IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1994 SESSION

STATE OF TENNESSEE, APPELLEE,	)	No. 02-C-01-9310-CC-00233
v.	)	Fayette County
	)	Jon Kerry Blackwood, Judge
	)	(Vehicular Homicide, Leaving the Scene of an Accident, and Driving on a Revoked License)
CLEO MASON, APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED

Joe B. Jones, Judge

O P I N I O N

The appellant, Cleo Mason, was convicted of vehicular homicide, a Class C felony, leaving the scene of an accident, a Class E felony, and driving on a revoked license, a Class B misdemeanor. The trial court found that the appellant was a standard offender and imposed the following Range I sentences: (a) Count I, vehicular homicide, confinement for five (5) years in the Department of Correction and (b) Count IV, leaving the scene of an accident, confinement for one (1) year in the Department of Correction. The trial court sentenced the appellant to confinement for ten (10) days in the Fayette County Jail for driving after his license was revoked. The sentences are to be served concurrently.

Three issues are presented for review. The appellant contends that the evidence contained in the record is insufficient, as a matter of law, to support a finding by a rational trier of fact that he was guilty of vehicular homicide beyond a reasonable doubt. He further contends that the trial court committed error of prejudicial dimensions in denying his motions to suppress (a) a statement he gave to law enforcement officers and (b) the results of a blood test.

The judgment of the trial court is affirmed.

On the evening of December 26, 1992, Twilla Henderson, her relatives, and friends were travelling from Collierville to Covington. As Ms. Henderson drove through Somerville late that evening, her vehicle was struck on the driver's side by a vehicle travelling in the opposite direction. The oncoming vehicle crossed the center line of the roadway, struck the left front fender, and maintained contact with the Henderson vehicle along the entire driver's side. Both doors and the post between the front door and the back door were sheered from the vehicle. The Henderson vehicle was completely open on the driver's side following the impact.

Tyrone Henderson, who was seated in the back seat of the Henderson vehicle, was killed. He was pronounced dead at the hospital approximately two hours after the collision.

The vehicle that struck the Henderson vehicle left the scene of the collision. It was subsequently discovered in a yard approximately one-half block from the situs of the collision. This vehicle, a Lincoln Towncar, left the roadway, passed through a ditch, went

up a hill, crossed the sidewalk, destroyed a portion of a hedge, grazed a tree, struck another tree, and came to rest next to a dwelling. The vehicle had massive damage to the front left bumper and fender.

The officers traced the Lincoln to Etta Mason, the appellant's mother, who lived in Moscow, Tennessee. Mrs. Mason did not drive the vehicle because it was too big for her. While the appellant told his mother that he was not driving the Lincoln on the night in question, a Moscow police officer testified that the appellant was the only person who drove the Lincoln. In addition, two of the appellant's friends, who testified as defense witnesses, saw the appellant driving the Lincoln in Somerville shortly before the collision occurred.

The appellant gave a statement to law enforcement officers. In the statement, the appellant admitted that he was driving the Lincoln when it collided with the Henderson vehicle. He also admitted that he had been drinking alcoholic beverages prior to the collision. He stated he had consumed approximately six cans of beer. Officers found two full wine cooler beverages and one empty bottle inside the vehicle. The coolers were still cool when the officers touched them.

Several law enforcement officers saw the appellant after his arrest. All of these individuals testified that the appellant was intoxicated. The appellant was unsteady on his feet, "very uncoordinated," his speech was slurred to some extent, he emitted a strong order of an intoxicating beverage, and he was combative and argumentative. He had a blood-alcohol content of .22%.

A driver's license check revealed that the appellant's driving privileges had been revoked prior to the evening in question. As previously stated, there was evidence that the appellant left the scene of the collision. He eventually went to the home of a friend in Somerville. His friend drove him to his mother's home in Moscow.

I.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

Based upon the foregoing summary of the evidence, the evidence contained in the record is sufficient to support a finding by a rational trier of fact that the appellant was guilty of vehicular homicide, leaving the scene of an accident, and driving a motor vehicle after his license had been revoked beyond a reasonable doubt. Tenn. R. App. P. 13(e); see Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This Court will now address the admissibility of the statement the appellant made to law enforcement officers.

II.

When the appellant was arrested at his mother's home during the early morning hours of December 27, 1992, he was read the Miranda warnings. The officer transporting the appellant to the City of Somerville Police Department testified that the appellant "didn't want to talk about anything or talk to anyone." Shortly after the appellant arrived at the police department, he reiterated that he did not want to make a statement and advised the officers that he wanted a lawyer. The appellant refused to take a chemical breath test, but he agreed to provide the officers with a blood specimen. While the appellant was at the hospital for the extraction of the blood specimen, Somerville police officers began questioning him about the offenses he was alleged to have committed. Later, the appellant was taken to the Fayette County Jail.

The chief of police and an officer went to the Fayette County Jail at 8:00 a.m. on the morning of December 27, 1992, to interrogate the appellant. The officers advised the appellant of the Miranda warnings and attempted to interrogate him about the events of the previous night. The appellant refused to give the officers a statement. Thereafter, the officers contacted the appellant's mother, Etta Mason. They asked her to contact the appellant and encourage him to give a statement to the police. An officer dialed a number, gave the telephone to Mrs. Mason, and she talked to the appellant. She told the appellant that he should tell the truth about what happened the previous night. The appellant told Mrs. Mason that he was not driving the Lincoln when it collided with the Henderson vehicle. Mrs. Mason told the appellant in the presence of the police chief and another officer that she was going to hire an attorney to represent him.

The chief of police, knowing that the Fayette County sheriff had been a friend of the appellant's family for many years, asked the sheriff to see if he could obtain a statement from the appellant.

On the afternoon of December 27, 1992, the sheriff met with the appellant. They had a general conversation, "not particularly about the wreck." The appellant told the sheriff that he would rather not discuss the matter with him.

The sheriff was approached by a trustee at the jail on the afternoon of December 28, 1992. The trustee told the sheriff that the appellant wanted to talk. The sheriff had the appellant brought to his office. When the appellant arrived at the sheriff's personal office, he told the sheriff that he wanted to make a statement about his involvement on the night in question. The sheriff asked the appellant if he was represented by a lawyer. The appellant told the sheriff that he was not represented by an attorney in this case.

The sheriff called the chief of police. The appellant was again given the Miranda warnings. He executed a written waiver of his right to remain silent and his right to counsel. The chief of police took an incriminating statement from the appellant.

The appellant's version about the matter was different. The appellant denied having the trustee contact the sheriff. The appellant testified that the sheriff told him:

> [I]t wasn't nothing but an accident, that wasn't too much going to be did, [sic] I needed to go ahead on and sign some papers so he could get me on out of there, so I could make bond. . . . [A]s soon as I get out . . . on bond, I could talk to my lawyer. . . . [I would] be held without bond if [I didn't give a statement].

The sheriff testified that he did not remember discussing a bond but that he could have discussed the possibility of bond with the appellant. However, the sheriff testified that he did not tell the appellant he had to give a statement before he could be released on bail or talk with an attorney.

A.

The standard of review applicable to suppression issues is well-established. When a trial court makes a finding of facts at the conclusion of a suppression hearing, the facts found by the trial court are afforded the weight of a jury verdict.[1] As a result, these facts are binding upon this Court if the evidence contained in the record does not preponderate against the findings of the trial court.[2]

. This standard has been applied to a variety of confession issues since 1958.[3] The appellate courts have invoked this standard when the issue presented for review was whether (a) the accused was given the Miranda warnings before the interrogation commenced,[4] (b) the accused was in custody when interrogated,[5] and (c) the statement was freely and voluntarily given.[6]

B.

In the landmark case of Miranda v. Arizona,[7] the United States Supreme Court,

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[1]State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994); State v. Makoka, 885 S.W.2d 366, 371-72 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Gentry, 881 S.W.2d 1, 5 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Ray, 880 S.W.2d 700, 704 (Tenn. Crim. App.), per. app. denied (Tenn. 1993); State v. Adams, 859 S.W.2d 359, 362 (Tenn. Crim. App. 1992), per. app. denied (Tenn. 1993); State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990), cert. denied, 502 U.S. 1079, 112 S.Ct. 986, 117 L.Ed.2d 148 (1992); State v. Aucoin, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed.2d 845 (1989).

[2]Stephenson, 878 S.W.2d at 544; State v. Smith, 868 S.W.2d 561, 570 (Tenn. 1993); State v. Bobo, 727 S.W.2d 945, 948 (Tenn.), cert. denied, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987); State v. O'Guinn, 709 S.W.2d 561, 565-66 (Tenn.), cert. denied, 479 U.S. 870, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986); State v. Harbison, 704 S.W.2d 314, 318 (Tenn. 1986); State v. Kelly, 603 S.W.2d 726, 729 (Tenn. 1980); Makoka, 885 S.W.2d 371-72; Ray, 880 S.W.2d at 704; Adams, 859 S.W.2d at 362; Aucoin, 756 S.W.2d at 710.

[3]Wooten v. State, 203 Tenn. 473, 481, 314 S.W.2d 1, 4-5 (1958).

[4]Aucoin, 756 S.W.2d 708-10.

[5]Smith, 868 S.W.2d at 570-71.

[6]Stephenson, 878 S.W.2d at 544.

[7]384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

noting the "inherent pressures of the interrogation atmosphere,"[8] formulated warnings that must be given a suspect before the commencement of custodial interrogation. Miranda requires law enforcement officers to warn a suspect "in clear and unequivocal terms" that (a) "he has the right to remain silent,"[9] (b) "anything said can and will be used against [him] in court,"[10] (c) he has "the right to consult with a lawyer and to have the lawyer with him during interrogation,"[11] and (d) if "indigent a lawyer will be appointed to represent him."[12] The purpose of these warnings is to protect the accused's Fifth Amendment privilege against self-incrimination.[13] There is "no talismanic incantation . . . required to satisfy [Miranda's] strictures."[14] However, the actual warnings given to the suspect must be a "fully effective equivalent" of the Miranda warnings.[15]

The holding in Miranda is limited to "custodial interrogations."[16] The Court defined the phrase "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[17] A person is "in custody" within the meaning of Miranda if there has been "a 'formal arrest or restraint on freedom of movement' of the degree associated

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[8]Miranda, 384 U.S. at 468, 86 S.Ct. at 1624, 16 L.Ed.2d at 720.

[9]Miranda, 384 U.S. at 467-68, 86 S.Ct. at 1624, 16 L.Ed.2d at 720.

[10]Miranda, 384 U.S. at 469, 86 S.Ct. at 1625, 16 L.Ed.2d at 720-21.

[11]Miranda, 384 U.S. at 471, 86 S.Ct. at 1626, 16 L.Ed.2d at 723.

[12]Miranda, 384 U.S. at 473, 86 S.Ct. at 1627, 16 L.Ed.2d at 723.

[13]Miranda, 384 U.S. at 477, 86 S.Ct. at 1629, 16 L.Ed.2d at 720.

[14]California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696, 701 (1981).

[15]Prysock, 453 U.S. at 359-60, 101 S.Ct. at 2809, 69 L.Ed.2d at 701 (quoting Miranda, 384 U.S. at 476, 86 S.Ct. at 1629, 16 L.Ed.2d at 725)).

[16]Miranda, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706; see Stansbury v. California, 511 U.S. ____, 114 S.Ct. 1526, 1528, 128 L.Ed.2d 293, 298 (1994); Minnesota v. Murphy, 465 U.S. 420, 430, 104 S.Ct. 1136, 1143-44, 79 L.Ed.2d 409, 421 (1984); California v. Beheler, 463 U.S. 1121, 1123-24, 103 S.Ct. 3517, 3519, 77 L.Ed.2d 1275, 1278-79 (1983); Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714, 719 (1977); Beckwith v. United States, 425 U.S. 341, 346, 96 S.Ct. 1612, 1616, 48 L.Ed.2d 1, 7 (1976); State v. Smith, 868 S.W.2d 561, 570 (Tenn. 1993); State v. Brown, 836 S.W.2d 530, 546 (Tenn. 1992); State v. Davis, 735 S.W.2d 854 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Stapleton, 638 S.W.2d 850, 859 (Tenn. Crim. App.), per. app. denied (Tenn. 1982).

[17]Miranda, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.

with a formal arrest."[18] The Court has refused to extend Miranda to non-custodial interrogations.[19]

C.

When a suspect clearly articulates[20] during custodial interrogation that he wishes to invoke the privilege against self-incrimination or the right to counsel, the officers conducting the interrogation must stop questioning the suspect.[21] As The United States Supreme Court said in Miranda:

> If . . . [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[22]

The appellant invoked both his right to remain silent and his right to consult with counsel or have counsel present before being interrogated. Therefore, the Somerville police officers and the sheriff should not have attempted to interrogate the appellant until he voluntarily decided to talk and counsel was made available to him. However, the appellant's free and voluntary confession was purged of the taint of the officers' continuous efforts to question him.[23] On each occasion, he had told the officers that he did not want to give a statement, and the officers ceased the interview.

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[18]Beheler, 463 U.S. at 1125, 103 S.Ct. at 3520, 77 L.Ed.2d at 1279 (quoting Mathiason, 429 U.S. at 495, 97 S.Ct. at 714, 50 L.Ed.2d at 719)).

[19]See, e.g., Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976) (an accused was not entitled to the Miranda warnings when special agents of the Internal Revenue Service questioned Beckwith in the dining room of his home).

[20]See Davis v. United States, ____ U.S. _____, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362, 371-72 (1994) (accused invokes his Fifth Amendment right to counsel when he states his request such that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney").

[21]Miranda, 384 U.S. at 444-45, 86 S.Ct. at 1612, 16 L.Ed.2d at 707.

[22]Miranda, 384 U.S. at 444-45, 86 S.Ct. at 1612, 16 L.Ed.2d at 707.

[23]State v. Crump, 834 S.W.2d 265, 270 (Tenn. 1992).

D.

If a suspect initiates contact with a law enforcement officer after invoking the privilege against self-incrimination and/or the right to confer with and have counsel present, the law enforcement officer may converse with the suspect.[24] What the suspect tells the officer is admissible as evidence if it is established at the suppression hearing that (a) the accused initiated the contact with the officer, (b) the waiver is knowingly and intelligently made,[25] and (c) the taint of the constitutional violation of failing to scrupulously honor the invocation of these Fifth Amendment rights is purged.[26]

In this case, the statement given by the appellant was admissible as evidence.[27] The record establishes that no law enforcement officer had contacted the appellant for approximately twenty-four hours prior to his sending the message requesting the sheriff. The appellant advised the sheriff that he wanted to make a statement about his involvement in the collision on the evening of December 26, 1992. He stated that he did not have an attorney, and he executed a written waiver of his Miranda rights. Considering appellant's voluntary initiation of the statement followed by the giving of proper Miranda warnings twenty-four hours after the last attempt at questioning, this Court finds the taint to be sufficiently purged.[28]

This issue is without merit.

III.

The appellant contends that the trial court committed error of prejudicial dimension

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[24]Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 2834, 77 L.Ed.2d 405, 411-12 (1983) (interpreting Edwards v. Arizona, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 387 (1981)); State v. Claybrook, 736 S.W.2d 95, 102-03 (Tenn. 1987); see Smith v. Illinois, 469 U.S. 91, 95, 105 S.Ct. 490, 493, 83 L.Ed.2d 488, 493-94 (1984); State v. Tidwell, 775 S.W.2d at 379, 386-87 (Tenn. Crim. App.), per. app. denied (Tenn. 1989).

[25]Bradshaw, 462 U.S. at 1044-47, 103 S.Ct. at 2834-35, 77 L. Ed.2d at 411-12; Crump, 834 S.W.2d at 270-71.

[26]Crump, 834 S.W.2d at 270.

[27]See Claybrook, 736 S.W.2d at 102-03.

[28]Crump, 834 S.W.2d at 272.

in denying his motion to suppress the results of blood tests performed upon blood removed from his body. He argues that an intrusive search was executed upon him and the blood sample was seized as a result of the search. He predicates this argument on the theory that the search and seizure was unreasonable and illegal because it violated the Fourth Amendment to the Constitution of the United States, Article I, § 7 of the Tennessee Constitution, and various statutes. He also argues that the manner in which the blood was taken violated Tenn. Code Ann. § 55-10-410(a).

As previously stated, the incident in question occurred on the evening of December 26, 1992. The investigation revealed that the abandoned motor vehicle was registered to the appellant's mother, Etta Mason, but the appellant was the only person who drove the vehicle. There were wine cooler beverages found in the vehicle. They were still cool when touched by an officer. An officer securing the scene shortly after the accident observed the appellant when he returned to the scene. The officer testified that the appellant appeared to be intoxicated. The appellant was arrested at 1:15 a.m. on the morning of December 27, 1992. An officer testified that the appellant appeared to be intoxicated at the time of his arrest.

The appellant was asked if he would take a chemical breath test to determine the alcoholic content of his blood. The appellant refused. He was subsequently taken to the Fayette County Jail, booked, and placed in a cell. The district attorney general advised the chief of police to obtain a blood specimen for a blood-alcohol test. An officer went to the jail and talked to the appellant. The appellant advised the officer that he would permit blood to be drawn for a blood-alcohol test. The appellant was then taken to a local hospital.

The appellant was loud and belligerent while in the emergency room of the hospital. He created "quite a disturbance." On three or four occasions the appellant said he was ready to have the blood drawn and extended his arms forward. When the nurse would approach with a syringe to draw the blood, the appellant would draw his arms to his chest. Since the appellant was disturbing the patients being treated in the emergency room, the officers removed him to a location immediately outside the emergency room door. This area is covered by a canopy.

There were four to five officers present. Each time they would try to restrain the appellant, he would pull away and stand up. This occurred on several occasions. Finally, an officer[29] sprayed the appellant with mace for one-half second. The officers subdued the appellant, placed him on the ground, extended his left arm, and the nurse drew the blood sample that was tested for alcohol content. The appellant was then returned to the Fayette County Jail.

A.

The implied consent laws in this jurisdiction provide that a person who operates a motor vehicle in Tennessee is deemed to consent "to a test for the purpose of determining the alcoholic . . . content of that person's blood."[30] However, when an accused is charged with the offense of driving while under the influence and refuses to take a chemical breath test or a blood-alcohol test to determine the alcoholic content of his or her blood, the test is not to be administered to the accused.[31] If the blood is drawn from an accused charged with driving while under the influence while unconscious and the blood is tested for alcoholic content, the results of the test may not be admitted as evidence over the objection of the accused.[32] These statutes provide greater protection than either the federal or state constitution.[33]

The United States Constitution permits the taking of blood samples from a conscious[34] or unconscious[35] person accused of driving while under the influence with or

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[29]The officer who applied the mace was also an emergency medical technician.

[30]Tenn. Code Ann. § 55-10-406(a)(1).

[31]Tenn. Code Ann. § 55-10-406(a)(3).

[32]Tenn. Code Ann. § 55-10-406(b).

[33]State v. Terry Fowler, Lake County No. 4, (Tenn. Crim. App., Jackson, November 6, 1985).

[34]Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

[35]Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957).

without the permission of the accused. The test results are admissible as evidence.[36] If a state permits the operator of a motor vehicle to refuse to take a chemical breath test or provide a blood specimen to determine the alcoholic content of the person's blood, the state may introduce the fact that the test was refused into evidence.[37]

When an accused has committed the offense of vehicular homicide or aggravated assault, the protection afforded by § 55-10-406 is not applicable. Subsection (e) of Tenn. Code Ann. § 55-10-406 provides:

> Nothing in this section shall affect the admissibility in evidence, in criminal prosecutions for aggravated assault or homicide by the use of a motor vehicle only, of any chemical analysis of the alcoholic . . . content of the defendant's blood which has been obtained by any means lawful without regard to the provisions of this section.[38]

The first question that is presented is whether the phrase "by any means lawful" permits a law enforcement officer to use physical force to obtain a blood specimen to test for alcoholic content when the accused, as here, is charged with vehicular homicide.

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[36]Schmerber, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908; Breithaupt, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448.

[37]South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983).

[38]In State v. Terry Fowler, Lake County No. 4 (Tenn. Crim. App., Jackson, November 6, 1985), this Court held this subsection of Tenn. Code Ann. § 55-10-406 is constitutional. See State v. Bullington, 702 S.W.2d 580, 583 (Tenn. Crim. App.), per. app. denied (Tenn. 1985), where this Court said in dicta that the statute was constitutional.

B.

In Schmerber v. California, the United States Supreme Court stated that one of the questions presented was "whether the police were justified in requiring [the accused] to submit to [a] blood test."[39] In South Dakota v. Neville,[40] the Court stated that Schmerber "clearly allowed a State to force a person suspected of driving while intoxicated to submit to a blood-alcohol test."[41]

Intrusions into a person's body are subject to the constraints of the Fourth Amendment to the United States Constitution and Article I, § 7 of the Tennessee Constitution.[42] As the United States Supreme Court said in Schmerber:

> It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of that Amendment.[43]

Schmerber, as well as other state decisions, establish several prerequisites that must be established before blood-alcohol test results may be introduced into evidence.[44] Before the test results of a compelled blood-alcohol test are admissible into evidence, the state must prove by a preponderance of the evidence that:

a) The officer compelling the extraction of blood from the accused has probable cause to believe that the accused committed the offense of aggravated assault or vehicular homicide while under the influences of an intoxicant or drug, and there is a clear indication

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[39]384 U.S. at 768, 85 S.Ct. at 1834, 16 L.Ed.2d at 918 (emphasis added) (the Court held that the police action was justified).

[40]459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (emphasis added).

[41]459 U.S. at 559, 103 S.Ct. at 920, 74 L.Ed.2d at 756 (emphasis added).

[42]Schmerber, 384 U.S. at 767, 86 S.Ct. at 1834, 16 L.Ed.2d at 918; State v. Blackwood, 713 S.W.2d 677, 679 (Tenn. Crim. App.), per. app. denied (Tenn. 1986).

[43]384 U.S. at 767, 86 S.Ct. at 1834, 16 L.Ed.2d at 918, cited with approval in Blackwood, 713 S.W.2d at 679.

[44]In Tennessee, compelled blood-alcohol tests are also subject to the prerequisites of § 55-10-406 unless the prosecution falls under § 55-10-406(e) as discussed supra.

that evidence of the accused's intoxication will be found if the blood is taken from the accused's body and tested;[45]

b) Exigent circumstances exist to forego the warrant requirement;[46]

c) The test selected by the officer is reasonable and competent for determining blood-alcohol content;[47] and

d) The test is performed in a reasonable manner.[48]

(1)

In this case, the officers had probable cause to arrest the appellant for vehicular homicide. His mother's motor vehicle was involved in the collision that resulted in the death of a passenger in the other car. The officers learned that the appellant was the only person who drove the vehicle. The interior of the vehicle had a strong odor of an intoxicating beverage. There were several wine coolers inside the vehicle, which were still cool when the officers discovered the vehicle. The officers were aware that the passenger had expired at the hospital. The appellant appeared intoxicated at the scene soon after the accident. When the officers went to arrest the accused, he appeared to be intoxicated. Therefore, the officers had a "clear indication" that a blood-alcohol test would reveal

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[45]Schmerber, 384 U.S. at 768-70, 86 S.Ct. at 1834-35, 16 L.Ed.2d at 919; State v. Terry Fowler, Lake County No. 4 (Tenn. Crim. App., Jackson, November 6, 1985); People v. Ryan, 171 Cal. Rptr. 854, 861 (Cal. Ct. App. 1981); State v. Sickler, 488 N.W.2d 70, 73 (S.D. 1992); State v. Lanier, 452 N.W.2d 144, 145 (S.D. 1990); State v. Krause, 484 N.W.2d 347, 350 (Wis. Ct. App. 1992). In Bullington, where the accused was convicted of aggravated assault while operating a motor vehicle under the influence of an intoxicant, this Court said in dicta that "[t]he State may compel submission to the testing if the officer has reasonable grounds to believe that the motorist is intoxicated." 702 S.W.2d 580, 583 (citations omitted).

[46]Schmerber, 384 U.S. at 770-71, 86 S.Ct. at 1835-36, 16 L.Ed.2d at 919-20; State v. Terry Fowler, Lake County No. 4 (Tenn. Crim. App., Jackson, November 6, 1985); Lanier, 452 N.W.2d at 145; Krause, 484 N.W.2d at 350.

[47]Schmerber, 384 U.S. at 771, 86 S.Ct. at 1836, 16 L.Ed.2d at 920; Sickler, 488 N.W.2d at 73; Lanier, 452 N.W.2d at 145.

[48]Schmerber, 384 U.S. at 771-72, 86 S.Ct. at 1836, 16 L.Ed.2d at 920; Hammer v. Gross, 932 F.2d 842, 845 (9th Cir.)(en banc), cert. denied, ____ U.S. ____, 112 S.Ct. 582, 116 L.Ed.2d 607 (1991); Sickler, 488 N.W.2d at 73; Lanier, 452 N.W.2d at 145; Krause, 484 N.W.2d at 351; Carleton v. Superior Court, 216 Cal. Rptr. 890, 893 (Cal. Ct. App. 1985); Ryan, 171 Cal. Rptr. at 861; People v. Kraft, 84 Cal. Rptr. 280, 284 (Cal. Ct. App. 1970).

evidence of intoxication. This prong was met in this case.

(2)

Also, there must be exigent circumstances to permit the withdrawal of blood from an accused.[49] It is common knowledge that the alcohol content of blood dissipates over time as a result of a person's natural bodily functions.[50] Consequently, exigent circumstances will usually be present when an accused commits aggravated assault or vehicular homicide while under the influence as the passage of time will result in the destruction of the evidence that the accused was intoxicated. The preparation of a search warrant, finding a magistrate who can issue the warrant, and serving the warrant takes time. The evidence of the level of intoxication would diminish while the officer performs this function.

There were exigent circumstances present to permit the drawing of the blood without a search warrant. The investigation at the scene of the collision consumed a considerable amount of time. The appellant had left the scene. The officers had to talk to the witnesses, determine the owner of the vehicle, drive to the appellant's home, and return the appellant to Somerville. During this entire time the evidence of the appellant's intoxication was dissipating through natural means. Also, a magistrate might have been difficult to find because it was the Christmas holiday season and the courts were closed. Therefore, this prong was satisfied.

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[49]Schmerber, 384 U.S. at 770-71, 86 S.Ct. at 1835-36, 16 L.Ed.2d at 919-20; State v. Terry Fowler, Lake County No. 4 (Tenn. Crim. App., Jackson, November 6, 1985) Lanier, 452 N.W.2d at 145; Krause, 484 N.W.2d at 350.

[50]Schmerber, 384 U.S. at 770-71, 86 S.Ct. at 1835-36, 16 L.Ed.2d at 919-20; Fowler, supra; Krause, 484 N.W.2d at 350.

(3)

The test selected by the officer must be reasonable and competent for determining the blood-alcohol content of the accused. The testing of a person's blood is a reasonable and competent way of measuring blood-alcohol content. In Schmerber, the Court said that a blood-alcohol test "is a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol."[51]

The drawing of a blood specimen for a blood-alcohol test results in a minimal amount of blood loss and "the procedure involves virtually no risk, trauma, or pain."[52] Therefore, this prong was also satisfied.

(4)

The drawing of blood for a blood-alcohol test must also be reasonable. Theoretically, the specimen should be taken by a person who has training or expertise in drawing blood. Tenn. Code Ann. § 55-10-410 addresses who may draw the blood. Subsection (a) states that a registered nurse, licensed practical nurse, clinical laboratory technologist or technician, licensed emergency medical technician or licensed paramedic[53] must draw the blood for the blood-alcohol test.[54] It further provides that blood specimens are to be taken "under procedures established by the department of health." However, the statute does not state the location where the specimen is to be obtained. Other courts

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[51]384 U .S. at 771, 86 S.Ct. at 1836, 16 L.Ed.2d at 920.

[52]384 U .S. at 771, 86 S.Ct. at 1836, 16 L.Ed.2d at 920.

[53]Tenn. Code Ann. § 55-10-410 has been amended (effective in May, 1995) and provides other qualified personnel who may procure a blood sample.

[54]The fact that someone not enumerated in the statute draws the blood does not, as a matter of law, prevent the state from using the blood-alcohol test results. It appears that the blood may be drawn by anyone trained to perform this procedure. State v. Stowers, 649 S.W.2d 607, 608-09 (Tenn. Crim. App.), per. app. denied (Tenn. 1983) (laboratory assistant).

have held that the blood may be drawn at the jail[55] or on the floor of an emergency room.[56] This Court concludes that the drawing of a blood specimen does not have to be drawn in a hospital environment so long as the person drawing the blood is qualified, the blood is taken in conformity with the "procedures" established by the department of health, and it does not threaten the safety or health of the accused.

The purpose of the statute in question is to "protect the donor . . . from being subjected to unhealthful conditions in the procurement of a blood sample and to prohibit the donor from being subjected to unqualified people taking samples."[57]

The appellant did not prove the "procedures" established by the department of health.[58] This Court cannot take judicial notice of these "procedures." Furthermore, the appellant failed to establish that the officer and hospital personnel subjected him to unhealthful conditions in the procurement of the blood specimen. The person drawing the appellant's blood was a nurse, one of the professions listed in the statute. The officer who applied the mace and helped restrain the appellant was also an emergency medical technician, one of the professions listed in the statute.

It must be remembered that the officers took the appellant to the emergency room to have the blood drawn. The appellant refused to cooperate with the hospital personnel assigned to draw the blood. In addition, the appellant became belligerent and loud. He was disturbing several people being treated in the emergency room. Thus, the officers had to remove him from the emergency room. In short, the appellant is a victim of his own conduct.

The physical force used by a police officer to obtain a blood specimen must be reasonable in light of the facts and circumstances that confront the officer when the decision is made to apply force. When determining whether an officer has used excessive force in obtaining a blood specimen from an accused, a court must apply the "objective

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[55]See Carleton, 216 Cal. Rptr. at 894-95; Sickler, 488 N.W.2d at 73; State v. Meyers, 464 N.W.2d 608, 608-09 (S.D. 1990); Lanier, 452 N.W.2d at 145.

[56]See Burns v. State, 807 S.W.2d 878, 883 (Tenn. Ct. App. 1991).

[57]Stowers, 649 S.W.2d at 608-09.

[58]See State v. McKinney, 605 S.W.2d 842, 845 (Tenn. Crim. App.), per. app. denied (Tenn. 1980).

reasonableness standard."[59] Unfortunately, the "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[60] Therefore, each case must be determined based upon its facts and circumstances.

The reasonableness of the force used by an officer in obtaining a blood specimen "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[61] As the United States Supreme Court said in Graham v. Connor:

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "'reasonableness"' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "'objectively reasonable"' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.[62]

When applying the objectively reasonable standard, the court should consider, among other circumstances, (a) whether the officer initiated the physical violence,[63] (b) whether the accused was combative, uncooperative, or unruly,[64] (c) whether the accused's conduct is an immediate threat to the officer's safety or the safety of others,[65] (d) the size

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[59]Graham v. Connor, 490 U.S. 386, 388, 109 S.Ct. 1865, 1867-68, 104 L.Ed.2d 443, 450 (1989); Hammer v. Gross, 932 F.2d 843, 845 (9th Cir.) (en banc), cert. denied, _____ U.S. _____, 112 S.Ct. 582, 116 L.Ed.2d 607 (1991).

[60]Graham, 490 U.S. at 396, 109 S.Ct. at 1872, 104 L.Ed.2d at 455 (citing Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861,1884, 60 L.Ed.2d 447, 481 (1979).

[61]Graham, 490 U.S. at 396, 109 S.Ct. at 1872, 104 L.Ed.2d at 455.

[62]Graham, 490 U.S. at 396-97, 109 S.Ct. at 1872, 104 L.Ed.2d at 455-56. (Citations omitted).

[63]South Dakota v. Neville, 459 U.S. 553, 559, n. 9, 103 S.Ct. 916, 920, n. 9, 74 L.Ed.2d 748, 756, n. 9 (1983); Schmerber, 384 U.S. at 760, n. 4, 86 S.Ct. at 1830, n. 4, 16 L.Ed.2d at 913, n. 4; Burns, 807 S.W.2d at 883.

[64]Hammer, 932 F.2d at 846; Krause, 484 N.W.2d at 352.

[65]Hammer, 932 F.2d at 846; Krause, 484 N.W.2d at 351.

and physical strength of the accused,[66] (e) the seriousness of the crime that the accused committed,[67] (f) whether the officer refused the accused's reasonable request to submit to a different form of measuring the blood-alcohol level,[68] and (g) whether the officer responded to the accused's combative resistance with inappropriate force.[69] A review of decisions permitting the use of force to obtain a blood specimen is helpful in determining whether the force in this case was objectively reasonable.

In State v. Ryan,[70] a California case, five officers restrained the accused while a blood technician drew blood from the accused's arm. According to the court, there was "no evidence . . . that the police used more force than necessary to overcome [the accused's] resistance or introduced any wantonness, violence or beatings."[71] In Carleton v. Superior Court,[72] another California case, the accused began struggling with the officers after he arrived at the jail. He refused to submit to a chemical breath test, provide the officers with urine, or provide a blood specimen. Six officers had to restrain the accused to obtain a blood specimen. A deputy held each leg and each arm while another deputy held the accused in a "carotid-restraint" choke-hold. Thereafter, a registered nurse drew blood from the accused's arm. The trial court denied the accused's motion to suppress the results of the blood-alcohol test. In affirming the trial court's denial of the accused's motion to suppress, the court said: "Although this degree of force may approach the brink of excessiveness, it was not excessive. Carleton's self-induced brief physical restraint before and during the withdrawal of a blood sample is not conscience shocking."[73]

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[66]Carleton, 216 Cal. Rptr. at 896.

[67]Hammer, 932 F.2d at 846; Krause, 484 N.W.2d at 351.

[68]Neville, 459 U.S. at 559, n. 9, 103 S.Ct. at 920, n. 9, 74 L.Ed.2d at 756, n. 9; Schmerber, 384 U.S. at 760, n. 4, 86 S.Ct. at 1830, n. 4, 16 L.Ed.2d at 913, n. 4; Hammer, 932 F.2d at 846; McCann, 588 A.2d at 1102; Burns, 807 S.W.2d at 883.

[69]Neville, 459 U.S. at 559, n. 9, 103 S.Ct. at 920, n. 9, 74 L.Ed.2d at 756, n. 9; Schmerber, 384 U.S. at 760, n. 4, 86 S.Ct. at 1830, n. 4, 16 L.Ed.2d at 913, n. 4; Carleton, 216 Cal. Rptr. at 893; Kraft, 84 Cal. Rptr. at 285-86; Burns, 807 S.W.2d at 883.

[70]171 Cal. Rptr. 854 (Cal. Ct. App. 1981).

[71]171 Cal. Rptr. at 862.

[72]216 Cal. Rptr. 890 (Cal. Ct. App. 1985).

[73]216 Cal. Rptr. at 896.

In McCann v. State,[74] the accused refused to give a blood specimen after being transported to a hospital. A struggle ensued. The officer and a medical technician attempted to hold the accused's arm down so that a blood sample could be obtained. Each time this was attempted, the accused was able to withdraw his arm. When the accused attempted to bite the officer, the officer applied a stun gun to the accused's arm. The accused's arm went limp and the blood specimen was obtained. The Delaware court held that the forced used to obtain the blood specimen was reasonable.

In State v. Lanier, [75] the accused was taken to the jail. There, he advised officers he would not permit the medical technician to draw blood from his body. When the technician attempted to draw the blood, the accused resisted. It took five or six officers to restrain the accused while the technician obtained the blood specimen. The South Dakota court held that the force used by the officers "did not exceed the amount necessary to effect" the drawing of the blood.[76]

In State v. Meyers,[77] another South Dakota case, the officers transported the accused to the local jail. The accused was asked to permit a blood specimen to be drawn from his arm. He told the officers: "Hell no, you ain't taking nothing."[78] He also rejected the request of the medical technician. Five officers assisted in restraining the accused while the technician obtained the blood specimen. The accused was placed in a chair and an officer held each leg and the right arm while two officers held the accused's left arm. He continued to resist while restrained. The South Dakota court said that "[u]nder these facts, it was not unreasonable for the police officers to forego a futile and potentially dangerous, unrestrained blood draw."[79]

In Sickler v. State,[80] yet another South Dakota case, the accused was taken to the

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[74]588 A.2d 1100 (Del. 1991).

[75]452 N.W.2d 144 (S.D. 1990).

[76]Lanier, 452 N.W.2d at 147.

[77]464 N.W.2d 608 (S.D. 1990).

[78]Meyers, 464 N.W.2d at 609.

[79]464 N.W.2d at 609.

[80]488 N.W.2d 70 (S.D. 1992).

local jail rather than a hospital due to his "extremely unruly behavior." A deputy sheriff placed the accused in a chair and restrained the accused while a deputy sheriff, who was also a lay practical nurse, drew a blood specimen. The South Dakota court held that the procedure employed did not threaten the accused's safety or health, the blood was withdrawn in a medically approved manner by a qualified nurse, and the procedure was not overly intrusive.[81]

In Burns v. State,[82] two police officers forcibly took the accused to the emergency room of a local hospital. The accused cursed, resisted, and fought the officers. In the emergency room the officers wrestled the accused to the floor and a lab technician obtained a blood specimen. The Texas court, noting that the accused initiated the violence, held that the "police officers did not overreact: [the accused] was merely restrained after he struggled to avoid having the laboratory technician draw his blood."[83]

In State v. Krause,[84] the accused was unruly and combative en route to the hospital. He refused to permit a blood specimen to be drawn, he shouted vulgarities, he continued to spit at the officers and the hospital personnel, and was generally unruly. Three officers placed a pillow case over the accused's head, tied his feet, and held his arm while a medical technician obtained the blood specimen. The restraint caused the needle to injure the accused's arm, he bit his tongue, and broke a tooth. The Wisconsin court held that "the forced used to restrain [the accused] . . . was reasonable in light of the totality of the circumstances facing the officers" when the medical technician attempted to draw the blood.[85]

In this case, the force used by the officers was objectively reasonable given the conduct of the appellant. He refused to cooperate inside the emergency room, he was loud, and he disturbed other people being treated. Some of the people being treated had been injured when the appellant struck their vehicle. Once the appellant was moved

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[81]488 N.W.2d at 73-74.

[82]807 S.W.2d 878 (Tex. Ct. App. 1991).

[83]807 S.W.2d at 883.

[84]484 N.W.2d 347 (Wis. Ct. App. 1992).

[85]484 N.W.2d at 352.

outside the emergency room door, he continued to resist four to five officers. The officers' only alternative was to physically restrain the appellant so that the nurse could obtain the blood specimen. Only after these attempts failed was the mace applied. An officer testified that they only used the force necessary to obtain the specimen. The facts contained in the record support the officer's statement. Therefore, this prong was satisfied.

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JOE B. JONES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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PAUL G. SUMMERS, JUDGE