Luther-Anderson, PLLP

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Elliott v. State – *self-incrimination*

by **Alan C. Norton**

An individual's refusal to submit to a state administered breath test is no longer admissible evidence against that individual in a DUI trial in Georgia. The Georgia Supreme Court in Elliott v. State, S18A1204 (February 18, 2019) held that admitting an individual's refusal to submit to a state administered breath test violates Article I, § 1, Paragraph XVI of the Georgia Constitution.

In authoring the opinion, Georgia Supreme Court Justice Peterson, reiterated that Georgia's constitutional protections against self-incrimination go beyond the more limited federal protections against self-incrimination. The Georgia Supreme Court reaffirmed its decision in Olevik v. State, 302 Ga. 228 (2017), where the Court held that an individual has a constitutional right to refuse to submit to a state administered breath test pursuant to the Georgia Implied Consent Statute. The Court reasoned that because an individual has the right to refuse testing, any admission of that refusal, would violate Georgia's constitutional provision against self-incrimination.

The Georgia Supreme Court was careful to appear to limit their decision in Elliott, supra. The Court noted that the Georgia

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PENDING DECISIONS AND FIRM NEWS

L-A Welcomes New Associates

Luther-Anderson would like to welcome five new members to its family: Alan C Blount, Tess Heisserer, Calli Kovalic, Alan C Norton, and Mike Jones.

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Luther-Anderson *Welcomes* New Associates

Alan C. Blount is a Memphis native. He received his Bachelor of Science Degree in Business and Enterprise Management from Wake Forest University in 2012. Alan graduated from the University of Memphis Cecil C. Humphreys School of Law in 2015. While in law school, he served on the Editorial Board of the University of Memphis Law Review and was elected to the Honor Council as a Student Justice. He also received the CALI Award for Excellence in Evidence. After law school, Alan clerked for the Honorable Chancellor Jim Kyle in Shelby County Chancery Court. Chancellor Kyle, who served as a Tennessee Senator for thirty years, brought an interesting, thoughtful, and invaluable perspective to Alan's practice of law.

Alan is the proud father of two children: Parker and Hazel. He and his wife, Emily, enjoy exploring the beautiful Chattanooga area, kayaking, and watching Memphis Grizzlies basketball. He also loves playing guitar and recording music in his free time.

CONNECT: acb@lutheranderson.com

Tess Heisserer received her Bachelor of Arts in Political Science from the University of Tennessee in 2013. She received her Juris Doctor from Washington University in St. Louis School of Law in 2016. She is currently licensed in Missouri, Illinois and the Eastern District of Tennessee.

Tess focuses her practice on litigating and effectively resolving disputes for clients. She has worked extensively with a wide variety of clients in matters involving real property, intellectual property, contracts, and employment and in different industries including the construction, commercial and residential real estate, insurance and sports industries.

Tess has been an active volunteer in the arts community helping and advising artists on their legal issues. Tess has returned to East Tennessee with perspective and experience that sets her apart from her peers. She has national recognition for her legal writing, and is fully equipped and ready to handle your dispute.

PRACTICE AREAS: General Civil Litigation Defense; Construction Law; Contracts.

CONNECT: tess@lutheranderson.com

As a magna cum laude graduate of Loyola University Chicago, Calli Kovalic started law school with the goal of one day becoming an advocate for people in need of one. In May 2015, Calli graduated in the top 28% of her class at Loyola University Chicago School of Law. She also graduated with a certificate in Advocacy and an Award in Leadership, Service, and Public Interest. Upon graduation, she was awarded a post-graduate fellowship through her law school which provided her funding to work at a non-profit organization representing victims in order of protection hearings in Chicago, Illinois.

Calli is licensed to practice law in the state of Tennessee and the state of Illinois. From May 2013 until October 2018, Calli worked in prosecutorial positions at: Cook County State's Attorney's Office (Chicago, IL), McDonough County State's Attorney's Office (Macomb, IL), and Shelby County District Attorney General's Office (Memphis, TN). She has been assigned to general sessions court, criminal court, felony drug court, felony preliminary hearing team, domestic violence, and negotiation desk positions. She has extensive experience in high-crime areas, and she is extremely knowledgeable about criminal law.

Calli has significant litigation experience, and she has handled 130 felony preliminary hearings, 2 jury trials, 10 bench trials, 15 motions to suppress, 15 order of protection hearings, and 7 social security disability hearings. In private practice, Calli excels at advocating for her clients – in both civil and criminal proceedings.

Outside of law, Calli is a Schwinn Cycling MPower certified spin instructor. You can find her teaching at the new Cyclebar opening in Chattanooga near Hamilton Place. She has been teaching group fitness classes since August 2010, and she has taught almost every type of class you can think of. Calli holds the following qualifications: TRX Suspension Trainer, Crossfit L1 Trainer,PiYO Beachbody Instructor, & Insanity Beachbody Instructor. Most of all, Calli loves to play with her three dogs in her free time.

CONNECT: cck@lutheranderson.com

Alan C. Norton grew up in Southwest Georgia, in the small town of Albany, Georgia. Alan attended Georgia Southern University where he earned his B.S. in Psychology, with an emphasis in Cognitive Psychology. After graduating from Georgia Southern, Alan attended Mercer University's Walter F. George School of Law, and graduated with his law degree in 2005 with Honors. After graduation Alan was appointed an Assistant District Attorney in the Lookout Mountain Judicial Circuit, where he worked for approximately thirteen (13) years, ending his career as a Senior Assistant District Attorney for Catoosa County, Georgia. During Alan's thirteen (13) year career, he has gained experience in handling a variety of criminal cases, including complex and high-profile matters, violent crimes, sexually based offense, drug trafficking and distribution, and property crimes.

PRACTICE AREAS: Criminal Defense; Domestic Relations and Family Law; Estate Planning

EDUCATION: Georgia Southern University, Psychology, B.S. Magna Cum Laude; Mercer University, Walter F. George School of Law, J.D. with Honors

LICENSES: Admitted to Georgia Bar, 2005; Pending Admission to the Tennessee Bar

CONNECT: acn@lutheranderson.com

Michael (Mike) Jones is a Chattanooga native. He graduated from C.S.A.S. in 2010 before attending the University of Tennessee, Knoxville where he received a B.A. in Political Science Pre-Law.

Most recently, Michael graduated from the University of Mississippi School of Law where he received a certificate-concentration in Criminal Law this past May. While in law school, he participated in the Ole Miss Law Street Law Clinic and Criminal Appeals Clinic assisting indigent clients with various family law, bankruptcy, social security and criminal appeals matters.

Michael enjoys spending his free time with his fiancée, Chloe and watching Tennessee Volunteers football and basketball. He will be taking the Uniform Bar Exam to practice in Tennessee this coming February 2019.

CONNECT: msj@lutheranderson.com

CONTACT US:

Phone: (423) 756 -5034
Fax: (423) 265-9903
Email: info@lutheranderson.com

Address:
P. O. Box 151
Chattanooga, TN 37401-0151

Street Address:
One Union Square, Suite 700
100 W. Martin Luther King Blvd
Chattanooga, TN 37402

[CONTINUED] . . Elliott v. State – *self-incrimination*

. . . [CONTINUED] constitutional provision against self-incrimination, is not applicable to a state administered blood test. Therefore, it is likely that where DUI investigations are concerned, Georgia law enforcement officers will be attempting to obtained blood sample from individuals suspected of driving while under the influence of alcohol and/or drugs, in increasing numbers. The increase in blood samples to be tested will undoubtable, places further presser on the Georgia Bureau of Investigations Division of Forensic Sciences, to analyze the increase in samples, despite a shortage of qualified personnel and an increasing backlog of samples to be tested.

The Georgia Supreme Court's decision in Elliott, supra., however, also may have further implications. Georgia's implied consent statue, specifically states that an individual's refusal to submit to a state administered test may be admissible at trial. *See* O.C.G.A. § 40-5-67.1(b). This statutory language is clearly now in opposition to the Court's holding in Elliott. It is likely that Georgia Courts, in future DUI proceedings will now begin to invalidate consent given under the present Georgia Implied Consent statute, on the grounds that the consent was not freely and voluntarily given. The probable inability in Georgia law enforcement officers to rely upon the implied consent statute, will force law enforcement officers to seek the necessary samples via search warrants, or to attempt to obtain samples via voluntary consent, after an individual has been advised of their rights pursuant to the Miranda decision.

The effect on Georgia's administrative license suspension procedure is less certain. Justice Bogg's in a concurring opinion stated that the ruling in Elliott, surpa. does not affect the administrative license suspension procedure. However, with the clear need for the Georgia General Assembly to overhaul the current implied consent system; there will be litigation for years to come to define the boundaries between an individual's rights against self-incrimination and unreasonable searches and seizures; and the State of Georgia's interests to regulate the motoring public.

Dedmon v. Steelman – *damage calculations*

Two cases involving damages calculations that have poignancy for insurance companies in particular have recently been decided in Tennessee and the 6th Circuit.

The first is *Dedmon v. Steelman*, 535 S.W.3d 431 (Tenn. 2017) which held that the collateral source rule applies in personal injury cases.

The collateral source rule excludes evidence of benefits to the plaintiff from sources collateral to the tortfeasor (i.e., plaintiffs' insurance payments) and precludes the reduction of the plaintiff's damage award by such collateral payments. This rule is based upon the principle that payments from collateral sources intended to benefit an injured party should not be used to reduce the liability of a party who inflicted injury.

In effect, the *Dedman* court reinforced Tennessee's proclivity to allow a windfall for a plaintiff as opposed to a tortfeasor. For example, in *Fye v. Kennedy*, 991 S.W.2d 754, 763-64 (Tenn. Ct. App. 1998), the Supreme Court of Tennessee stated that "[t]he theory underlying the collateral source rule is that a tortfeasor should be responsible for 'all harm that he causes."

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. . . [CONTINUED] However, the burden still rests on the plaintiff to prove that medical expenses the plaintiff is seeking to recover are necessary and reasonable. *Borner v. Autry*, 284 S.W.3d 216, 218 (Tenn. 2009). This requires, except in the most obvious and routine of cases, that the plaintiff present competent expert testimony to meet its burden. *Id.* A physician who is familiar with the extent and nature of the medical treatment may give an opinion concerning the necessity of another physician's services and the reasonableness of the charges. *Id.*

The *Dedmon* decision means that plaintiffs may submit evidence of the injured party's full, undiscounted medical bills as proof of reasonable medical expenses. On the other hand, the defendant is precluded from submitting evidence of discounted rates accepted by medical providers from the plaintiffs' insurer to rebut the plaintiff's proof that the full bills are reasonable.

Defendants are still able to submit any other competent evidence to rebut the plaintiffs' proof on the reasonableness of the medical expenses. Therefore, as defense attorneys, instead of submitting evidence of the amount accepted by a hospital from an insurance company, we must submit competing expert proof or other "non-insurance" proof that the bills were unreasonable.

In sum, the *Dedmon* case reinforces Tennessee's adherence to allowing a substantial windfall to plaintiffs and relying on the common law collateral source rule in the personal injury litigation context. In light of this ruling, a strong and experienced defense attorney is necessary to navigate the procedural and substantive waters in Tennessee.

The second pertinent decision to insurance companies came down recently, in December 2018, in *Lindenberg v. Jackson National Life Insurance Company*, 912 F.3d 348 (6th Cir. 2018).

In the *Lindenberg* case, the U.S. Court of Appeals for the Sixth Circuit held that Tennessee's statutory cap on punitive damages violates the right to trial by jury under the Tennessee Constitution.

Fortunately for insurance companies, this decision is not binding on Tennessee courts. However, this decision certainly sets the stage for a battle in Tennessee state courts as to the constitutionality of the cap.

For the time being, Tennessee's statutory punitive damages cap, *Tenn. Code Ann.* § 29-39-104, is still in effect. The statute caps punitive damages—which may only be awarded if the claimant proves by clear and convincing evidence that the defendant acted maliciously, intentionally, fraudulently or recklessly—at two times the amount of compensatory damages awarded or $500,000, whichever is greater.

The Tennessee Supreme Court has not yet ruled on the issue of the constitutionality of the punitive damages cap. The U.S. District Court attempted to certify the question to the Supreme Court of Tennessee, but the Tennessee Supreme Court declined to issue an opinion based upon the U.S. District Court's failure to certify the entire issue: (1) whether the punitive damages cap statute is constitutional and (2) whether punitive damages were recoverable at all since plaintiff had already recovered under ae statutory "bad faith" provision.

The State of Tennessee has intervened and appealed to an *en banc* hearing before the entire panel of active 6th Circuit judges, who could then certify the entire question to the Tennessee Supreme Court. If that were to happen, the Tennessee Supreme Court would then rule on the constitutionality of Tennessee's own statutes.

Until this case rummages through the procedural steps and we receive a full answer from the Tennessee Supreme Court, there is a big question mark for attorneys in Tennessee as to the direction of the punitive damages cap. For the time being, it's best to equip yourself with experienced and knowledgeable attorneys at Luther-Anderson who remain vigilantly watching for developments of the law which affect your business.

Former Governor Haslam Commutes Cyntoia Brown's Sentence

By: Calli Kovalic

Recently, national news praised former Governor Haslam for his decision to commute Ms. Cyntoia Brown's sentence. Ms. Brown will be paroled on August 7, 2019. Approximately 14 years ago, Ms. Brown was convicted of premeditated first-degree murder, felony murder, and especially aggravated robbery. The crime, which she committed when was 16, involved a 42-year-old man who had picked her up to engage in sexual intercourse. Until now, she has been serving a life sentence for the merged murder conviction.

Prior to former Governor Haslam commuting Ms. Brown's sentence, the Tennessee Supreme Court answered a certified question of law regarding this case. The Tennessee Supreme Court was only deciding a narrow question of law: whether Ms. Brown was parole eligible. The Court held, "A defendant convicted of first-degree murder that occurred on or after July 1, 1995, may be released after service of at least fifty-one years if the defendant earns the maximum allowable sentence reduction credits." Contrary to popular belief, the Court did not examine on the facts of the case, but rather only clarified a sentencing issue. The headlines on the specific issue made it seem like the Tennessee Supreme Court dove into a factual analysis of Ms. Brown's case, but in reality, an opinion was only issued an opinion regarding what it means, under Tennessee law, when a person is sentenced to life in prison.

When I looked into the facts myself, I learned a lot about this case and my own beliefs. At Ms. Brown's trial, officers testified the man was found lying face down on his bed and his hands were under his face with his fingers partially interlocked. A short time later, the man's truck was discovered in a parking lot, which led to the discovery of Ms. Brown in a hotel room. In her statement to the police, Ms. Brown stated she thought the man was reaching for a gun and she was in fear for her life, so she shot him using a gun from her own purse. She grabbed her keys and two of the man's guns which she intended to pawn. She took $172 from the victim's wallet, which matched the amount recovered on her person by the police.

Ms. Brown was a victim herself. She had been trafficked by her abusive boyfriend, known as Cut Throat, after she had ran away from her adoptive parents' home. Her boyfriend made physically and verbally abused her, sexually assaulted her, made her prostitute herself, and made her give such proceeds to him. Even prior to her abusive boyfriend, Ms. Brown's life has not been easy. Ms. Brown's birth mother testified she drank a fifth of whiskey everyday while she was doctors, and doctors testified Ms. Brown has fetal alcohol spectrum disorder including alcohol-related neurodevelopmental disorder.

While in prison, Ms. Brown attended college classes and received an associate's degree from Lipscomb University in 2015.

It is worth it to look into this case and explore how you feel about former Governor Haslam's decision. Personally, I applaud what he decided. Even in law, most things are not black and white. Americans like to talk about what is *just* and *fair*, but I've learned that picture looks different for everyone. If this case has taught me anything, it's that mandatory sentences really seem unjust. The Tennessee Supreme Court was called in to issue an opinion about the mandatory minimum someone has to serve in these situations and their answer was 51 years. This seems like a completely arbitrary number that is not equal punishment for every single person facing this sentence. Each crime is different, and a different approach seems more appropriate (i.e. analyzing on a case by case basis) – particularly cases involving a 16-year-old defendant.

In my opinion, Ms. Brown faced a life of hardships. Even if we take those hardships out of the picture, holding 16-year-olds to an arbitrary number seems like an unjust way to determine a sentence. A statute decides

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. . . [CONTINUED] the individual's fate. Outside the scope of Ms. Brown's case, I think this should open our dialogue throughout the country regarding mandatory sentencing (particularly sentencing with juveniles). Even further, I think it should open the dialogue for sentencing ranges and being bound to sentence someone to what the statute indicates. We are all human beings, and regardless of the vision of justice we prescribe to, a good starting point for this topic is recognizing case-by-case basis makes more sense than numerical numbers attributed to *anyone* who commits a crime.

Gerard M. Siciliano

Alaric A. Henry*

Daniel J. Ripper*

Thomas M Horne†

Tess Heisserrer❖⁂

Alan C. Blount

Alan C. Norton*

Calli C. Kovalic⁂

Sam Anderson†

*Also Licensed in GA
❖Licensed in MO
⁂Licensed in IL
†Rule 31 Civil Mediators