PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

The GREEN LIGHT NEWS

Volume 23, Issue 2 March 2023

Asleep at the Wheel: How to Build an OWI Circumstantial Evidence Case

By: Ken Stecker and Kinga Canike

A typical Operating While Intoxicated (OWI) investigation usually begins with the "Vehicle in Motion" phase where the officer observes the driver committing a traffic offense. However, not all OWI investigations begin with driving. Some start when the officer observes the driver asleep or unconscious in the driver's seat. In these cases, it will be incumbent on the prosecution to show that defendant drove before police arrived on the scene.

The Motor Vehicle Code defines "operate" as "[b]eing in actual physical control of a vehicle."[2] Michigan courts have held that the prosecution can prove "operation" through circumstantial evidence and reasonable inferences that arise from that evidence.[3]

In every OWI trial, the prosecution must prove that defendant operated the motor vehicle.[1] The Motor Vehicle Code defines "operate" as "[b]eing in actual physical control of a vehicle."[2] Michigan courts have held that the prosecution can prove "operation" through circumstantial evidence and reasonable inferences that arise from that evidence.[3]

In *People v. Solmonson*, 261 Mich. App. 657 (2004), police observed defendant unconscious in the driver's seat of his vehicle which was parked on the road outside the fog line.[4] It was 3:45 a.m. and he had an open beer can between his legs. The engine was off but warm, and the keys were in the ignition. The defendant was alone and told police he was coming from a nearby county where he had been working. He never denied being the driver of the vehicle, and police found no one else in the area. At trial, defendant argued that someone else drove him to the location but offered no evidence to support his theory. A jury convicted defendant of the OWI charge and he appealed the conviction, arguing there was insufficient evidence to support it. The Court of Appeals held that "the jury must have concluded from the circumstantial evidence and reasonable inferences that the prosecutor met his burden of proving defendant was operating the vehicle in an intoxicated state before the police arrived."[5]

In *People v. Stephen*, 262 Mich. App. 213 (2004), a police officer found defendant at the county fairgrounds asleep in his truck, which was wedged on a parking log.[6] The truck's engine was off, the transmission was in park, and the keys were in defendant's pocket. The defendant smelled of intoxicants and was confused. He stated that he had been drinking at a bar, had too much to drink, drove to the fairgrounds to sleep, struck the parking log while trying to leave the fairgrounds, and was unable to free his truck so he went to sleep. The district court granted defendant's motion to dismiss the OWI charge on the basis that

(Continued on page 5)

1. M Crim JI 15.2
2. MCL 257.35a
3. *People of the City Troy v. Haggarty,* No. 305646 (Mich. App.)(Decided on September 27, 2012).
4. *People v. Solmonson,* 261 Mich. App. 657 (2004).
5. *Id at 663.*
6. *People v. Stephen,* 262 Mich. App. 213 (2004).

Inside this Issue

A Message to Law Enforcement - MADD's New National President Tess Rowland

"How far that little candle throws his beams! So shines a good deed in a weary world." – William Shakespeare. The quote dates back to 1600, but it is quite relevant today.

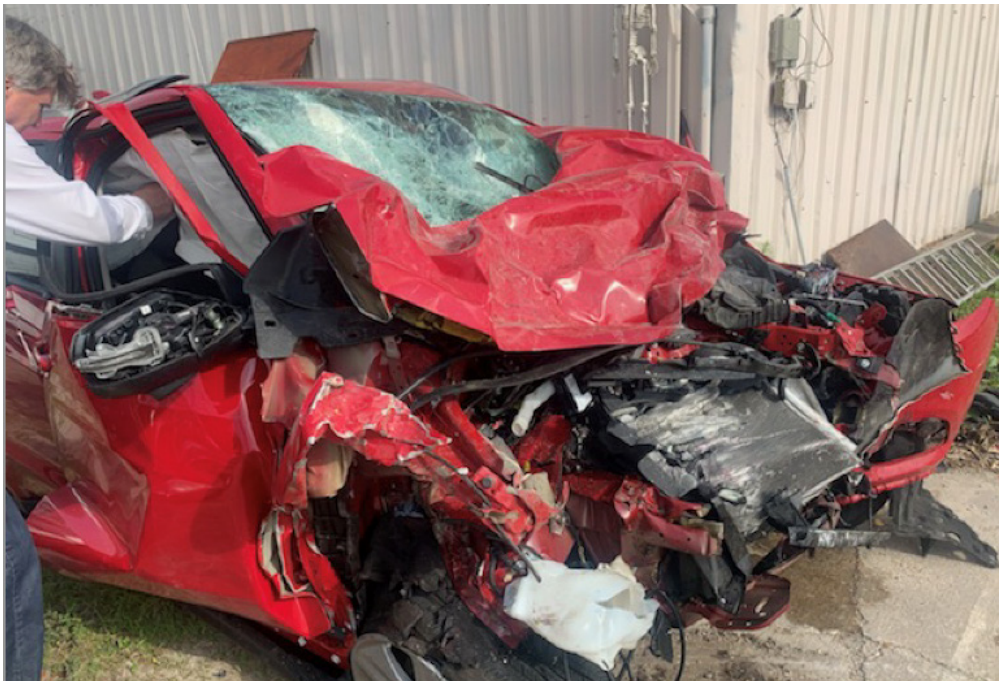
Today, we live in a weary world. Thank you all for being the light. I promise you; your good deeds change the world every day.

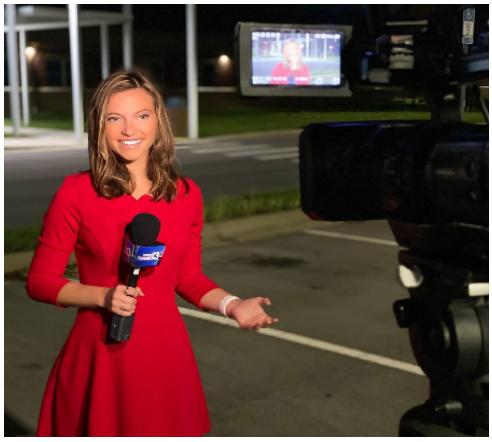
As Law Enforcement Officers, you know the grim statistics that illustrate the true crisis we are experiencing surrounding drunken and drugged driving in this country. While the numbers don't lie, they don't do justice to the calls you have worked, the sights you have seen, the hands you have held and the loss you have felt.

With as many 32 people becoming new impaired driving victims each day and now over 11,000, a 14% increase, losing their life to this preventable crime this year, it might be hard to believe that just one officer, or even one traffic stop, truly can make a difference... I can attest to that.

It is with great honor to virtually introduce myself. My name is Tess Rowland, and I am serving as the new National President of Mothers Against Drunk Driving. I am originally from Fort Lauderdale, Florida, but I now reside in Houston, Texas. Like many

MADD National President Tess Rowland





A month into the position, I called my mom the night before, telling her I was so happy I had switched to the morning shift and that I was, "The happiest I had been in my entire life."

victims, I never envisioned becoming part of the MADD Family, but the true reason I am here today is because of several hard-working law enforcement officers.

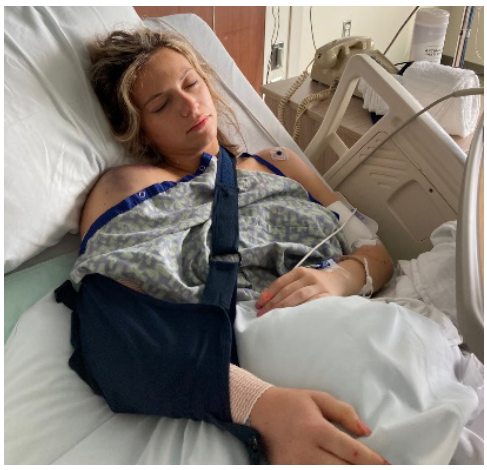
In May 2020, I graduated from Loyola University New Orleans with big dreams of becoming a news reporter. I achieved those dreams in the most beautiful of places and became a weekend anchor and reporter for WMBB News 13 in Panama City Beach, Florida. In March 2021, I was offered the opportunity to become the morning reporter which meant I would get weekends off, but I'd have an early wake up time of 2:00 a.m. I quickly accepted the offer knowing I would be off at noon and could spend time on the beach (a 22-year-olds dream) and that I would be avoiding heavy traffic.

I woke up to head into work on May 4, 2021, thinking it was just another Tuesday morning. A month into the position, I called my mom the night before, telling her I was so happy I had switched to the morning shift and that I was, "The happiest I had been in my entire life."

I was not even 5 minutes from my house when I encountered an alleged wrong-way, reckless drunk driver with drugs in the car. I was unconscious for much thereafter, but responders on scene told me my knee had been pulverized by the dashboard, and the engine of the car was just an inch away from my body.

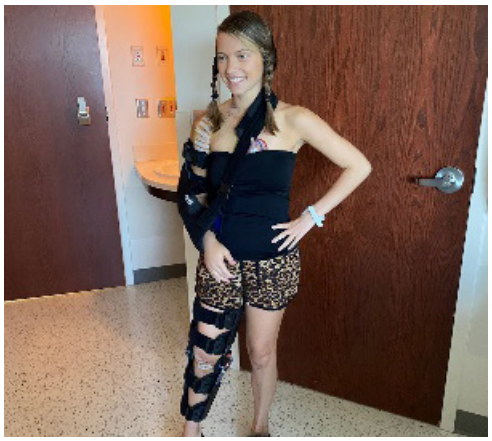
My parents got the call that no parent ever wants to receive, and my mom drove nine hours to be by my side. By the time she got there, I had already had two emergency surgeries.

Doctors initially attended to my knee as I had lost massive amounts of blood, and the gash was so deep it was almost as if the



bottom portion of my leg was hanging by a thread. They then discovered I suffered complex fractures to my elbow, arm, and shoulder.

My shoulder fracture was so severe, a total shoulder replacement was the recommended treatment, but being 22 years old at the time, the doctors wanted to try to rebuild it to avoid a joint replacement at a young age. So, 22 screws and 4 plates



later, I came out of surgery number four. Doctors said my shoulder would never be anatomically correct. Even with the surgery, they were not able to tell me if I would gain true use of my arm, or how much range of motion I would have.

A few days later when I could not hold down any food, the trauma team discovered internal injuries. Due to the impact of my crash, nearly every internal organ had adhesions, and a portion of my intestines had to be removed in what would be my fifth surgery in just nine days.

To date I have had 7 surgeries, I now have 4 large scars, and I now live with an uncertain future and the extreme probability of a total shoulder replacement in the future.

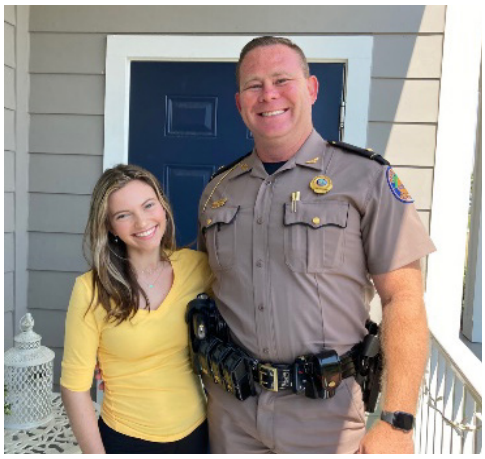
One of the first texts in the hospital I received was from Lt. Jason King from Florida Highway Patrol Troop A. He knew my parents lived far, and he wasn't sure if I was in the hospital alone… Many with injuries can attest, that the phone calls often stop when the wounds have healed, and months pass after an injury.

Lt. King's calls never did.

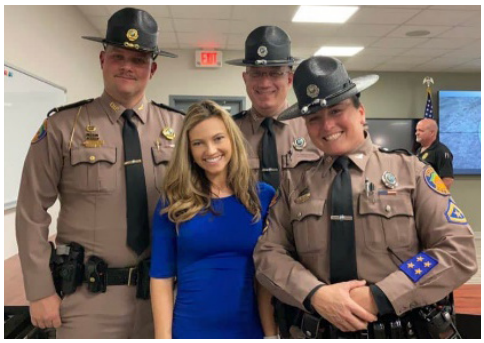
He constantly checked in on how I was feeling and then the conversation changed. I told him I didn't want this to happen to anyone else, and I needed to do something. We needed change.

Law enforcement serves as our last line of defense and it's because of you that many are able to get to where they need to go safely and return to their loved ones.

Lt. King first put me in contact with a local towing company to whom I shared my story with. White's Wreckers soon fell in love with my story and created a free tow home initiative in Panama City Beach. With a simple call, a drunk driver could have a ride home with their car, free of charge, 24/7.



Then, Lt. King connected me with our local Law Enforcement liaison to create more overtime enforcement opportunities. All this change, just a few months after my crash. When I was well enough to return to work, Lt. King connected me with other members of Troop A, like Trooper Sue Barge and Lt. Daniel Wagner. Many TV viewers had shared with me their personal connection to DUI and how often it happens, so I suited up with my camera and hopped in a patrol car to see for myself. The results were shocking. Within minutes, we responded to a crash. One thing I found; it was many people in their 20s getting DUIs.



So that's when Lt. King, Trooper Barge, Trooper Holland, and I started giving presentations at local schools in the area. Then, through connecting with Bay County Sheriff Tommy Ford, we saw through the first ever area DUI Task Force comprised of 8 agencies.

All of this incredible good, simply because one officer took the time. All of FHP Troop A lit that candle in a weary time for me and doing so changed the course of my life. For this, I am forever thankful.

I understand the many sacrifices and long hours that come with your profession, and the added frustration that the laws in place may not make your job easier. I am here to tell you, that despite those frustrations that you may encounter, please know that you are saving lives.

Law enforcement serves as our last line of defense and it's because of you that many are able to get to where they need to go safely and return to their loved ones. Thank you for fighting the good fight by keeping drunk and drugged drivers off our roads and waterways. Thank you for being the light in many lives and the true reason many are able to make it home safely.

For Your Information

Michigan Supreme Court SCAO Memo, December 13, 2022

Mandatory Jail Minimums - OWI 2nd/OWI 3rd - Thomas P. Boyd, State Court Administrator

Each year, the State Court Administrative Office (SCAO) and the Office of Highway Safety Planning (OHSP) must submit data to the National Highway Traffic Safety Administration (NHTSA) on the number of OWI 2nd and OWI 3rd sentences that comply with the minimum penalties for repeat OWI offenders established under federal law.

To receive full federal funding from the U.S. Department of Transportation, the State of Michigan must enact and enforce a "repeat intoxicated driver law" that establishes minimum penalties for defendants convicted of a second or third offense for intoxicated driving. 23 USC 164(b). For sentencing purposes, a repeat intoxicated driver law is defined as requiring a minimum penalty of 30 days community service or 5 days jail for a second offense, and 60 days community service or 10 days jail for a third or subsequent offense. 23 USC 164(a)(5).

Michigan's drunk driving statutes were previously consistent with the minimum sentencing requirements of 23 USC 164(a)(5); however, effective March 24, 2021, 2020 PA 383 authorized courts to suspend mandatory jail minimums associated with OWI 2nd and OWI 3rd convictions if a defendant participates in and successfully completes a specialty court program.

The percentages shown identify the number of OWI 2nd and OWI 3rd sentences from 2021 and 2022 that were compliant with the federal funding sentencing requirements.

Offense	2021	2022
OWI 2nd	74.5%	56.1%
OWI 3rd	80.0%	66.9%

Although this decrease is partially explained by the enactment of 2020 PA 383, the data suggests some jail sentences are still being suspended **without** participating in and successfully completing a specialty court program.

With this information in mind, please remember that under Michigan law mandatory jail minimums for subsequent intoxicated/impaired drivers "**must not be suspended** unless the defendant agrees to participate in a specialty court program1 and successfully completes the program." (emphasis added.) MCL 257.625(7)(a)(iii); MCL 257.625(7)(b)(ii)(A); MCL 257.625(9)(d); MCL 257.625(11)(d).

Please ensure that you are only suspending mandatory jail minimums associated with OWI 2nd and OWI 3rd convictions where specifically authorized by Michigan law. This will not only promote compliance with Michigan law, but also help preserve our federal funding. Please contact your regional administrative office with any questions.

National Transportation Safety Board (NTSB) Alcohol and Drug Report

Alcohol, Other Drug, and Multiple Drug Use Among Drivers, December 13, 2022, SRR-22-02

This safety research report examines the crash risk associated with different drugs, including alcohol, and the prevalence of their use among drivers; it also discusses countermeasures to reduce impairment-related crashes. To do this, the National Transportation Safety Board (NTSB) conducted a literature review of impaired driving research, examined drug reporting in the National Highway Traffic Safety Administration's Fatality Analysis Reporting System, and performed an independent analysis of the presence of potentially impairing drugs in driver specimens submitted to four US laboratories that met strict standards for collecting high-quality toxicology data.

The NTSB identified the following safety issues: (1) the need to implement proven countermeasures for alcohol-impaired driving; (2) the need to address the growing problems of cannabis-, other drug-, and multiple-drug-impaired driving; (3) the need to improve drug-impaired driving laws and enforcement; (4) the need to ensure that driving safety is considered in the evaluation of prescription and over-the-counter drugs; and (5) the need to enhance systems for documenting and tracking the incidence of drug use and driving.

As a result of this safety research, the NTSB makes new recommendations to the National Highway Traffic Safety Administration; the US Food and Drug Administration; and the 50 states, the District of Columbia, and the Commonwealth of Puerto Rico. The NTSB also classified two previous recommendations.

Watch related video on NTSB YouTube Channel. Read the full report here.

How to Build an OWI Circumstantial Evidence Case *(continued from page 1)*

he was not "operating" the truck at the time the police officer found him asleep in it. The Court of Appeals ruled it was not necessary for the officer to have observed the defendant operating the truck for him to be arrested and prosecuted for OWI. It held that "defendant's arrest was clearly valid because a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe a misdemeanor punishable by more than ninety-two days' imprisonment occurred, and reasonable cause to believe the person committed it."[7]

Based on the above case law, an officer investigating an OWI case involving a person sleeping behind the wheel should look for and document the following in his/her police report:

- Are the tires and hood warm to the touch?
- Are the keys in the ignition?
- Is the ignition switch on or off?
- Is there any other evidence to support there possibly being another driver?
- Is the individual in the vehicle behind the wheel or in the back seat?
- Is the vehicle's transmission in drive?
- How much alcohol did the driver drink before he/she arrived at the location?
- When did the driver last drink before he/she arrived at the location?
- Did the driver have any alcohol to drink since he/she arrived at the location?
- Is the vehicle registered to the driver?

In conclusion, it is important for law enforcement to do a thorough and complete investigation so there is sufficient evidence to show the defendant was operating a vehicle while intoxicated before police arrived. This allows prosecutors to prove their cases in court and hold these dangerous drivers accountable for their actions.

Views expressed in this article are solely those of the authors. Please consult your prosecutor, local counsel, or commanding officers if you need any further guidance or before changing procedure based on this article. For more information on the Prosecuting Attorneys Association of Michigan (PAAM) Traffic Safety Training Program, contact Kenneth Stecker or Kinga Canike at steckerk@michigan.gov or canikek@michigan.gov.

7. *People v. Stephen,* 219 Mich. App. 213, 219 (2004).

Prosecuting Attorneys Association of Michigan
116 West Ottawa, Suite 200
Lansing, Michigan 48913
Phone: (517) 334-6060
Fax: (517) 334-6787
Email: steckerk@michigan.gov,
canikek@michigan.gov

This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.

PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

The Yellow Light Legal Update

Volume 21, Issue 2 **March 2023**

Clicking on case names (highlighted in blue text) will take you directly to the PDF version of the opinions online.

Published Cases

Michigan Supreme Court

Defendant ran a red light while driving over 100 miles per hour and collided with other vehicles, killing one person and causing severe injuries to others. The People charged her with second-degree murder and two counts of operating while intoxicated (OWI) causing serious impairment of a body function, which the prosecution later dismissed.

Before trial, defendant moved the court to allow her to testify at trial that she intended to pull over when the police officer activated his overhead lights but didn't because the passenger thrusted a gun into her ribs and threatened to kill her if she stopped the car. She also wanted to testify that the passenger was on parole. The People opposed the motion, arguing the defendant could not assert a duress defense to murder and should not be allowed to testify to this.

The trial court denied defendant's motion and a jury convicted her of second-degree murder. The Michigan Court of Appeals affirmed the defendant's conviction. The Michigan Supreme Court (MSC) granted application for leave to appeal.

The Court ruled that duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony. Therefore, the Reichard's rationale extends to allowing duress to be asserted as an affirmative defense to what is known as depraved-heart second-degree murder.

The defendant argued that duress can be raised as a defense to an unintentional homicide. The MSC agreed with the defendant, holding it was not a harmless error for the trial court to not allow the defense to testify to duress in this case.

The Court ruled, that the Michigan Supreme Court unanimously held in *People v Reichard,* 505 Mich 81 (2020), that duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony. Therefore, the *Reichard's* rationale extends to allowing duress to be asserted as an affirmative defense to what is known as depraved-heart second-degree murder.

People v Gafken, No. 161835, decided on December 29, 2022.

Unpublished Cases

(An unpublished opinion is not binding as precedent but may have persuasive value in court. See, Michigan Court Rule 7.215)

Michigan Court of Appeals

In February 2021, there was an ice fishing festival on Devil's Lake in Lenawee County. At around 7:00 p.m., defendant was traveling from a tavern to his friend's house on a snowmobile

when he drove his snowmobile into an ice fishing shanty, killing the man inside the shanty. He was charged with reckless driving causing death and operating a snowmobile while intoxicated causing death.

An eyewitness testified at the preliminary examination that defendant may have been traveling at approximately 65 to 70 miles per hour before hitting the shanty. This eyewitness observed the crash from at least 100 yards away. The shanty was made of dark material with little or no reflective material. A Michigan State Police trooper testified that there were no signs of significant braking along defendant's path before the crash. The trooper further testified that defendant's snowmobile went about 80 to 83 feet from the location of the shanty before

The Yellow Light Legal Update is an addition to The Green Light News.
With this insert, you can keep a notebook for just the traffic safety cases.

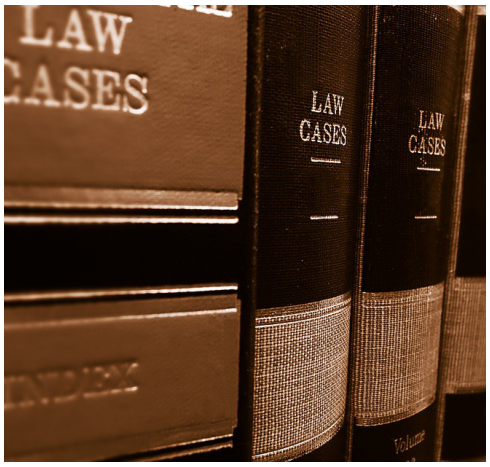
stopping, dragging the shanty and decedent with it. The snowmobile's speedometer was found detached from the snowmobile with the tac stuck at 80 kilometers per hour.

The COA held, "... Driving at a high rate of speed, on a dark night, across a lake where many people had gathered for a festival provided probable cause that defendant was driving recklessly. But driving recklessly does not equate to driving under the influence of a controlled substance."

An officer with the Department of Natural Resources spoke with defendant and described him as "pretty mellow" for a guy who had just been in a crash, but noted nothing else out of the ordinary about defendant. Defendant's blood also came back with 8ng/ml of THC.

After the preliminary examination, defendant was bound over to the circuit court on both charges. Defendant moved to dismiss the OWI charge arguing that there was insufficient evidence to show he was under the influence. The trial court denied defendant's motion and this appeal followed.

The Michigan Court of Appeals (COA) agreed with defendant that the district court abused its discretion when it found probable cause to believe defendant was driving while under the influence.



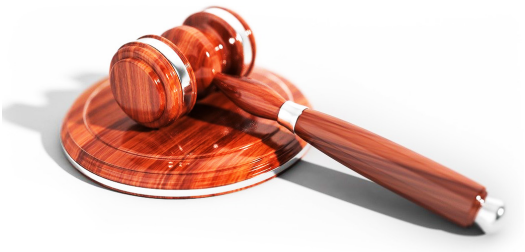
The COA held, "[t]he evidence indicated that defendant was traveling at a high speed and did not brake hard before colliding with the shanty. Driving at a high rate of speed, on a dark night, across a lake where many people had gathered for a festival provided probable cause that defendant was driving recklessly. But driving recklessly does not equate to driving under the influence of a controlled substance." The COA also ruled that the presence of marijuana alone in the defendant's blood did not prove that he was under the influence while operating the snowmobile. It stated, "[t]he prosecution has presented no evidence indicating that 8 ng/ml of THC is enough to render a person under the influence, nor that this amount of THC has an effect on a person's ability to operate a motor vehicle."

People v Ellenwood, No. 362219, decided on December 22, 2022.

Defendant was charged with OWI 3rd after being involved in a single-vehicle crash in February 2021. In circuit court, he moved to reduce the charge by challenging the validity of his 2011 OWI conviction. He argued that the 2011 conviction could not be used as a predicate offense because it was procured in violation of his Sixth Amendment right to counsel. The circuit court granted defendant's motion.

On appeal, the prosecutor argued the circuit court erred in granting defendant's motion because defendant failed to demonstrate that the 2011 OWI proceedings violated his right to counsel. The COA agreed. It held that a defendant wishing to attack an earlier uncounseled conviction has the burden of presenting prima facie evidence that the earlier conviction violated his right to counsel. To do this, the defendant must follow the process in *People v Carpentier*, 446 Mich 19, 29; 521 NW2d 195 (1994).

Pursuant to *Carpentier*, a defendant must present prima facie proof that a previous conviction was entered, and that imprisonment was imposed as it relates to a case where defendant was unrepresented. Alternatively, defendant can also "present[] evidence



that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time." If defendant satisfies either approach, then the trial court holds a *Tucker* hearing, and the burden shifts to the prosecution "to establish the constitutional validity of the prior conviction." The COA held that the defendant here failed to present prima facie evidence that his earlier conviction violated his right to counsel under either approach under *Carpentier*.

People v Jacobs, No. 360206, decided on December 29, 2022.

Defendant appealed his sentence of 4 to 10 years imprisonment following a guilty plea to OWI causing serious impairment and third-offense habitual offender.

Eyewitnesses saw defendant intentionally crash into other vehicles parked in the parking lot. Defendant drove 63 to 65 miles per hour in a 45-mile-per-hour zone. An eyewitness observed defendant weaving in and out of his lane and crossing the centerline into oncoming traffic. Defendant ended up crashing head on into another driver from the opposite lane. Defendant's blood came back 0.261 grams per 100 milliliters of blood.

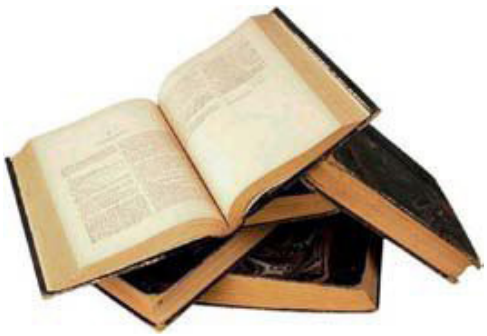
On appeal, defendant argued that the trial court erroneously assessed 25

points for OV 3 because his conviction of OWI causing serious impairment already punished him for causing life-threatening or permanent incapacitating injury. He argued that this constituted a "double count." The COA rejected this argument, relying on *People v Gibson*, 219 Mich App 530; 557 NW2d 141 (1996), to hold that there is no double jeopardy violation when the sentencing guidelines allow a factor that is an element of the crime charged to also be considered when computing an offense variable score.

Defendant also argued that the trial court erroneously assessed OV 17 at 10 points because there was no evidence to establish that defendant's culpability went beyond what was required to satisfy the elements for OWI causing serious impairment. Once again, the COA disagreed. It stated the following: "the trial court properly found that getting behind the wheel of a vehicle, leaving the parking lot after intentionally crashing into vehicles, and continuing onto a public roadway where defendant was observed weaving in and out of the lane and crossing the centerline into oncoming traffic, while extremely intoxicated, was a wanton and reckless disregard for the life or property of another person."

People v Minnick, No. 360594, decided on January 26,2023.

Defendant pled guilty in district court to a reduced charge of failure to display a valid license



and was sentenced to 60 days in jail. On appeal, he argued that the district court abused its discretion by imposing a 60-day jail sentence for his conviction, contrary to MCL 769.5, which establishes a rebuttable presumption for a nonjail, nonprobationary sentence for a nonserious misdemeanor conviction.

Under the plain language of the statute, the COA must determine whether the district court articulated "reasonable grounds" for imposing a sentence that departs from the presumptive nonjail sentence. Here, the COA held that the district court adequately articulated grounds for imposing a 60-day custodial sentence, which included defendant's high risk for recidivism, his risk to public safety, and his long criminal history dating back to 1995. The COA stated that this demonstrated both that those grounds were reasonable and support that the sentence is more proportionate to the offender and the offense than the presumptive nonjail, nonprobationary sentence.

Here, the COA held that the district court adequately articulated grounds for imposing a 60-day custodial sentence, which included defendant's high risk for recidivism, his risk to public safety, and his long criminal history dating back to 1995.

People v Simpson, No. 360957, decided on January 12, 2023.

Defendant was charged with reckless driving causing death after rear ending victim's vehicle at a red light. At the preliminary examination, evidence established the following: the weather and road conditions were dry; the road was free of defects; defendant's vehicle was traveling 53 mph at impact (speed limit was 45 mph); defendant failed to take any action to avoid the collision until a half second before; and defendant's brakes were functional. The district court bound over on the charge. After a motion to quash, the circuit court dismissed the charge on the basis that there was insufficient evidence to establish that defendant had driven his vehicle with a willful or wanton disregard for safety.

The COA reversed and held that the district court did not abuse its discretion when it bound defendant over on the charge because a fact finder could reasonably conclude that defendant drove with willful or wanton disregard for safety. A willful or wanton disregard for speeding and running red lights can show willful and wanton

disregard for safety. See *People v. Miller*, 198 Mich. App. 494 (1993).

People v Dahlka-Arrendondo, No. 359694, decided on January 12, 2023.

Consult Your Prosecutor Before Adopting Practices Suggested by Reports in this Article.

The statutes and court decisions in this publication are reported to help you keep up with trends in the law. Discuss your practices that relate to these statutes and cases with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practices in reliance on a reported court decision or legislative change.

This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.