the courtroom to raise "the specter of racial prejudice" that might arise by the demonstration of the Confederate flag or other such symbols that could damage "a criminal defendant's fundamental protection of life and liberty against race or color prejudice." The Supreme Court of the United States has emphasized that "permitting racial prejudice" in the court system damages both the fact and the perception of the public itself and would damage the role of the judiciary in the eyes of the public.

State v. Gilbert (Tenn. Cr. App. 12/3/21)

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