Criminal Law Update
September 2022

Dwight E. Stokes
General Sessions Judge
Sevier County, TN

Closing arguments: Judge has wide discretion regarding closing arguments

- Facts: In a case involving aggravated stalking, the defendant maintained that the judge erred in limiting the time allowed to argue his case to the jury, depriving him of opportunity to fully present his defense to the fact-finder.
- The trial record reflected that a juror had requested a break and at that point the judge instructed counsel to limit argument to five more minutes.

Closing arguments: Valuable tool for state and defense and both should have wide latitude in their arguments

- Held: 1)Under totality of facts, trial court did not abuse its discretion in assessing a time frame for defense argument as defense was afforded the opportunity to fully present closing argument.
- 2) The CCA noted that closing argument is a valuable privilege for both state and defense and generally wide discretion is given to counsel and should not be unduly restricted by trial judge.
- 3) Defense had been given considerable time summarizing facts, discussing officer credibility and inconsistencies, and laying out elements of offenses, and the meaning of reasonable doubt.
- State v. Gibson ((Tenn. Cr. App. 4/27/22)

Confession: In light of 17-year old defendant's youth and inexperience, and totality of facts, confession voided

- Facts: In case involving murder/robbery, the 17-year old defendant and his mother were escorted to a small interview room. The detectives had visible guns, the defendant had never been interrogated before and had no experience with Miranda rights.
- When the defendant was presented the waiver form for Miranda, his mother was engaged in discussion with another detective about her family.

Too many distractions for young person to fully understand process

- Held: Trial court erred in admitting statement into evidence under totality of circumstances.
- 1) Defendant would not have understood his right to stop the interview or to decline in answering questions.
- 2) Instructions by detective were clumsy, as defendant was told to sign the waiver "just to say I read this."
- 3) When signing waiver, his mother was talking to another detective about her children which "deprived" the juvenile from opportunity to confer with mother "within the realm of social norms."
- 4) Defendant had problems with reading comprehension.

Impressive opinion recognizing practical factors in interrogation

- Held: Based upon totality of circumstances, defendant did not freely and voluntarily give his statement after a knowing and intelligent waiver of constitutional rights.
- "Considering the defendant's difficulties with reading and the distracting conversation between Det. Kendrick and Ms. McKinney, it is unreasonable to expect the defendant to have been able to read and understand the waiver of rights form in that environment."
- Practice point: Excellent recognition by appellate court
- State v. McKinney (Tenn. Cr. App. 1/5/22)

Threshold question for Miranda: Whether defendant is in custody

- Facts: In a case involving rape of a child, the defendant moved to suppress a statement he gave to Det. Taylor, claiming he did not voluntarily waive his constitutional rights.
- Neither party put on live evidence but both relied entirely on contents of video recording of the interview. The two hour interview showed detective drove defendant to sheriff's department because defendant did not have license, he said he went there of "his own free will," he was advised he was "free to leave" and could terminate interview at any time.

Since defendant not in custody, no Miranda warnings are necessary

- Held: 1) CCA found defendant was not in custody and Miranda warnings were not required. Trial judge was wrong in not addressing issue of whether defendant was in custody. CCA noted that issue is a necessary first step in all cases.
- Facts reflect in every way that defendant freely went with detective, understood he was free to leave, and was not coerced in any way, so CCA held defendant was not in custody and that there was no need to read Miranda to him.

Detective gives textbook lesson in how to conduct interrogation

- Held: 2) The CCA also held that under all circumstances the defendant gave a free and voluntary statement to detective. In fact, detective gave a textbook lesson in what to do:
- 1) She read Miranda rights to defendant though not required to. She went the extra mile.
- 2) As detective read rights she had him read along.
- 3) She asked if he understood, and after negative response, she went through his rights again.
- 4) She explained the nature of the investigation.
- 5) She told him to read every line of waiver form.
- Conclusion: Defendant voluntarily gave statement.
- State v. Gonzalez-Martinez (Tenn. Cr. App. 5/2/22)

Waiver of Miranda rights: "Totality of circumstances" test

- Facts: In a case of felony murder by a 15-year old, the defendant claimed that his age, lack of education, his limited mental ability, his reduced capacity to understand Miranda warnings, and the absence of a parent at the interrogation supported his argument that he had not knowingly, voluntarily and intelligently waiver his Miranda rights.
- Held: The CCA held that the "totality of the circumstances" supported the trial court's conclusion that defendant did knowingly, voluntarily, and intelligently waive his Miranda rights.

"Totality of the circumstances"

- The test requires consideration of:
- 1) Juvenile's age, education, experience, and intelligence;
- 2) capacity to understand Miranda;
- 3) juvenile's familiarity with Miranda and ability to read and write;
- 4) any intoxication;
- 5) any mental disease or disorder;
- 6) the presence of a parent or guardian or adult.

Guiding principles of "totality of the circumstances" test

- 1. Courts must exercise special care in scrutinizing purported waivers by juvenile suspects;
- 2) No single factor should by itself render a confession unconstitutional absent coercive police activity;
- 3) The absence of a parent at the interrogation alone does not render a confession inadmissible.

Analyzing factors:
A key judicial role

- 1) Defendant was 15, no longer in school but planned to pursue GED; in 9th grade, he read at 3rd grade level; was in special education; had a learning disability that affected his reading comprehension; IQ of 92; investigator was polite and non-confrontational and used appropriate language for 15-year old; even though emotional and concerned about jail, defendant's demeanor was cooperative and he finally admitted he was the shooter.
- Evaluation by conference judges: _____.

Factor #2: Perception of Miranda

- 2) Defendant was able to follow along as investigator read rights; stated he had no questions when asked; he provided a self-serving reason for providing a statement; he understood he likely needed an attorney and that he did not have to talk to investigator; he knew statement could be used against him.
- Evaluation by conference judges: _____.

Factor #3: Familiarity with Miranda; Factor #4: level of intoxication, if any

- 3) Defendant was able to read and write in English; he was thoroughly advised of rights; he had some previous involvement with law enforcement in criminal justice system.
- Evaluation: _____
- 4) Not under influence of any intoxicant
- Evaluation: _____

Factor # 5: Mental disease or disorder

Factor # 6: Absence of parent

- 5) No mental disease or disorder; gave clear responses to investigator's questions.
- Evaluation: _____
- 6) CCA said investigators should have attempted to contact parents before interview but investigators did not try to make contact.
- Evaluation: _____
- Conclusion of CCA: Close case but totality of circumstances showed voluntary waiver and trial court properly denied motion to suppress.
- State v. Cook (Tenn. Cr. App. 2/7/22)

"You make the call": Admissible or not?

- Held by conference participants: Young age, poor reading comprehension, special education requirements, reading at 3rd grade level, and total lack of attempt to reach parents requires suppression of statement.
- Reverse, remand, suppress statement and have new trial based on other proof which included eyewitness identification of defendant and proof of his involvement.
- Do not give approval to poor law enforcement practices, as it tends to encourage poor law enforcement practices.
- Why? Inspire confidence in legal system by expecting high standards by law enforcement, judges, prosecutors and defense counsel. Novel approach but worth trying.

COVID-19 protocols: Do they violate constitutional protections?

- Facts: The defendant raised several due process and constitutional claims in regard to his prosecution:
- 1) That denial of his motion to continue the case should have been granted in order to prevent a "tremendously flawed trial."
- 2) His 6th amendment right to confrontation was denied because of mask requirements.
- 3) Requiring jurors and counsel to wear masks deprived him of effective assistance of counsel.

CCA addresses defense concerns of COVID-19 protocols

- Held: 1) Motion to continue:
- (a)Defendant was not denied a fair trial. Grant or denial of continuance is subject to sound discretion of trial court.
- (b) Defense must show a different result would occur if continuance was granted.
- (c) Trial court is granted great deference because of problems in assembling the witnesses, lawyers, and jurors at the same place at the same time, so continuances should not be routinely granted except for compelling reasons.
- (d) Defendant only claimed proceeding to trial was unfair without presenting any testimony or evidence to support his claim.

COVID-19 Protocols

- Held: 2) Defendant's right to confront witnesses.
- a) CCA held that trial court's enforcing a face mask requirement by order of TN Supreme Court did not violate right to confrontation, even though such court has taken strong position in regard to "physically facing witnesses." Still, the right is not absolute and must occasionally give way to considerations of public policies and the necessities of case, including ensuring the health and safety of those in courtroom in the "midst of a global pandemic."
- b) Each witness who testified against defendant testified in his presence and "only" defendant's nose and mouth were obscured, so witnesses could "perceive his presence."
- c) While TN had not addressed issue, federal courts had and held that wearing masks did not violate defendant's constitutional rights.

COVID-19 Protocols

- Held: 3) CCA held that requiring counsel and jurors to wear masks and maintain social distancing did not interfere with his right to effective counsel.
- a) Broad discretion of courts to conduct trial.
- b) Defendant cited no authority for position.
- c) Jurors and attorneys could observe eyes, facial and body movements, hesitation in speech, and other languages of the body in developing perceptions about the witness, "the language of the entire body."
- State v. Daniels (Tenn. Cr. App. 6/29/22)

Cellphone and Facebook evidence: Authentication connecting defendant?

- Facts: In murder/robbery case, defendant claimed evidence seized by search warrant was not authenticated as being connected to defendant. Defendant claimed cellphone was registered to "Esmine Reese" and not him and that Facebook account was not shown to be that of defendant.
- Held: The CCA held both the cellphone and Facebook account were properly connected to defendant under proof which was probative and relevant to the case against defendant.

What was the connection to the defendant in cellphone and Facebook?

- 1) Cellphone account: CCA pointed out one method of authentication is testimony by witnesses with knowledge "that a matter is what it is claimed to be." Here, witness Gough testified he had known defendant for 6 months and had communicated with defendant at that number.
- Sgt. Beebe testified he found text messages on both Gough's phone and the phone Gough identified as defendant's relating to drug transactions including one with victim.
- Defendant's sister testified defendant came to visit her in Chicago day after shooting and phone activity reflected defendant in TN on day of crime and in Chicago the next day.
- These all authenticated phone as being that of defendant.

FB posts established by "corroborating circumstantial evidence"

- 2) Facebook messages: The CCA noted that "evidence from social media and emails" is authenticated when "the prosecution offers corroborating circumstantial evidence." Here, relatives and friends testified that information on defendant's FB account directly related to defendant, including photograph of defendant, and fact that defendant advertised marijuana for sale after victim was robbed of marijuana. The proof established the FB messages related to the defendant and were probative and relevant to the case.
- State v. Berry (Tenn. Crim. App. 2/10/22)

Authentication of Facebook messages: "Distinctive identifying characteristics"

- Facts: In case of murder/robbery, defendant maintained trial court erred in authenticating Facebook messages against defendant.
- Held: CCA held the proof established that the substantive content of the FB messages contained numerous details about defendant's life including "distinctive characteristics" connecting defendant to the crimes.

"Distinctive characteristics"

- Agent Scarbro testified he got search warrant for defendant's Facebook account and that Facebook authenticated the records as coming from defendant's account, reflected in a certificate of authenticity admitted as an exhibit under the name of "Benitez." Most messages in the account were directed to defendant's girlfriend and another known friend of defendant.
- CCA also found the certificate was a proper business record under TRE 803(6)- (a) made at time of transaction, (b) kept in course of regularly conducted activity, and (c) as a regular business practice.
- The messages were not hearsay because not admitted for truth but to put defendant's messages into context of conversation and so they would not be nonsensical without proper context.
- State v. Benitez (Tenn. Cr. App, 4/27/22)

Evidence of other crimes: Text messages of drug sales admissible

- Facts: In a case involving possession of heroin with intent to sell, defendant argued court erred in admitting text message exchange involving a drug sale that did not involve the current charges.
- The text was an exchange with "Danielle" about meeting her for $80 worth of heroin. Defendant maintained intent was not an issue as he denied that the drugs belonged to him, and state should not have been able to use the text to show he was dealing drugs.

Evidence of prior misconduct: Principles for courts to consider

- Held: Trial court did not abuse discretion in admitting the text messages. In evaluating proof of other bad acts courts should note these principles:
- 1) Courts have broad discretion on evidence rulings;
- 2) TRE Rule 404(b) permits such evidence if such evidence is relevant to issue of identity, intent or rebuttal of accident or mistake and probative value outweighs danger of unfair prejudice;
- 3) Such evidence not allowed to prove character of person in conformity with character trait;
- 4) Evidence of bad acts must be clear and convincing.

When crime requires state to show specific intent (such as drug sale)

- Held: The CCA noted that previous TN cases have held that "where the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove the defendant acted with specific intent notwithstanding any defense the defendant might raise."
- State v. Tate (Tenn. Cr. App. 2/28/22)

Improper impeachment of defense witness: prior bad acts

- Facts: In a case of attempted murder, the defendant maintained that the trial court improperly allowed the state to cross-examine a defense witness (Mr. Woods) about whether he had sold meth out of his trailer. Defense had objected and state said it wanted to use proof to show Woods had "motivation not to be completely honest with what happened that day."
- The court allowed the proof and the state introduced indictments against Woods, and the judge told Woods he could implicate himself in the crime, following which Woods invoked the 5th amendment.

Bad act of witness wrongfully admitted by trial judge

- Facts: On appeal, the CCA held that the trial court had erred in allowing the prior bad act evidence because the prior bad acts had not been proven by clear and convincing evidence, but the CCA found the error harmless.
- Held: The TN Supreme Court concluded that the CCA correctly determined the trial court had erred in allowing the "bad acts" evidence, but that the CCA erred in finding "harmless error."

Improper impeachment of witness "sullied" the entire trial

- Held: The TN Supreme Court noted that the improper impeachment "arguably sullied the reputations of multiple defense witnesses" and not just that of Mr. Woods, as the state emphasized the situation over and over noting that the defense witness was a "drug dealer."
- The TSC said the proof against the defendant was not overwhelming and that the improper impeachment more likely than not affected the judgment, which constituted "reversible error."
- State v. Moon (Tenn. 4/20/22)

Admissibility of pornography: Proof directly relevant to current case

- Facts: The defendant was convicted of multiple counts of rape of child. The defendant contended the court erred in admitting adult pornographic material found on defendant's electronic devices, claiming that such proof was not relevant and, even if relevant, the probative value was outweighed by prejudicial impact of the proof.
- Held: The CCA held trial court did not abuse its discretion in determining the porn was relevant.

"Relevance" – proof tending to make version of facts more or less probable

- 1) CCA held the evidence was clearly relevant under TRE 401 as the detective's testimony and the pornography admitted as evidence corroborated the victim's testimony by making her version of the events more probable and therefore relevant.
- 2) The CCA also found the probative value outweighed the danger of unfair prejudice, even though such proof must be closely scrutinized.

Porn was not about "other wrongs" of defendant but was about the actual charges the defendant was facing

- 3) The CCA concluded that the pornography introduced corroborated victim who testified defendant, her father, showed her porn scenes depicting sexual activity just like her father made her engage in, including oral sex.
- CCA pointed out the proof was not about "other wrongs" but was about the wrongs alleged in the indictment, "substantially comporting with victim's testimony."
- 4) CCA said it was error to allow detective to testify that officers found "lots" of videos with pornography as trial court should have limited the proof to that supporting victim's testimony, but that the error was harmless.
- State v. Willingham (Tenn. Cr. App. 4/20/22)

Prior inconsistent statement: Transcript from federal trial admissible

- Facts: In a case involving felony murder, defendant maintained that trial court erred by admitting testimony of Adrienne Mathis as substantive evidence via transcript from a prior federal proceeding, claiming it was inadmissible pursuant to TRE 803(26). Defendant claimed the transcript lacked trustworthiness.
- Held: The CCA concluded trial court did not err in admitting the statement as substantive evidence since all the conditions of TRE 803(26) were met.

Statement met all the requirements of TRE 803(26) and is admissible

- 1. The declarant witness testified at trial and was subject to cross-examination by defendant.
- 2. The statement had been given under oath which satisfied TRE 803(26) requirement of being audio or video recorded, or written statement signed by witness, or statement given under oath.
- 3) In jury-out hearing, the judge determined statement was trustworthy.
- The CCA also noted that a prior statement about events that a witness claims at trial to be unable to remember is "inconsistent" with the trial testimony.
- State v. Boyd (Tenn. Cr. App. 12/1/21)

In camera interview by judge with minor child held reversible error

- Facts: In this civil case regarding competing petitions for adoption of minor child, one of the parties asked if the child could testify, and the GAL stated that the child wanted to speak to the judge in private. The other party also indicated no objection to the request.
- Though reluctant at first, the trial judge granted the request, noting after the meeting with the child the judge would report back to all parties and indicate what the child expressed to him so everybody would know what was said and it would be on the record.
- After the interview, the case was reset to be concluded and the judge did not report what the child said.

Court never told parties what the child testified to prior to its ruling

- Facts: When the trial later resumed, the trial court issued a memorandum opinion without ever revealing what the child had stated.
- Held: The Court of Appeals concluded that the trial court committed reversible error by not reporting the substance of the child's testimony before the issuance of its opinion because that deprived the parties of any opportunity to offer testimony or evidence in response to the child's testimony.

Parties did not give up their rights to be informed of in camera discussion

- Key points:
- 1) The appellate court noted the child's testimony obviously influenced the trial judge but the Court of Appeals could not tell if the preponderance of the evidence would have favored the result without the child's testimony.
- 2) Even though all parties clearly agreed to let child talk to judge privately, "it is not at all clear from the record that the parties agreed to be uninformed as to the content of the child's testimony until it was written into the final judgment." So the failure to object by any party "did not insulate" the trial court from committing reversible error.
- In re Lyric N. (Tenn. Court of Appeals 7/29/22)

Text messages of defendant: Not introduced for "truth of the matter"

- Facts: In a case involving double murder, Det. Gish testified as expert in field of digital analysis and testified he received cellphone devices of defendant from which he was able to extract incriminating text messages of the defendant, as defendant reacted to messages he received and by instructions he gave to others after receiving messages.
- Defendant told others "don't talk to nobody," to close Facebook account, to stop talking so much, among other reactions he made.
- The trial court allowed the messages into evidence over objection by defendant.

Not hearsay if not offered for truth of matter asserted

- Held: The CCA held that the text messages did not violate the hearsay rule because the messages were not offered for the truth of the matter and were therefore not hearsay.
- 1) Messages from Waynetta were not offered for truth but to show context of defendant's text message: "Don't talk to nobody."
- 2) Messages to other witness, including to stop talking and to close down FB account, were "orders and instructions" and not for truth.
- 3) Other texts were questions, and "questions , like commands, are not generally considered hearsay because they are not offered for truth of matter asserted."

Denial of right to confront accusers? No, statement was "non-testimonial"

- As to defendant's claim he was denied right to confront witnesses against him by admission of texts, the CCA pointed out that TSC has ruled that a "statement is non-testimonial if the primary purpose is something other than establishing or proving past events potentially relevant to prosecution."
- The "primary purpose" of these texts was to provide "context" to defendant's text messages and they were not being sent by individuals in the "roles of witnesses" at the time the messages were sent.
- State v. Perry (Tenn. Cr. App. 4/22/22)

"Would you have shot the victim?"

- Facts: In a case in which the defendant was found guilty of 2nd degree murder, the defendant argued that the trial court erred in admitting testimony from a state witness, Mr. Heatherly, about whether he would have shot the victim.
- The defendant argued such question by the state was speculative and irrelevant, and the state countered that the response of the witness was at most "equivocal," and that the court did not err in allowing the question.
- Mr. Heatherly responded by saying, "I don't know how to answer that really."

"Would you, could you, should you?" Cat in the Hat- "I really don't know"

- Held: Defendant not entitled to relief on this.
- 1) The CCA stated that the threshold issue with regard to evidence is relevance, and the CCA noted the question was likely asked in regard to the state attempting to show that the defendant did not reasonably fear imminent death or serious bodily injury.
- 2) The CCA noted that in general the "testimony of the witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."
- 3) The CCA ultimately decided that the response was "nonresponsive" and defendant did not articulate how the testimony could have affected the jury.
- State v. Ford (Tenn. Cr. App. 5/19/22)

Ferguson principle: The state cannot be forced to preserve a statement it never had in its possession

- Facts: In case involving murder charge, the defendant maintained the trial court erred in not granting a mistrial or at least striking the testimony of the state witness (Samuels) who suggested in her testimony she had given a previous statement to detectives. Defense asked for a copy of the statement, claiming it was Jencks material pursuant to TRCP Rule 26.2 requiring production of copy of any prior statement.
- State claimed there was no such statement and only previous statement was at preliminary hearing.

No relief from TRCP rules or from Ferguson rules: No proof statement ever existed

- Held:
- 1) CCA found defendant's reliance on TRCP Rule 26.2 was misplaced as nothing in record indicated state had any other statement of witness other than from preliminary hearing.
- 2) Ferguson claim also was without merit as record suggested state was never in possession of a written statement from Samuels.
- State v. Bobo (Tenn. Cr. App. 3/17/22)

Ferguson Rule revisited

- Ferguson claims controlled by these principles
- 1) Ferguson relates to state's duty to preserve potentially exculpatory evidence.
- 2) Proper inquiry is whether a trial without lost evidence would be fundamentally fair.
- 3) Court must first determine whether state had duty to preserve the lost or destroyed evidence.
- 4) State has general duty to preserve all evidence subject to discovery rules.
- 5) Duty to preserve is limited to evidence that may play a significant role in suspect's defense.
- 6) If proof establishes duty to preserve and that state failed duty, court must determine (i) degree of negligence; (ii) the significance of evidence destroyed; (iii) sufficiency of other evidence, in determining any appropriate remedy in the case.

TRCP Rule 26.2: Application to General Sessions Court

- 1.The advisory commission comments to TRCP 26.2 makes clear that Rule 26.2 "in no way applies to a preliminary hearing or any other hearing conducted in General Sessions Court." The commission makes it clear such rule only applies in Criminal Court.
- 2. As G. S. judges, if we are about to conduct a trial in a matter, and the issue of another statement is raised, it would not be inappropriate for a G.S. judge to note the purpose of the rule and that if there is an existing statement that it be exchanged. If no request is made before trial, the rule would give no indication of either side being able to rely on it, but if readily available it could be exchanged if such does not unduly delay the matter.
- 3. Most importantly, reasonableness should prevail: exchange it if readily available. If defense wanted to go through all discovery, it did not have to agree to trial in first place and vice versa. But if statement exists and easy to exchange and if it bears on truthfulness, a reasonable solution should be reachable.

Insanity or diminished capacity defense: a look at the basics

- Facts: In a case involving murder and aggravated assault, the defendant contended that the evidence was insufficient to support his convictions or to overcome his defenses based on insanity and diminished capacity.
- Key aspects of the facts included:
  1) on 6/26/16, the defendant's mother, who survived the attack, and his father, who was killed, were in the kitchen fixing breakfast, when the mother saw defendant stabbing father with a knife. The defendant stabbed his mother and asked her how it felt. He told 8-year old he was not going to hurt her.
- 2) The defendant walked out of house and told an officer he stabbed the MF'ers because they were pedophiles and they were hurting the 8-year old. The defendant told officers he did not know the couple. Officer Gotsey testified the defendant "really believed that the people inside the house were not his mother and father."

Abnormal behavior and presence of drugs in defendant's system

- 3) Many people testified, including police officers and medical personnel, saying he never appeared paranoid or delusional. The defendant did test positive for barbiturates, benzidines, cannabinoids, cocaine and opiates.
- 4) Many friends and acquaintances of defendant testified that in the weeks leading up to attack they had witnessed abnormal behaviors in him, including looking up at sky, mumbling and walking around in circles.

Layperson and expert testimony bring out a multitude of variations in proof

- 5) Dr. Montgomery testified as expert in psychiatry on behalf of defense and stated test results indicated defendant was suffering from a severe mental disease and a drug-induced psychosis at the time of the stabbing.
- 6) Dr. Young testified for state as a clinical psychologist and said her one hour interview suggested "malingering" even though she did say certain evidence indicated defendant was suffering from drug-induced auditory hallucinations and paranoia around time of the stabbing.
- Dr. Kovack testified for state that a review of defendant's records indicated defendant was able to appreciate the wrongfulness of his actions.

Insanity or diminished capacity?

- Held: Viewed in the light most favorable to state (due to outcome of conviction), the CCA concluded that defendant failed to prove insanity by clear and convincing evidence.
- The evidence, while not overwhelming, was sufficient for jury to reasonably conclude that defendant acted with a knowing intent. This included proof by a fellow inmate defendant planned to "play crazy" for a lesser sentence;" Dr. Young's testimony defendant was "malingering," and Dr.Kovack's testimony that defendant was exaggerating his symptoms.
- State v. Elrod (Tenn. Cr. App. 3/28/22)

Insanity in General Sessions Court

- 1) The Elrod case is a good case to review in regard to dealing with these type issues. It gives a good overview of how a court must deal with differing opinions on the facts of whether a defendant is in control of his actions.
- 2) High profile murder cases may bring on close scrutiny by the media so a good review of insanity issues and capital case considerations can be very helpful and encouraged so you can act with confidence in such cases.

Rape of child: No requirement for victim's testimony to be corroborated

- Facts: Jane Doe and S.L. were half-siblings adopted by same family. Jane told her mother on 7/5/16 that J.L. raped her the night before, when Jane was 9 and J.L. 17. 911 was called and law enforcement responded followed by forensic interview, resulting in charges against J.L.
- After a trial in juvenile court resulting in conviction, J.L. appealed to circuit court for trial de novo. Ultimately, a trial was had and defendant was found guilty based upon Jane's testimony defendant penetrated her orally, rectally and vaginally. Defendant appealed to Court of Appeals.

Testimony of victim alone sufficient to convict defendant of rape of child

- Held: The Court of Appeals held that the evidence was sufficient to support the convictions for rape of child and incest.
- 1) There is no requirement that the victim's testimony be corroborated in rape of child, so victim's testimony can be the only evidence.
- 2. Forensic evidence is not required to establish proof of rape.
- 3. Credibility determinations are made by fact-finder (a jury or judge);
- 4) Rational fact-finder could find J.L. guilty beyond a reasonable doubt for rape of child and incest.
- State v. S.L. (Tenn. Civil Appeals 3/1/22)

"Irrelevant and inflammatory" testimony results in dismissal of case

- Facts: In case in which defendant was charged with drugs and firearm charges, the defendant filed a motion in limine to prevent any mention of fact that defendant was a registered sex offender. The trial court granted the motion and ruled very explicitly that there was to be no proof by state referring to defendant's sex offender status.

"Explosive revelation" leads to mistrial

- Facts: After the judge's clear ruling, the following exchange occurred in the state's direct proof:
- Prosecutor: What exactly are your job responsibilities?
- Officer Miller: I am an – I work in the PSU unit which supervises registered sex offenders.
- The defendant objected, requesting a mistrial. The state said it didn't mean to, and the judge ruled the state's action was not intentional. The trial court offered a remedial instruction but defendant declined saying such instruction would just add more attention to the state's error.

"Evidence of the defendant's criminal history hung like a cloud" in the court

- Held: The CCA found that the trial court erred in failing to grant a mistrial based on the state's poor conduct in bringing up the sex offender status.
- 1) "Evidence of the defendant's criminal history hung like a cloud over the entirety of the trial."
- 2) The response by the state witness was in "direct contravention" of the trial court's recent and explicit ruling.
- 3) The explosive nature of the revelation was disastrous, and the CCA stated it was their "view" the trial court abused its discretion by denying the defendant's motion for a mistrial.

No fault for defense counsel to not want to call more attention to issue

- 4. The court noted the prosecutor had been warned by the trial court but yet the state asked the witness to describe "exactly" what his job responsibilities were.
- 5.The defense was justified in not accepting judge's offer for a limiting instruction, as court could not disagree with defense that more attention would have been called to incident.
- Practice Point: Drastic failures require drastic actions such as mistrial.
- State v. Higgins (Tenn. Cr. App. 5/2/22)

Momon hearing is not required when defendant elects to testify at trial

- Facts: Defendant was convicted of felony theft and contended that trial court should have granted his motion for new trial "due to the defendant's lack of understanding of his constitutional rights during the Momon hearing," due to concussion he had suffered. He stated he could not recall discussing testifying at trial with his attorney and could only recall "bits and pieces" of the trial.

"But, sir, you did testify"

- Held: The CCA held defendant had failed to establish by preponderance of evidence that he was incompetent to stand trial or to act as a witness in his own defense as he chose to do.
- 1) First, the trial court held there was no mention of any health problem on day of trial or of any work-related injury.
- 2) The CCA noted that the trial court actually held a Momon hearing and the defendant was advised of his right to testify, and the defendant decided to testify because he did not want the officer's testimony to go unchallenged.

If defendant elects to testify, no Momon hearing is required

- 3) The CCA also noted that the TN Supreme Court has specifically declined to extend the ruling in Momon to those instances when, as in the present case, the defendant elects to testify at trial. Because the defendant elected to testify, no Momon hearing was required.
- State v. Dawson (Tenn. Cr. App. 1/10/22)

Momon Re-visited:
State v. Momon (Tenn 1999)

- "When a defendant elects not to testify and to waive his fundamental constitutional right to do so, counsel must hold a colloquy with the defendant on the record, out of the presence of the jury, in which counsel should question the defendant to ensure that the defendant understands that:
- 1) the defendant has the right not to testify and there is no inference from failure to testify;
- 2) the defendant has right to testify and if he/she wishes to testify no one can prevent D testifying;
- 3) the defendant has consulted with counsel and been advised of rights and freely waives right to testify.
- Practice point: No reason not to go over at trials in G.S. Ct.

Vehicle search: constructive possession of drugs or weapons

- Facts: Defendant was a passenger in a vehicle which was lawfully stopped for a traffic offense. Officers smelled marijuana (but officer conceded he could not distinguish from hemp) and discovered marijuana and oxycodone in the center console, a marijuana cigarette on the passenger floorboard, and a weapon under the passenger seat.
- Defendant was convicted of simple possession of oxycodone and marijuana and possession of handgun as a felon. Defendant challenged the sufficiency of evidence, claiming state failed to prove each case beyond reasonable doubt.

An evidentiary analysis: Constructive possession and reasonable doubt

- Held: 1) The CCA held the state's proof was sufficient beyond a reasonable doubt as to simple possession of marijuana. (a) A small bag of VI was found in center console and marijuana joint on floor in passenger area; (b) officers could "smell" scent of marijuana but that was weakened by inability to distinguish from hemp; (c) CCA concluded totality of proof was sufficient to convict of marijuana possession because of "open and obvious nature of the contraband" including the closeness in proximity of joint to the defendant.

Constructive possession and reasonable doubt

- 2) In regard to possession of weapon found under passenger seat, the CCA held the state failed to prove beyond reasonable doubt. There was no attempt to get fingerprints from weapon; the actual ownership of gun was not established; defendant was not the owner nor driver of the vehicle; and the gun was not in plain view; defendant never made movement toward gun.
- CCA: "In short, there is absolutely nothing beyond the defendant's physical proximity to the weapon to establish any kind of nexus of possession." No evidence linked defendant to weapon or suggested he was aware of its presence in vehicle.

Constructive possession and reasonable doubt

- 3) In regard to possession of oxycodone, the CCA found state failed to establish guilt beyond reasonable doubt. The oxycodone was validly prescribed to mother of driver; pills were in center console of car not owned or driven by defendant; pills were concealed under pile of papers and other items; no evidence that defendant ever accessed console or that he knew of the pills; the pills were small in quantity and not in plain view.
- CCA: "Beyond the defendant's presence, the state failed to introduce any incriminating circumstances which connected the defendant to the pills."
- State v. Siner (Tenn. Cr. App. 1/27/22)

Key principles in regard to constructive possession of drugs or contraband

- 1. To sustain conviction for possession of illegal drugs, the state has to establish the defendant possessed the controlled substances and that possession was knowing.
- 2. In regard to firearms, the state has to show that the defendant possessed the firearm and that he acted recklessly, knowingly, or intentionally in doing so.
- 3. Possession may be either actual or constructive.

Key principles in regard to constructive possession of drugs or contraband

- 4. Constructive possession is the ability to reduce an object to actual possession. If constructive, there must be proof the accused had the power and intention at a given time to exercise dominion and control over the contraband either directly or through others.
- 5. Mere presence in the vicinity of the contraband is not, alone, sufficient to support a finding of constructive possession. Neither is mere association with a person who does control the drugs or property where it is discovered.

Key principles in regard to constructive possession of drugs or contraband

- 6. When the defendant is not in exclusive possession of the place where contraband is found, additional incriminating facts and circumstances must be presented that affirmatively links the accused to the contraband in order to raise a reasonable inference of possession.
- 7. Constructive possession is evaluated in light of the totality of the circumstances and may be proven by circumstantial evidence.
- 8. Possession may be exercised solely or jointly with others.

Key principles in regard to constructive possession of drugs or contraband

- 9. Whether possession is knowing is generally shown by inference and circumstantial evidence.
- 10. When the defendant is charged with possession of contraband located in a vehicle, knowledge may be inferred from control over the vehicle in which the contraband is found.
- 11. The court must consider all facts involved in a "totality of circumstances" analysis.
- 12. When another person is committing visibly criminal acts in the presence of the accused, the chances are substantially greater that a companion is more than a bystander.

Key principles in regard to constructive possession of drugs or contraband

- 13. When contraband is in a location under the control of multiple persons, incriminating circumstances other than mere ownership and presence have contributed to findings of sufficient evidence of constructive possession, including "open and obvious nature of contraband."
- 14. Evidence of knowledge or lack of knowledge about the presence of contraband are significant in determination by courts of whether there is sufficient evidence to convict defendant.

Photographic line-up: Not unduly suggestive under Neil v. Biggers

- Facts: In murder case, defendant filed motion to suppress identification of defendant by the witnesses who participated in photographic line-up. Defendant claimed the photo of defendant was different from other photos and was designed to stand out.
- Held: The CCA held the trial court did not err finding the line-up was not unduly suggestive. The court noted that photos were all of males who were short, had dark hair and similar facial hair, plus they were all already familiar with the defendant.

Five factors of Neil v. Biggers

- Neil v. Biggers has a two-part analysis:
- 1) trial court determines whether ID procedure was unduly suggestive; and
- 2) whether under totality of circumstances whether identification was reliable.
- Five factors as to reliability of identification:
- 1) opportunity of witness to view the suspect;
- 2) degree of attention of witness at the time;
- 3) accuracy of prior description of defendant;
- 4) level of certainty of the witness; and
- 5) length of time between crime and the confrontation.

Line-up held to be not unduly suggestive and also to be very reliable

- Held: 1) The CCA held that the trial court properly found that while the line-up was a little suggestive, it was not "unduly" suggestive;
- 2) As to reliability, CCA noted (i) both witnesses had full opportunity to view defendant; (ii) degree of attention of witnesses was very high; (iii) witnesses knew defendant and accurately described him; (iv) witnesses were "absolutely certain of identification; and (v) length of time between crime and confrontation was very slight.
- State v. Bobo (Tenn. Cr. App. 3/17/22)

Indicia of reliability of identification outweighs suggestive procedure

- Facts: In a murder case, defendant filed motion to suppress the eyewitness identification, claiming eyewitness had a limited time to view suspect; that witness's attention was diverted; the witness initially claimed he did not know who shot him; and witness was never asked to state degree of confidence in his identification at line-up.
- Trial court held identification procedure was not unduly suggestive.

Indicia of reliability was very strong and overcame suggestive procedure

- Held: CCA held that even though the identification procedure was suggestive, the indicia of reliability was strong enough to outweigh the corrupting effect of the suggestive identification procedure.
- 1) The CCA found that the photo line-up was suggestive: (a) investigator knew exact placement of defendant's photo in line-up; (b) even more problematic was investigator's failure to inform witness that perpetrator may or may not be in line-up; (c) investigator failed to get a "confidence statement" from witness as to degree of confidence in identification which is an important tool. So CCA concluded that procedure was "unnecessarily suggestive."
- 2) The CCA said the next step is to determine under the 5-step Biggers process whether the reliability of the identification outweighed the corruptive effect of the suggestive procedures.

Biggers five-factor review weighs in favor of reliability

- Held: CCA held 1) witness able to observe defendant very close up ("within a foot or two"); 2) witness was well-focused on perpetrator in broad daylight; 3) there were no prior descriptions which results in a neutral factor; 4) level of certainty of witness was very high as identification was immediate; 5) length of time passed was only a few hours.
- Conclusion: Indicia of reliability outweighed corrupting effect of suggestive ID procedure.
- State v. Cook (Tenn. Cr. App. 2/7/22)

Rule of Sequestration: "I demand the rule"

- Facts: In a vehicular assault/DUI case, the defendant contended that the trial court erred in granting the request of the state to privately confer during a break with its expert witness who was in the middle of his testimony.
- The defendant argued that the state violated the Rule of Sequestration and gained an unfair advantage by being allowed to better prepare the witness for cross-examination.

The rule of sequestration

- Facts: The facts established that during the trial while defense was cross-examining the expert, the expert was asked about an FDA recall for the machine (Vista 1500), the same machine which tested defendant's blood. The state objected that it did not have advance notice of recall, and the trial granted a recess for the expert to review the substance of the recall.
- After the recess, the witness explained that the recall was in regard to testing of diabetic patients, which was not a part of the test for defendant. The trial court then prohibited any further cross-examination of witness but allowed explanation for why the recall did not apply.

The "rule" prohibits witnesses from discussing case with other witnesses, not with trial counsel

- Held: The CCA held that the rule of sequestration prohibits witnesses from discussing their testimony with other witnesses but not with trial counsel.
- The trial court did not abuse its discretion in allowing witness to talk to counsel after receiving information not provided during discovery, specifically because "the rule" does not apply to witnesses discussing their testimony with counsel.
- State v. Moore (Tenn. Cr. App. 4/12/22)

Blood draw by hospital: Not a result of state action

- Facts: In DUI case, defendant maintained that the trial court erred in denying motion to suppress the blood draw as she claimed she was denied the opportunity to obtain a subsequent blood test pursuant to TCA 55-10-408(e) and also because she was not warned of the consequences of submitting to a chemical test prior to the blood sample.
- One week after the crash, Sgt. Bellavia obtained a judicial subpoena for the defendant's medical records, which showed blood alcohol content of .176.
- The state countered that the blood test was performed during the course of medical treatment and not the result of state action.

"Blood drawn at behest of treating physicians and not police officer"

- Held: The CCA held that evidence did not preponderate against trial court's denial of motion since defendant was gravely injured in car crash and blood was drawn at the behest of treating physicians and not police officer.
- 1) Evidence gathered by private persons is generally not subject to exclusionary rule because with private action there is no police conduct to be deterred.
- 2) There is no constitutional violation when there is no state action.

"In order to provide the best patient care" and not to prosecute

- 3) As to defendant's claim she was denied opportunity for independent test pursuant to TCA 55-10-408, the CCA noted that she was "simply incorrect" as right to independent test applies only to blood test at "written request of a law enforcement officer."
- 4) As to argument of defendant that state violated her rights by waiting to indict her until after blood sample had been destroyed, the court again stated this argument also ignored fact the blood sample was taken by medical personnel, not officers, in order to "provide the best patient care."
- State v. Moore (Tenn. Cr. App. 4/12/22)

Search warrant with no "time stamp"

- Facts: In a case involving aggravated sexual battery, police sought a search warrant from magistrate who granted the warrant but the proof established that the S/W affidavit had no time stamp.
- The defendant maintained that the trial court erred by denying the motion to suppress the evidence seized pursuant to S/W, claiming there was no proof that the affidavit was sworn to before the issuance of warrant.

Safeguards against governmental intrusions into privacy of individuals

- Held: The CCA held that trial court had properly found that the affidavit was sworn to in front of the trial judge before the warrant was issued.
- 1) The CCA noted that the TN Constitution provides safeguards against governmental intrusions into the privacy and security of individuals and TRCP Rule 41 provides that a warrant shall issue only on affidavit that is sworn before a magistrate and establishes grounds for issuing the warrant. Rule 41 also provides that magistrate shall endorse on the S/W the hour, date, and name of the officer to whom the warrant was delivered for execution. This is to ensure that S/W is executed prior to its issuance and that any discrepancy "will be apparent on the face of the warrant."

"Clear expression" warrant was sworn to in front of judge prior to its issuance

- 2) The CCA noted that the facts established that the S/W was received as exhibit and that on 1/30/18 an affidavit was sworn by detective in front of trial judge. The judge signed the S/W and noted that the warrant was issued at 9:55 P.M. The trail court properly found that there was a clear expression the affidavit was sworn in front of the judge prior to issuance of warrant.
- State v. Montella (Tenn. Cr. App. 4/7/22)

Consent for search: Person with common authority over premises

- Facts: Det. Hawkins received information from Sgt. Ryan regarding murder case based on an anonymous tip about a Dodge Charger that was used during a shooting. The information included naming the defendant as the shooter. The vehicle was determined to be at the house of Mr. Hinerman, the defendant's cousin and the owner of the home where the vehicle was located. Officers went to the home and found the Charger at the end of the driveway.
- Instead of seeking a S/W, Det. Hawkins and other officers approached the house and knocked on door. Hinerman opened the door and was asked to step outside. In their discussions, Hinerman advised that the defendant and other co-defendants were in the home. Hawkins asked if they could come in to get defendant and Hinerman gave permission but first wanted to put up his cats.

Common authority over premises

- Facts: Hinerman led the officers to a downstairs bedroom which he identified as the defendant's bedroom. Officers yelled for defendant and when there was no answer, officers entered the room finding defendant asleep on bed with gun on bed beside him. Det. Hawkins identified defendant as same person who was in video on victim's cell phone.
- Defendant contested the validity of warrantless entry into the premises and discovery of handgun, which he sought to suppress. Trial court denied motion.

"Consent to search" as exception to search warrant requirement

- Held: The CCA held that the record supported the trial court's ruling that Hinerman had joint authority over the home and bedroom where defendant was located and gave proper consent to the officers entering the home and bedroom.
- The CCA noted the Constitution presumes warrantless searches to be unreasonable unless conducted pursuant to exception to S/W requirement, and that consent was one such exception.

Key principles regarding search conducted pursuant to valid consent

- 1. Consent for warrantless search may be given by the defendant or by a third party who possessed common authority over premises or effects to be inspected.
- 2. Common authority is shown by mutual use of the property by persons generally having joint access or control for most purposes. It is reasonable to recognize that any of co-inhabitants has the right to permit inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.
- 3. Hinerman clearly had joint authority in the home and bedroom and gave valid consent to officers to enter.
- State v. Hinerman (Tenn. Cr. App. 5/4/22)

Vehicle inventory search: No eligible driver available

- Facts: Officer Akins was assigned to U.S. Marshall-led Smoky Mountain Fugitive Task Force which assists in apprehending violent fugitives among other felons. The task force was looking for Erreese King who was a wanted fugitive.
- The defendant (Holmes) was not a target of the investigation but he had been warned about possibly harboring a fugitive. King was seen in defendant's vehicle which was stopped. King was arrested for outstanding warrants and defendant was arrested for driving on revoked license.

Officer discretion: Tow vehicle or allow someone to drive from scene

- Facts: The officers determined that none of three occupants could drive the vehicle and therefore determined to tow the vehicle. The officers performed an inventory search of the vehicle which revealed cocaine and Oxycontin.
- Officer Akins testified it was up to officer discretion whether to tow vehicle or allow someone to drive it from scene. Akins testified no one asked to drive it away, but defendant's family testified they were available to drive it from scene. There was conflicting testimony.
- Trial judge held the inventory search was valid.

"No eligible driver was available"

- Held: The CCA held that inventory search was lawful and overruled motion to suppress. CCA found that vehicle was stopped in middle of road and family members of defendant did not arrive until after search of vehicle had begun and therefore impoundment and search were valid.
- CCA held record supported trial court's decision "because no eligible driver was available to take possession of the car when Officer Akins decided to impound the vehicle and have it towed from the scene."
- State v. Holmes (Tenn. Cr. App. 1/4/22)

Black's Law Dictionary: "Sua sponte" "Without prompting or suggesting"

- Facts: The defendant was on trial for unlawful possession of a firearm by a felon and other charges. During a jury-out hearing, an officer overheard the defendant threaten one of the victims. The bailiff informed the trial judge about the altercation.
- The trial judge proceeded sua sponte to hold a jury-out hearing. During the hearing, the court questioned witnesses, Solomon and Harper, and each testified about the incident in the hallway. After the court's questioning, the court afforded both the state and the defense the opportunity for cross-examination and gave them the opportunity to present witnesses of their own, which was declined by both parties.

"Sua sponte" hearing by trial judge

- Facts: After completing the sua sponte hearing, the court did the following:
- 1) Found there was clear and convincing proof that the defendant made the threatening statement to the witness and that the threat was relevant to the issue of the defendant's intent to case the victim to fear imminent bodily injury;
- 2) Reserved right to let state present proof of the incident, ultimately conducting a jury-out hearing and allowing to state to present proof of the incident over defense objection;
- 3) Revoked the defendant's bond till trial conclusion.

Judges with inherent power to supervise and control courtroom

- Held: The CCA held the trial court did not exceed its authority or violate evidentiary rules by the sua sponte hearing. The CCA discussed the following key principles:
- 1) TN courts possess the inherent power to supervise and control court proceedings:
- 2) Trial judge has broad discretion in controlling courts and conduct of trial;
- 3) Judge must be careful not to indicate bias in favor of or against any party in the case;

Judges with inherent power to supervise and control courtroom

- 4) Having been informed of defendant threatening witness, the trial court has right to act immediately and appropriately to inquire into situation and address the issues.
- 5) TRE 404(b) requires a judge to hold jury-out hearing upon request of either party but it does not preclude a trial court from holding a hearing on its own initiative.
- 6) TRE 614 provides that a court may not call witnesses except in "extraordinary circumstances", and all parties are entitled to cross-examine any witnesses so called. TRE 614 also allows the court to interrogate witnesses, subject to objections by parties.
- State v. Reece (Tenn. Cr. App. 2/17/22)

Judge Rader and sua sponte hearing

- Judge Jeff Rader and his sua sponte hearing to address issue of potential violation of the rule of sequestration based on attorney request after observation of two witnesses having a discussion in hallway during break in case.

12-year old rape victim: Use of comfort/therapy dog

Facts: In a case in which the defendant was accused of 81 counts of aggravated sexual battery plus rape of a child, the defendant contended that the trial court had erred in allowing the victim to testify at trial with the assistance of a therapy dog, claiming the court did not conduct an evidentiary hearing regarding the dog's qualifications and necessity of its use by victim. He also complained that the dog was paraded in and out of courtroom in front of the jury in blatant defiance of the court's directive.

Man accused of 83 child sex charges complains about child's therapy dog

- Held: The CCA held that the trial court did not abuse its discretion by allowing the victim to testify with the assistance of the therapy dog.
- 1) CCA found that witness stand was arranged to limit jury's view of dog and that nothing in record supported dog was "paraded" around courtroom or in manner that was "obtrusive or disruptive." During new trial motion, trial judge had described use of dog as "a very neutral event."

Judge: Entrusted with "exercising control over conduct of trial"

- 2) CCA noted that TRE Rule 611 entrusts trial judge with "exercising appropriate control over the presentation of evidence and conduct of the trial." The Advisory Commission comments to Rule 611 state:
- "Nothing in these rules prohibits the court in its inherent authority from permitting a suitable animal, toy or support person to accompany a witness who is shown to be at risk or unable to communicate effectively without the aid of such comfort."

"Lucia" is a good dog, "yes, you are"

- 3) State filed a pretrial motion regarding use of therapy dog stating dog (Lucia) was trained to accompany traumatized victims in court. Defense objected and state explained that witness stand had been re-arranged to keep dog out of sight of jury. The state's motion also noted the benefit of the therapy dog to the victim in this case.
- The CCA noted that while judge did not conduct a hearing and make explicit findings regarding Lucia's qualifications, this is not mandated by case law or by TRE 611.
- State v. Cox (Tenn. Cr. App. 2/3/22)

Jury instruction in case is a good statement of law for judges

- "The law allows either the prosecution or the defense to use a facility dog during the testimony of witnesses. This dog is not a pet, does not belong to any witness. It is a highly trained professional animal available for use by either side. The presence of the facility dog is in no way to be interpreted as reflecting upon the credibility of any witness. You may not draw any inference either favorably or negatively for or against either the prosecution or defense because of the dog's presence and should attach no significance to the use of a facility dog by any side or witness. You may not allow any sympathy or prejudice to enter into your consideration of the evidence merely because of use of a facility dog."

TN Supreme Court: Probation revocation must be two-step process

- Facts: The defendant pled guilty to felony theft and received a six-year sentence, suspended to supervised probation. A series of VOP hearings were conducted over a period of time and finally the trial court fully revoked the defendant's probation.
- The trial court explained it was conducting a two-step analysis. First, the court found defendant violated probation by failing to report back to jail following discharge from the treatment facility and thereby absconding.
- Second, the court concluded that based on evidence at hearing plus defendant's character, and nature of offense, the court said the appropriate consequence was to "fully revoke probation."

"And now a word from the Supremes"

- Procedure: The defendant appealed to CCA which affirmed the trial court, following which the Supreme Court granted permission to appeal.
- Held: The TN Supreme Court concluded that probation revocation is a two-step consideration on the part of trial courts.
- "The first is to determine whether to revoke probation, and the second is to determine the appropriate consequence upon revocation."

Supreme Court changes law on revocation of probation

- TSC states the law now recognizes that it is "critical" to have reasons from trial court "articulating" reasons for the actual sentence imposed to ensure fair and consistent sentencing.
- "Indeed, how can an appellate court determine if the trial court has abused its discretion if it has no insight on the reasons or factors considered?"

Key principles noted by Tennessee Supreme Court in VOP matters

- 1. Trial court will be given "broad discretion" and "presumption of reasonableness" as long trial court addresses the principles and purposes of the sentencing act.
- 2. It is not necessary for findings to be lengthy or detailed but just sufficient for appellate court to do a meaningful review.
- 3. This process will develop confidence in the integrity and fairness of judiciary.

Supreme Court upholds revocation based on all factors considered

- Held: The TSC held that based on the specifics of the case --- considering the defendant's repeated violations, addiction, and the nature of his most recent violation (discharge from Freedom House and being an absconder), and the trial court's findings that defendant knew expectations of him upon discharge from treatment, that the trial court had given multiple opportunities to him --- there was overwhelming evidence to support the decision to fully revoke his probation.
- TSC noted that trial judge was speaking figuratively when he said he had "no choice" but to revoke him, as judge was basing that on proper factors of sentencing.
- State v. Dagnan (Tenn. 3/4/22)

!5-year delay in VOP prosecution: "Bureaucratic negligence/indifference"

- Facts: Defendant was charged with VOP in 2005 and not served with VOP until 2020. Defendant moved to dismiss for denial of speedy trial, claiming delay was "inherently prejudicial" and "attributable to bureaucratic negligence."
- The state claimed defendant caused the delay himself and there was no prejudice to defendant by delay.

Speedy trial protections apply to probation revocation procedures

- Held: The CCA held that defendant's right to speedy trial was violated and that trial court abused its discretion in denying motion to dismiss. Underlying the decision CCA noted:
- 1) Defendants are entitled to speedy trial under state and federal constitutions.
- 2) Guarantees are designed to protect accused from oppressive pretrial incarceration and anxiety and concern from pending charges.
- 3) Probation revocation procedures fall within speedy trial protections.

Speedy trial principles

- 4) Probation revocation proceedings are commenced when trial judge issues warrant.
- 5) Trial court must carefully balance societal interest in punishing criminals against a defendant's interest in a speedy trial, since dismissal is only available remedy.
- 6) To determine whether violation has occurred, court must balance four factors from Barker v. Wingo (U.S.S.Ct 1972)

Barker v. Wingo (1972)

- 1) Length of delay: 15-year delay- big factor.
- 2) Reasons for delay: In this case, CCA said delay was caused by either Madison County's failure to timely upload the 2005 warrant into database or by Shelby County's failure to check NCIC database. The state was clearly negligent and weighs heavily against state.
- 3) Defendant filed motion timely- factor for D.
- 4) Prejudice to defendant- he was not able to timely complete probation – weighs heavily for defendant.
- In totality, weighs heavily for defendant.
- State v. McBrien (Tenn. Cr. App. 4/6/22)

VOP: State proof was "unreliable hearsay" and must be dismissed

- Facts: Defendant was sentenced to 20 years (twelve years plus ten years consecutive). On 11/12/20, VOP was issued alleging defendant violated probation with new offenses of domestic assault and coercion of witness.
- At the VOP hearing, probation officer testified that on 9/1/20 the Memphis police responded to a call, at which time defense objected on basis of hearsay. The prosecutor responded that it was reliable hearsay and that copy of warrant was attached to probation report. The trial court ruled it was reliable hearsay, and probation officer resumed testimony. No witnesses to the actual events were called to the witness stand.

Proof at VOP hearing was "clearly hearsay" and was "unreliable"

- Held: The CCA held that state failed to establish by preponderance of evidence that defendant had violated his probation. The CCA found that the state did not offer any proof of why the victim or officer were not there to testify or show the information in the report was reliable, and the trial court did not make finding of good cause to justify denial of defendant's constitutional rights. The proof was "clearly hearsay."
- Judgment reversed and remanded.
- State v. Harris (Tenn. Cr. App. 2/22/22)

Key principles in VOP hearings

- 1. State must establish violation by preponderance of the evidence.
- 2. While courts recognize that a new arrest and pending charges are proper grounds on which a trial court can revoke a defendant's probation, a trial court may not rely on the mere fact of an arrest or an indictment to revoke a defendant's probation. Instead, the state must show by a preponderance of the evidence that the defendant violated the law.
- 3. "Reliable hearsay" is admissible in probation hearings so long as the opposing party has a fair opportunity to rebut the evidence. If reliable hearsay is admitted, the defendant must be granted at least "minimum" confrontation requirements established by case law – a) finding of "good cause" by court to deny rights of defendant; and b) a showing that report or testimony is reliable.

Withdrawal of guilty plea: "Any fair and just reason" analyzed

- Facts: On 1/23/20, defendant entered into open plea on second degree murder charge. At that time the state provided a detailed account of facts including eyewitness statement of a person who saw defendant at scene "ranting about a boyfriend and drugs." Officers found the defendant with a changed appearance (freshly cut and dyed hair). The court instructed defendant about seriousness of decision. Defendant stated she had discussed it at length with attorneys, that she had gone over the agreement in detail and understood the agreement and all her rights.
- Defendant had discussion with her mom about deal and decided to change lawyers, and a week later moved to withdraw her guilt plea. The judge denied the motion.

Withdrawal of guilty plea: No unilateral right of defendant to do so

- Held: The CCA concluded the trial court had properly considered all factors in State v. Phelps, leading TN Supreme Court case, and court had properly found the defendant did not provide sufficient justification of a "fair and just" reason for withdrawal of the plea.
- The CCA said several key principles apply:
- 1) A trial court's decision on plea withdrawal is reviewed for an abuse of discretion.
- 2) A defendant who has entered a guilty plea does not have a right to unilaterally withdraw a plea.

Factors regarding withdrawal of guilty plea

- 3) The TN Supreme Court established seven factors to evaluate withdrawal of plea:
- i) amount of time lapsed between plea and motion;
- ii) whether is valid reason for delay in withdrawal;
- Iii) whether defendant has asserted his'her innocence;
- Iv) circumstances underlying plea;
- v) defendant's nature and background;
- vi) prior experience of defendant with court system;
- vii) potential prejudice to state if allowed.

Final conclusion by trial court and CCA: No fair and just reason for withdrawal

- Conclusion: No fair and just reason for withdrawal has been established after considering totality of factors.
- 1) Defendant did file motion timely;
- 2) No real delay by defendant in filing motion;
- 3) No clear assertion of innocence at any point;
- 4) Circumstances of plea weigh against defendant as she chose to go forward;
- 5) Defendant had thoroughly discussed with lawyers;
- 6) Extensive experience with criminal justice system.
- Factors 1-2 favor defendant; 3-6 favor denial of motion.
- State v. Brooks (Tenn. Cr. App. 3/3/22)

Withdrawal of plea:
No single factor is dispositive

- Facts: Defendant pled guilty to evading arrest, burglary, shoplifting, and driving on revoked. Sentencing was delayed and two months later defendant wished to withdraw plea.
- Held: Record did not support fair and just reason for defendant to be allowed to withdraw plea of guilty. i) Two months had passed; ii) he said he thought he had more time to withdraw plea; iii) Defendant never maintained innocence; iv) when he pled, he indicated he understood plea and his rights; v) no real negative background or extensive criminal record.
- "On balance, record simply does not support a fair and just reason" for allowing withdrawal of guilty plea.
- State v. Jones (Tenn. Cr. App. 2/25/22)

Policy considerations in Tennessee for withdrawal of guilty plea

- 1. No unilateral right on part of defendant to withdraw plea;
- 2. The purpose of "any fair and just reason" is to allow a hastily entered plea made with "unsure heart" and "confused mind" to be undone.
- 3) The inconvenience to court and prosecution from a change of plea is slight as compared with public interest in protecting the right of accused to jury trial.
- 4) Trial court should exercise caution in refusing to set aside plea even if it is characterized as a change of heart.
- 5) However, a defendant should not be allowed to pervert the process into a tactical tool for purposes of delay or other improper purposes.

……..And now…..

- Ethics
-
- Dwight E. Stokes
- Fall 2022

Charitable Organizations and Fundraising

- Facts: A judge in West Virginia sought an advisory opinion in regard to a charitable organization which was holding a fund-raiser in the form of a "Jail and Bail" event. The organization created "phony charges", set their bail amounts, and collected donations to secure bail.
- The judge was asked to serve as a judge for the event, and he sought an opinion from Judicial Education Committee over whether or not he could participate.

Gives the appearance of solicitation of contributions

- Held: The commission found that the judge could not serve as a judge for the event because the public might misconstrue, however wrong they may be, the judge's participation as being solicitation of donations for the organization.
- The commission pointed to Rule 3.7 of the Code of Judicial Conduct which states that a judge can solicit contributions for such an event only from members of the judge's family or from judges over whom the judge does not exercise supervisory or appellate authority.

Issue: Is there coercion or abuse of prestige of judicial office?

- The comments to the rule note that it is "generally permissible for a judge to serve as an usher or food server or preparer, or to perform similar functions at fund-raising events sponsored by charitable organizations. Such activities are not solicitation and do not present an element of coercion or abuse of prestige of judicial office."
- County fair booth of Methodist Church: "Judge Rader sure makes a great burger!"

Issues regarding "close friendships" between judges and attorneys

- Facts: A judge who presided over four rural counties in Colorado sought an advisory ethics opinion based on situation in which he had a very close relationship with an attorney with whom he attended law school, each had participated in each other's weddings, and attended births of each other's children. They had worked at the same law firm for awhile until later forming their own firm before it dissolved. After dissolution, their interaction decreased but they remained friends.
- After the requesting party became judge, the attorney did not practice in his court to avoid conflicts. Things changed to the point the judge would be presiding in an area where his friend practiced.

Recuse due to friendship? The decision is "within the judge's discretion"

- Issue: Would the judge have to recuse himself every time the attorney appears before the judge?
- Held: The Colorado Supreme Court Judicial Ethics Advisory Board opined that "a judge need not per se disqualify himself/herself because a friend appears as a lawyer."
- 1) The opinion noted that whether a judge should recuse self is evaluated on a case-by-case basis in which the inquiry hinges on the closeness of the relationship and its bearing on the underlying case.
- 2. If the relationship is so close or unusual that it "reasonably raises a question of propriety," the judge should consider recusing, but the decision is within the judge's discretion.

Examine the friendship

- 3) Examine the friendship and consider:
- a) whether relationship might give a reasonable appearance of impropriety;
- b) even if judge believes recusal is unnecessary, the judge should disclose the relationship to the parties because there might exist information the parties could reasonably consider relevant to a motion for disqualification.

Key points by Colorado Supreme Court

- 1. A rule requiring a judge to disqualify self whenever a friend appeared before the judge would be "unnecessarily restrictive in a community where friendships among judges and lawyers are common."
- 2. "Mere existence of a trial judge's friendship with an attorney, by itself, does not create bias or the appearance of impropriety."
- Colorado Judicial Ethics Board (11/17/21)

Nature of friendship: Factors to consider

- Factors (listed in detail in outline):
- 1) Very close relationship of families of judge and attorney (share holidays or vacations);
- 2) Financial, political, partnership, amorous relationships to be closely scrutinized;
- 3) Whether received gifts or compensation from attorney;
- 4) Culture and size of community;
- 5) Reputation in community of close relationship between judge and attorney.
- Conclusion: Friendship alone does not require recusal, but a "significantly close relationship indicates, at a minimum, that judge should disclose relationship to the parties."

Discipline due to dishonesty, fraud or deceit: Attorney discipline in TN (2022)

- Facts: In TN attorney discipline proceedings, the Board of Professional Responsibility found that attorney's testimony (about his income in a juvenile court proceeding to reduce his child support obligation) violated TN Supreme Court Rule 8.4, which states it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Fraud and dishonesty: answers "carefully crafted" to appear true

- Facts: The hearing panel found the attorney's answers were carefully crafted to give the "appearance of literal truth" but were in fact dishonest in that they intentionally omitted relevant information fairly called for in the questions before the hearing panel.
- The hearing panel found the presumptive sanction was disbarment but the sanction was reduced to a one-year suspension due to 40-year unblemished record.

Attorney discipline with great application to all judges: listen closely!

- Held: The TN Supreme Court upheld the attorney's suspension and noted key principles about attorney conduct which provides excellent direction for JUDGES:

- 1. "Our advisory system for the resolution of disputes rests upon the unshakeable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice."

Listen carefully lawyers....
And judges

- 2) "The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." Lawyers have the "first line task of assuring the integrity of the process" as officers of the court.
- 3) Lawyers have a duty to do "more than simply refrain from committing perjury."

"General duty of candor"

- 4. A lawyer's general duty of candor to the courts includes not only the duty to refrain from knowing misrepresentations but also a positive duty to disclose to the court all material facts.
- 5. The "general duty of candor" requires attorneys to be honest and forthright with courts; that attorneys refrain from deceiving or misleading courts either through direct representations or through silence; and this duty is owed to courts during all aspects of litigation.

"Legal institutions depend on popular support to maintain their authority"

- 6. "Lawyers have no less obligation to meet these standards in litigation in which they are personally involved.. In all circumstances, a lawyer's conduct may further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."

"When it comes to the law, lawyers (and judges) should know better"

- 7. The TN Supreme Court noted: "Misleading testimony was given by an experienced and accomplished lawyer, someone who should have been well-acquainted with a lawyer's special obligations to demonstrate respect for the law and legal institutions."
- 8) As stated by trial judge: "An experience and accomplished lawyer should know better than to omit information highly relevant to the issues before the court."

In remembrance of Justice Cardozo

- "Membership in the bar is a privilege burdened with conditions." (Justice Cardozo)

- "Membership within the ranks of the judiciary is a privilege burdened with conditions."

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

Disqualification of D.A.'s office reversed by TN appellate court

- Facts: A general sessions judge was the target of a bribe, and due to the fact the sessions judge would be a witness in the case, the trial court granted the defendant's motion to disqualify the 12th Judicial District Attorney's Office. The trial ruled it would create the appearance that the judge would have improper influence over the DA's office since the DA's office practiced in the sessions court regularly. The state appealed.

CCA: No evidence district attorney's office was biased or would be unfair

- Held: The CCA reversed in 2-1 decision, concluding that trial court abused discretion in disqualifying the entire 12th Circuit's DA's office.
- 1) Venue of case is in small community in which participants all know each other. Population of Bledsoe County: 14,913.
- 2) No evidence the staff were in fact biased toward the general sessions judge just because they appeared in his court.
- 3) No evidence DA's office would prosecute defendant unfairly. The CCA said it took more than the "mere possibility of impropriety to disqualify entire office.

Dissent by Judge Kelly Thomas: "Wait just a minute, sports fans!"

- Dissent: Judge Thomas held trial court did not apply an incorrect standard or reach a decision against logic or reasoning.
- 1) The prosecuting witness is the judge who presides over the actions of the DA's office.
- 2) Judge Thomas said the smallness of the community exacerbated the problem since the witness was the "only" general sessions judge in the county.
- 3) Thomas said he could not find trial court abused discretion in ruling that was problematic.

Dissent: Majority comes close to requiring "actual impropriety"

- 4) Judge Thomas noted that all the circuit judges in the 12th district recused themselves, stating: "If the Circuit Judges feel that a conflict exists, then I cannot say the trial court abused its discretion" in finding appearance of impropriety with DA's office prosecuting case.
- 5) Judge Thomas stated the majority's analysis "comes perilously close to requiring evidence of actual impropriety rather than just an appearance of impropriety."
- State v. Nale (Tenn. Cr. App. 3/22/22)

Prosecutor turned judge: Recusal not required in this case

- Facts: Defendant claimed judge erred in not recusing himself because in 1990 the judge was a prosecutor who prosecuted the defendant and once said: "There is a dark side to the defendant which teachers and coaches don't see, and when the dark side surfaces, no young girl is safe." Also, the convictions obtained by defendant in the 1990 trial were later overturned by TN Supreme Court.
- Judge said any actions when he was a prosecutor were professional and did not reflect his personal opinion about the defendant and that he had no bias.

Appearance of bias just as injurious as actual bias: "In the eyes of beholder"

- Held: CCA held that recusal was not objectively required and judge had properly denied motion to recuse.
- 1) A judge shall recuse self when judge's impartiality might reasonably be questioned.
- 2) Impartiality might reasonably be questioned when judge has knowledge of facts in question, when judge served as a lawyer in the matter in controversy, etc.
- 3) Test for recusal is an objective one because appearance of bias is just as injurious as actual bias.

Is there a "reasonable basis" for questioning the judge's impartiality?

- 4) The judge did serve as actual prosecutor in previous case and not just supervisory role, but the former case was 30 years ago.
- 5) The issue is: "whether 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."
- Conclusion: Recusal not required.
- State v. McMurry (Tenn. Cr. App. 4/12/22)

Is the TBI above the law?

- Facts: In February 2015, the plaintiff in this civil action negotiated a judicial diversion agreement on two criminal charges. The defendant consented to four years of probation in exchange for dismissal of other charge and expunction of his records.
- 1) The defendant completed 4 years probation, and he paid the applicable fee.
- 2) State consented to expunction and the parties submitted agreed order, which provided that all public records would be expunged.
- 3) No appeal was filed and order was sent to TBI.
- 4) Law required TBI to expunge within 60 days.

"We will, we will, not expunge"

- 5) Records were not expunged and counsel notified TBI to expunge records.
- 6) TBI stated it had been informed by counsel TBI did not have to remove because TCA 40-32-101 makes sexual offenses ineligible for expunction.
- 7) Defendant sued TBI in Chancery Court and said court declined to rule and allowed interlocutory appeal.

Plaintiff to TBI: "We are the champions, we are the champions, expunge my record, cause we…."

- Held: TN Supreme Court held that the plaintiff's position was correct and that the TN statute simply obligates the TBI to remove expunged records from a person's criminal history within 60 days. The law entrusts courts with adjudicating whether an offense is eligible for expungement.
- 1) TBI is not assigned any responsibility in the process of expungement.
- 2) The statute says "the court determines."
- 3) State agencies may not alter a judgment of a court even if that judgment is illegal.

"TBI, thou shalt not eviscerate principles of res judicata"

- 4) "To hold that TBI possesses such authority would eviscerate principles of res judicata, which serve the core judicial function of settling disputes between contending parties."
- Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. David B. Rausch, Director of the TBI, and TBI
- (Tenn. 5/27/22)

Ethics 101

1. The TBI is required to comply with the law.
2. Law enforcement officers are required to comply with the law.
3. Each of the courts of the State of TN and each judge in the State of TN is to first and foremost make every effort to comply with the requirements of the law.

No one is above the law.

Ex parte communications posted on social media "after" final sentencing

- Facts: A judge in West Virginia sentenced a defendant in a criminal case to the penitentiary, following which he received a message from a third party on Facebook alerting him to to various posts made by the defendant, who was not a "happy camper." The posts did not contain threats but did call the victim, victim's family member, and the judge disrespectful names.
- The judge sought an advisory opinion from the Judicial Investigation Committee.

Offensive ex parte communications revealed by third parties to judge

- Held: The JIC recommended as follows:
- 1) The judge should not review or consider any Facebook posts about the subject of a pending or impending case referred to him by a third party.
- 2. Any similar ex parte communication that the judge receives should be immediately referred to both the prosecutor and defense attorney to investigate its truthfulness and to take any further action that they may deem appropriate.

Judge should not contact Department of Corrections or the like

- 3. The judge should not contact the Commissioner of the Division of Corrections and Rehabilitation and alert them to the situation since the judge did not know if, and the judge could not investigate whether, the defendant in fact posted the comments. The Commission noted that by doing so, the judge would create an appearance, however incorrect it might be, that the judge was trying to use her/his position to effectuate the outcome of a parole hearing.

Ex parte communications

- Recommendations based on:
- 1) Confidence in judiciary;
- 2) Avoiding abuse of the privilege of judicial office;
- 3) Ex parte communications
- West Virginia Judicial Investigation Commission, Advisory Opinion 2021-02 (1/21/21)

Judge as sideline football broadcaster: Not prohibited but be careful what say

- Facts: Judge sought advisory opinion as to fact he had served as sideline broadcaster for high school football games for seven years before he became judge. He now inquires if can continue in that role now that he has been appointed to the bench(judicial bench that is)
- Held: Yes – The judge's volunteering as a sideline broadcaster would not violate any rules of Code of Judicial Conduct because there did not appear to be anything that would lead to potential conflicts or an appearance of impropriety.
- Judicial Investigation Commission (W. Va. 8/11/21)

TN judge questions where the media is regarding his Big Pharma lawsuit

- Facts: TN circuit court judge was handling a major opioid case involving numerous parties and a claim of over one billion dollars.
- During the course of the case, the judge gave an interview to a Law360,com reporter in which he discussed that the alleged discovery violations by certain defendants were "the worst case of document hiding that I have ever seen. It was like a plot out of a John Grisham movie, except that it was even worse than what he could dream up."
- Later, the judge posted on his personal Facebook page about the lack of media coverage, next to a "Re-elect" banner with his name. There were additional similar postings.

"Positioning himself as community advocate and voice for change"

- Held(by TN Court of Appeals): Trial court's denial of recusal motion of defendants must be reversed and case remanded for another judge. (Judge also lost his election.)
- 1) Trial judge appeared to be motivated to garner interest in his case and attention to his opposition to opioids, positioning himself "as an interested community advocate and voice for change."
- 2) Judge failed to address recusal issue first and wrongfully ruled on sanctions issues.
- Clay County v. Purdue Pharma (Tenn. App. 4/20/22)

Judge stripped of all judicial power through end of his term in office

- Held (BOJC): Reasonable cause found by Board of Judicial Conduct that he would be suspended for duration of his term from 8/2/22 through 8/31/22 at such time as his term will end, after which BOJC will lose jurisdiction over said judge (since he lost his election). Judge would be prevented from exercising any judicial power or authority.
- In re: Judge Jonathan Young (TN BOJC 7/26/22)

"The Specter of Racial Prejudice": Dueling CCA panels & differing results

- Facts: In a case very similar to the situation in State v. Tim Gilbert (Tenn. Cr. App. 12/3/21), a different panel reached a diametrically opposed result.
- In both cases, the jury deliberated in the Giles County Circuit Court jury room which had substantial Confederate memorabilia, including a portrait of Jefferson Davis and the Confederate flag, in the same county in which the Ku Klux Klan was founded, across the street from the courthouse.
- The defendant in each case claimed that the environment was inherently prejudicial and exposed the jury to extraneous prejudicial information against the defendant.

Defendant did not show prejudice by jury convening in Confederacy Room

- Held: The CCA held that, while the CCA did not condone the presence of the Confederate memorabilia in the jury room, the defendant failed to show that any specific extraneous information was improperly brought to the jury's attention or improperly brought to bear upon any juror or grand juror, and, accordingly, no unequivocal rule of law was breached.
- State v. Martin (Tenn. Cr. App. 8/16/22)

State v. Gilbert vs. State v. Martin: The battle of the CCA panels

- In February 2022 conference, I noted the extremely strong statement that was made by the first panel of CCA which emphasized the historical context of the Confederate jury room, the history of Giles County replete with the founding of the KKK, and the extremely dangerous conditions that surrounded the case for a person of color having the jury deliberate in a Confederate memorial room.

"The Specter of Racial Prejudice"

- The first panel (Gilbert case) boldly concluded that the "specter of racial prejudice" permeated the entire atmosphere of the case, resulting in a reversal of the defendant's conviction.
- Therefore, I applauded the decision, since we live in a day and time when we need as court systems to clearly and boldly denounce racial prejudice and make it clear there is no place for prejudice or discrimination in our system of justice. This includes no tolerance for a county having a jury deliberate life-changing decisions in a jury room smothered in memorabilia of the Confederacy in the very county where the KKK was founded in very dark days of our nation.

"The Specter of Racial Prejudice"

- Headlines of 2022 in TN and the United States:

- June 29, 2022 – Knoxville News-Sentinel:
- "Racist Attack at Middle School Forces Family To Leave Tennessee Town"

- July 19, 2022 – Knoxville News-Sentinel:
- "KPD Chief Fires Officer Over Racism Cover-up"

- August 16,2022 – Articles feature the two differing results of Court of Criminal Appeals cases

"The Specter of Racial Prejudice"

- August 9, 2022:
- A substantial new report is released by Southern Prisons Coalition, a group of civil and human rights organizations, which is entitled:
- "Human Rights Violations in Prisons Throughout Southern United States Cause Disparate and Lasting Harm in Black Communities"

"The Specter of Racial Prejudice"

- Findings:
- 1. Systemic Discrimination Is Reflected in U.S. Carceral System
- 2. Black People Disproportionately Placed in Solitary Confinement;
- 3. Practice of Forced or Coerced Labor in Disproportionately Black Carceral System Continues Vestiges of Chattel Slavery in U.S.
- 4. Racially Biased System Harms Black Children and Families
- 5. U.S. Education System Disproportionately Disciplines Black Children and Pushes Them Into Juvenile System

"The Specter of Racial Prejudice"

- April 28, 2022:
- A joint effort of Disability Rights Tennessee (DRT) and the Youth Law Center(YLC) release a report on Wilder Development Center, a Department of Children's Services Facility, entitled "Designed To Fail" is released.

- Contents of Report: DCS is failing youth of color who are being disproportionately warehoused in TN under conditions which is harming them

"The Specter of Racial Prejudice"

- April 27, 2022:
- A report by the Minnesota Department of Human Rights was filed after the completion of an "investigation into the City of Minneapolis and the Minneapolis Police Department."
- The Minnesota DHR opened its investigation after an MPD officer murdered George Floyd on May 25, 2020.

"The Specter of Racial Prejudice"

- Conclusions regarding force against black individuals:
- 1. MPD uses higher rates of severe force against black individuals;
- 2. MPD more likely to stop vehicles of people of color if police are able to identify race of occupants;
- 3. MPD treats black individuals more harshly than whites, including likelihood to be searched and/or to be cited with violations; held for longer periods; use of force greater; likelihood of being arrested, all under similar circumstances;
- 4. Black people more likely to be cited with disorderly conduct or obstruction or other collateral consequences under similar circumstances.

"The Specter of Racial Prejudice"

- 5. MPD uses covert social media to target black leaders, black organizations and black elected officials without a public safety objective, including conducting surveillance of the same unrelated to criminal activity. It also includes use of covert accounts to pose as community members to criticize black elected officials.
- 6. MPD officers maintain culture where officers use racist, misogynistic, and disrespectful language and are rarely held accountable.
- 7. MPD provides deficient training and guidance.
- 8. MPD has ineffective accountability and oversight systems which contribute to discriminatory policing.

"The Specter of Racial Prejudice"

- These findings in Minnesota are consistent with similar reports across nation and including studies in Tennessee.

James Baldwin Play: "Tell me, where do you live."

- Challenge to all of us:
- "Where do we live? What do we know about our jurisdiction, the area where we live?
- "How can you not know all the things you do not know?"
- Why are we content not to know? We need to use our senses to know all that we can about our county – the issues, the problems, the limitations, the resources, how we can solve problems.

The county in which we live and where we exert power and control

- As judges today, as we hear cases and preside over our courtrooms, it is important that we see all the people in our courtroom – the defendants, the victims, the witnesses, the lawyers, the police officers, and all the human beings who are there to be seen, to be heard, to be understood.
- It is important to understand the depleted budgets that do not provide for enough public defenders to meet the demand. To understand the limitations of counsel who need more time with clients. To understand backgrounds, neighborhoods, educational opportunities, poverty and limited incomes. To understand the desperation of rent due and high fines and probation fees and demands of probation. To realize the lack of mental health resources and the brokenness of families and lack of drug and alcohol resources.

"Tell me, where do you live."

- It is important to know "where we live," and to expand the territories where we live. The area "where we live" probably should include every geographical inch of our "judicial jurisdiction," the area over which we exert considerable power and authority.
- It is important to know all that we can about people and institutions and resources and limitations in the county where we live.

We are effectively asked every day:

- In what world do you live? What are your guiding principles that drive what you want to know?
- Why are you content not to know all that you do not know?
- Why do you not care enough to find out?

- A HAUNTING QUESTION:
- "Hey Judge Stokes, where do you live?
- "Are you in any position to make any judgments about my life?"