PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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Kratom and Driving: A Dangerous Combination

By: Kenneth Stecker and Kinga Canike

Most everyone knows the dangers of drinking and driving, but recent headlines have put the spotlight on another danger on our roads – kratom and driving. This is a topic that we see in the headlines:

> "Suspected Driving Under the Influence Case Involving Mitragyine." [1]
> "Deputies say DUI driver carrying new Kratom drug." [2]
> "DUI suspect in Danish child's death back in Charleston jail after failed drug test." [3]

Mitragyna speciosa is an evergreen tree native to Thailand and Southeast Asia.[4] Its leaves and an extract made from its leaves are commonly referred to as kratom.[5] Kratom can be used in various ways. Its leaves can be chewed or crushed into a powder.[6] The powder can be used to make tea or packaged as capsules.[7] Kratom extract can be mixed into liquids for consumption. [8]

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Kratom's effects vary depending on how much a person ingests. In lower doses, kratom is known to be a stimulant.[9] In higher doses, those effects are opioid-like or sedative.[10] Kratom has been used for many purposes including opioid withdrawal, pain relief, and to treat depression and anxiety.[11] However, research is inconclusive as to whether kratom has any health benefits.[12]

The American Kratom Society, which strongly promotes the use of kratom, estimated that there were over 15 million kratom users in the United States in 2019.[13] Kratom is not federally scheduled as a controlled substance even though the Drug Enforcement Administration has listed it as a drug of concern.[14] Some of these concerns stem from the fact that lack of regulation results in varying quality and purity among kratom products.[15] Six states have made it illegal, and there is pending legislation in other states to either criminalize or regulate it to some degree.[16] Here in Michigan kratom continues to be legal and therefore readily accessible.[17] It is sold on the internet and at gas stations and headshops around the state.

Common kratom side effects include the following:

- Dizziness
- Drowsiness
- Hallucinations and delusion
- Depression
- Breathing suppression
- Seizure, coma, and death.[18]

These side effects, which can last up to five hours, make the combination of kratom and driving very dangerous.[19] This is where Michigan Public Act 543, which went into effect in 2013, comes into play.

(Continued on page 6)

1. https://academic.oup.com/jat/article/42/7/e65/4989296
2. https://speciosa.org/deputies-say-dui-driver-carrying-new-kratom-drug-written-by-treidherald-review-com217-421-7977/
3. https://abcnews4.com/news/crime-news/dui-suspect-in-danish-childs-death-back-in-charleston-jail-after-failed-drug-test
4. https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/kratom/art-20402171
5. Id.
6. Id.
7. Id.
8. Id.
9. https://jaoa.org/article.aspx?articleid=2094342
10. Id.
11. https://www.cbsnews.com/news/kratom-poison-control-calls-soared-in-recent-years/
12. https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/kratom/art-20402171
13. https://www.americankratom.org/images/Kratom_Population_2019.pdf
14. https://drugabuse.com/blog/trading-dependencies-theres-nothing-mild-about-a-kratom-addiction/
15. https://www.cbsnews.com/news/kratom-poison-control-calls-soared-in-recent-years/
16. https://speciosaguide.com/kratom-legality-is-kratom-legal-in-my-state/#Is_Kratom_Legal_in_Michigan
17. Id
18. https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/kratom/art-20402171
19. Id.

Inside this Issue

Alex Otte, MADD's New National President, Shares Her Story and Heart with Law Enforcement

Many would say they generally understand the selfless contributions that law enforcement personnel make to our communities every day, others still would say that while they may not understand, they appreciate the sacrifices made by law enforcement personnel and their families to keep all of us safe. I can tell you that not only do I understand and appreciate it, I'm marrying it. I say all of this to tell you from the beginning that when I say thank you and that I understand the sacrifices that you and your families make every day that you put on the uniform, you know where I'm coming from.

My name is Alex Otte and I am MADD's new National President. I am 24 years old and I live in Lexington, Kentucky, with my fiancé, Zach (a patrol officer

for LPD), and our two giant dogs, Sheriff and Sergeant.

I came to MADD for the same reason a lot of people do. I was run over by a drunk driver. I wasn't hit in a vehicle, I wasn't involved in a minor crash, I was a child, and I was run over. It was July 2, 2010. I was 13 years old. I was sitting on a jet ski behind my dad's house on Lake Herrington in Danville, Kentucky. I was waiting for my mom and brother to dock our boat so that I could dock my jet ski and go up to the house. There was a 17-foot bass boat

The man who ran me over was more than three times the legal blood alcohol limit, two and a half hours later. He was charged $250.

coming under a nearby blue bridge, and I gave my mom a thumbs up to tell her that I saw him coming and I wasn't going to move.

Herrington is a very narrow lake, and on either side is a steep rock embankment. I was near the right side of the lake, so I stayed still. The boat was headed toward my mom and brother, and my mom screamed. He banked it to the left and never straightened up.

The boat hit me from the side going more than 60 mph. I flew off the jet ski and landed face down in the water. The boat went up over the jet ski and came down on top of my body before it sunk. I suffered many severe injuries including a traumatic brain injury, a broken neck, bilateral shattered femurs and the loss of my right leg. I was airlifted to the trauma hospital in Lexington with very little chance of surviving.

The man who ran me over was more than three times the legal blood alcohol

limit, two and a half hours later. He was charged $250.

I wanted to be the last little girl that this ever happened to. I know more than 10 years later that I wasn't, but I will continue to fight until that day comes, and I am so grateful that you will, too.

As I said before, I am marrying into the law enforcement life. I understand what it is that you do and the sacrifices that each of you and your families make every day. I know the frustration that comes with continuing to diligently do your job and sometimes the laws not making that any easier.

Many of you see victims of drunk and drugged driving and other violent crimes

on the worst days of their entire life, and you don't get to see what happens after. I'm what happens after. I want to encourage you that despite the frustrations that come with your profession, you are saving lives. Being vigilant about stopping drunk and drugged drivers and getting them off our nation's roads and waterways will put an end to stories like mine and so many others. Thank you. Please continue to fight the good fight and know that you are having an impact on so many lives and saving so many others.

Traffic Safety Initiatives: Safer Roadways through CDL and CMV Enforcement

The Important Role of Police Officers

By Romana Lavalas, Senior Attorney, National Traffic Law

Holding Commercial Driver's License (CDL) holders accountable for their driving behaviors by properly adjudicating and recording their traffic-related convictions saves lives.

While prosecutors and courts play important roles in the conviction reporting process, it is vital to understand that the process starts at the roadside, and, as such, the role of law enforcement cannot be overstated. After all, for convictions to be properly reported, citations must be issued by a patrol officer, a commercial vehicle enforcement (CVE) officer, or a Motor Carrier Safety Assistance Program (MCSAP) officer and then properly adjudicated through the court system.[1]

Although CVE officers have regular contact with commercial driver license (CDL) holders and larger commercial motor vehicles (CMVs), non-CVE officers often do not. Many police officers who routinely engage in traffic enforcement are reluctant to enforce those same laws against the operators of large trucks and buses, of whom many are CDL holders. Stopping large trucks and buses presents unique challenges for non-CVE officers, including the longer distances these vehicles need to exit and to reenter the roadway; the significant height advantage the drivers of heavy vehicles have over an approaching officer's cruiser or motorcycle; the potential for dealing with special cargo (perishables, livestock) or disgruntled passengers once stopped; and, of course, the documents these drivers must maintain (logbooks or medical certificates).

Many police officers who routinely engage in traffic enforcement are reluctant to enforce those same laws against the operators of large trucks and buses, of whom many are CDL holders.

The Federal Motor Carrier Safety Administration (FMCSA) is the agency charged with regulating safety for the commercial motor vehicle industry in the United States, as well as setting the minimum standards required for obtaining commercial licenses, which are issued by states. In order to encourage the enforcement of routine traffic offenses committed by the operators of large vehicles, FMCSA created the Large Truck and Bus Traffic Enforcement Training course to educate non-CVE officers on how to safely and effectively conduct routine traffic stops of large trucks and buses.[2]

For some police officers and even prosecutors, any traffic details related to CMV or CDL enforcement can seem tedious and an unnecessary hassle. Admittedly, when new police recruits join the force, it is unlikely that their idea of what it means "to protect and serve" their community involves traffic enforcement, let alone CMV traffic enforcement. Yet, traffic enforcement details are a prime opportunity for police officers to protect and serve their communities because traffic safety affects every community.

While studies show that between 2016 and 2017, the number of fatal traffic crashes in the Unites States decreased, the percentage of large trucks or buses involved in fatal crashes increased.[3] In 2016, at least 11.8 percent of all fatal crashes involved at least one large truck or bus.[4] In 2017, that percentage grew to 13 percent.[5] The same trend exists for nonfatal crashes. In 2016, 7.4 percent of nonfatal crashes involved at least one large truck or bus; in 2017, that number grew to almost 8 percent. In addition, large truck and bus crashes are disproportionately represented among motor vehicle fatalities. For example, large trucks and buses comprise 9.8 percent of all vehicle miles traveled in 2017, but accounted for 13 percent of all traffic fatalities.[6]

Further, because of their large size and heavier cargo, crashes involving large trucks and buses and typical passenger vehicles tend to be fatal to the occupants of the non-CMV. According to the Insurance Institute for Highway Safety,

> *The largest number of motor vehicle crash deaths occur among occupants of passenger vehicles … The likelihood of crash death varies markedly among these vehicle types according to size. Small/light vehicles have less structure and size to absorb crash energy,*

1. The MCSAP is a federal grant program that provides financial assistance to states to reduce the number and severity of accidents and hazardous materials incidents involving commercial motor vehicles (CMVs). While not all CVE officers are MCSAP funded, for the purpose of this article, all civilians or law enforcement officers who are specifically responsible for commercial vehicle enforcement measures will be referred to as "CVE officers."
2. Federal Motor Carrier Safety Administration (FMCSA), National Training Center, "Truck and Bus Enforcement."
3. National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Facts 2017: A Compilation of Motor Vehicle Crash Data* (Washington, DC: NHTSA, 2019).
4. FMCSA, *Pocket Guide to Large Truck and Bus Statistic 2018* (Washington, DC: FMCSA, 2018).
5. FMCSA, *Pocket Guide to Large Truck and Bus Statistics 2019* (Washington, DC: FMCSA, 2020).
6. FMCSA, *Pocket Guide to Large Truck and Bus Statistics 2019*.

so crash forces on occupants will be higher. People in lighter vehicles are at a disadvantage in collisions with heavier vehicles [such as large trucks and buses].[7]

Conducting routine traffic stops on CMVs is one strategy that non-CVE officers can use to protect and serve their communities because it keeps unsafe drivers and poorly maintained large vehicles off the roads.

In addition, enforcement targeting large vehicles can yield results beyond traffic safety. Some opportunists have used large trucks to conduct criminal activity such as human smuggling, drug trafficking, and human trafficking. Unlike passenger vehicles whose interior compartments are easily viewed, large truck interiors can have hidden interior compartments (such as a sleeper berth) and they sit higher up on the road, making it more difficult to observe who or what may be inside the truck cab. Further, some semi-trailer attachments are large enough to hold several people or large caches of drugs. FMCSA recognizes these possibilities; therefore, in addition to its generalized Large Truck and Bus Enforcement Training, FMCSA also created the Drug Interdiction Assistance Program (DIAP).[8] The training program emphasizes the detection of criminal conduct that can be related to large vehicles, such as drug trafficking. These trainings each deal with enforcement as it relates to the vehicles themselves; however, for the non-CVE officer, there are also enforcement actions that can be taken against the drivers of these large vehicles (typically, CDL holders) apart from the CMV operation.

Since commercial drivers are not always operating commercial vehicles, officers conducting routine traffic enforcement involving passenger vehicles are likely to come across a CDL holder operating a private vehicle. Traffic stops are particularly significant for CDL holders operating personal vehicles because driver behavior in a passenger vehicle can affect a professional driver's CDL privileges.[9] For instance, under the CFR 49 § 383.51(b)(1) (2), a CDL holder operating a non-CMV who is convicted of operating while intoxicated or under the influence of drugs, faces a mandatory disqualification of his

or her CDL privileges for one year. For a second conviction of the same offense, the penalty is dramatically more substantial—a "lifetime" or 10-year revocation of the driver's CDL privileges.[10]

Even ordinary traffic offenses, such as speeding, impact CDL holders regardless of whether they are operating a CMV when stopped.

Routine traffic enforcement has a greater impact on CDL holders than on nonprofessional drivers because of federal and state penalties and prohibitions on these drivers when they violate traffic laws.[11] Even ordinary traffic offenses, such as speeding, impact CDL holders regardless of whether they are operating a CMV when stopped. For instance, if a CDL holder was convicted of two separate speeding tickets within a three-year period and both convictions were for traveling 15 miles per hour or more above the speed limit, the driver's CDL would be disqualified for 60 days.[12]

While the vast majority of CDL holders are law-abiding drivers, some CDL holders may rely on non-CVE officers to offer them a "roadside reduction" or let them off with a mere warning, simply because they have a CDL. The idea behind this expectation is that, by ticketing a CDL holder, the officer is endangering the livelihood of the driver because a conviction might lead to the loss of CDL privileges or the loss employment. However, to view things from this perspective places the result of the CDL holder's driving behavior on the officer, rather than on the driver. The reality is that the operator has put his or her driving privileges— and perhaps employment—at risk because of his or her own bad driving behavior (speeding, impaired driving, etc.).

Not only does routine traffic enforcement have a greater impact on CDL holders, but enforcement is also relevant to predicting crash risk for this group of drivers. A study published by the American Transportation Research Institute indicated that driving behaviors that some would consider minor can have serious effects on the likelihood of a future crash.[13] For example, if a CMV operator had a conviction for "failure to use" or an "improper" signal on his or her driving record, that driver had an 82 percent increased crash likelihood.[14] A prior "failure to keep a proper lane" conviction yielded an 83 percent increased crash likelihood.[15]

Only violations that are issued and properly adjudicated through the court system can be recorded on a driver's motor vehicle history and thereby lead to CDL disqualification by a state's driver's license authority (SDLA). CDL holders' motor vehicle records are used by police,

(Continued on page 7)

7. Insurance Institute for Highway Safety, "Fatality Facts 2018 Passenger Vehicle Occupants," citing Sean M. Puckett and John C. Kindelberger, Relationships between Fatality Risk, Mass, and Footprint in Model Year 2003-2010 Passenger Cars and LTVs – Preliminary Report.
8. FMCSA, National Training Center, "Drug Interdiction Assistance Program – DIAP."
9. 49 C.F.R. § 383.51.
10. Reinstatement after lifetime disqualification. "A State may reinstate any driver disqualified for life for offenses described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) after 10 years, if that person has voluntarily entered and successfully completed an appropriate rehabilitation program approved by the State. Any person who has been reinstated in accordance with this provision and who is subsequently convicted of a disqualifying offense described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) must not be reinstated." 49 C.F.R. § 383.51 (a)(6).
11. 49 C.F.R. § 383.51.
12. Regulatory Guidance for 49 C.F.R. 383.51—Disqualification of Drivers – General Questions
Question 1:
a. If a CDL holder was convicted of one "excessive speeding" (15 or more miles over the speed limit) violation in a CMV and the same violation in his/her personal vehicle, would the driver be disqualified? Or,
b. If a CDL holder was convicted of two separate "excessive speeding" (15 or more miles over the speed limit) violations in his/her personal passenger vehicle, would the driver be disqualified?
Guidance: Yes, in both cases, if the second offense was within 3 years of the first. Whether the vehicle is a CMV is irrelevant. Commercial Driver's License Standards, Requirements and Penalties, Regulatory Guidance, 84 FR 8464-01.
13. Caroline Boris and Dan Murray, *Predicting Truck Crash Involvement: 2018 Update* (Arlington, VA; American Transportation Research Institute, 2018).
14. Boris and Murray, *Predicting Truck Crash Involvement: 2018 Update*, 15.
15. Boris and Murray, *Predicting Truck Crash Involvement: 2018 Update*, 15.

Challenges of Cannabis Analysis and Impacts on Driving and Public Health

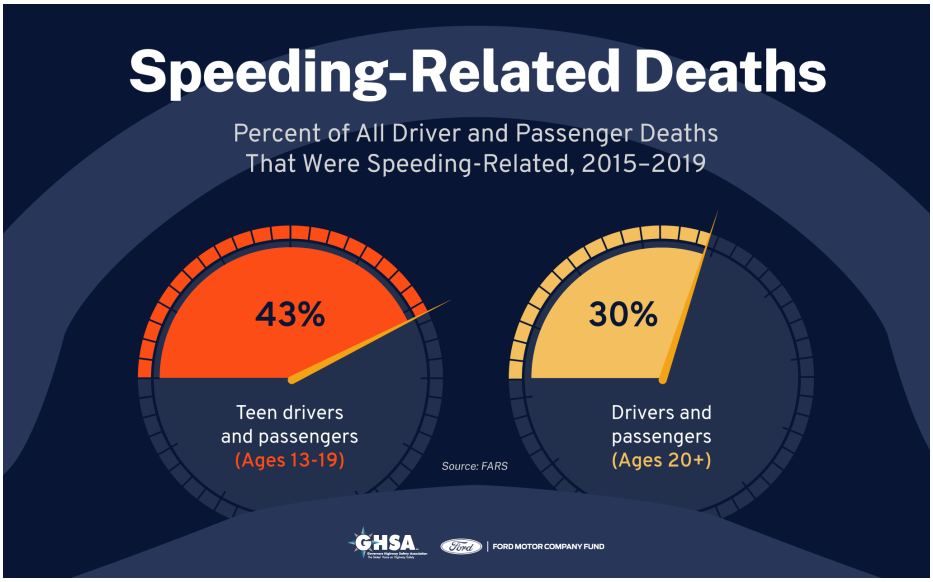
Interview with Dr. Madeleine Swortwood, Assistant Professor,
Department of Forensic Science, Sam Houston State University (swortwoodm@shsu.edu)

Dr. Madeleine Swortwood is an Assistant Professor and Director of Graduate Programs for the Department of Forensic Science at Sam Houston State University in Texas. She has presented for the Traffic Safety Training Program on numerous occasions on drug toxicology. Dr. Swortwood is very familiar with the challenges that cannabis-impaired driving poses for law enforcement and prosecutors handling these cases. She recently conducted an interview for News-Medical.net on how cannabis is impacting driving and public health. That interview is available at the link below.

Dr. Madeleine Swortwood

https://www.news-medical.net/news/20210209/Challenges-of-Cannabis-Analysis-and-Impacts-on-Driving-and-Public-Health.aspx

For Your Information



Teens and Speeding

The Governors Highway Safety Association (GHSA), in partnership with Ford Motor Company Fund, released a new report that examines the significant role speeding plays in teen driver fatalities and offers practical tools to help parents rein in this lethal driving habit.

The new analysis for GHSA found that from 2015 to 2019, teen drivers and passengers (16-19 years of age) accounted for a greater proportion of speeding-related fatalities (43%) than all other age groups (30%). During this five-year period, 4,930 teen drivers and passengers died in speeding-related crashes.

Motor Vehicle Deaths in 2020 Estimated to be Highest in 13 Years

Preliminary data from the National Safety Council (NSC) shows that 2020 was a deadly year on our roads despite less people driving due to the COVID-19 pandemic. There was an eight percent increase in fatalities and 24% increase in the fatality rate. This represented the highest jump in fatality rate in almost one hundred years. Click on this link for the complete NSC press release.

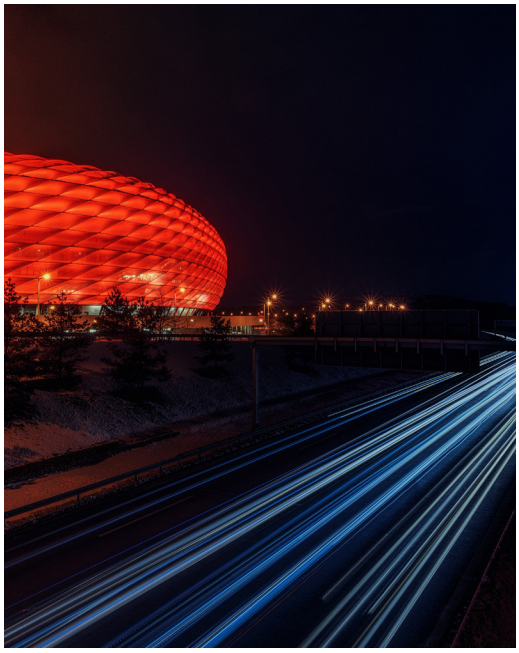
Kratom and Driving *(continued from page 1)*

Public Act 543 states in pertinent part as follows:

"Sec. 625. (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

(25) As used in this section: (a) "Intoxicating substance" means any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following: (i) Recognized as a drug in any of the following publications or their supplements: (A) The official United States pharmacopoeia. (B) The official homeopathic pharmacopoeia of the United States. (C) The official national formulary. (ii) A substance, other than food, taken into a person's body, including, but not limited to, vapors or fumes, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication." [20]



Because kratom falls under the category of "intoxicating substance," a person violates this law only when he or she operates a motor vehicle while under the influence by an intoxicating substance.[21]

Because kratom falls under the category of "intoxicating substance," a person violates this law only when he or she operates a motor vehicle while under the influence by an intoxicating substance.[21]

Michigan Criminal Jury Instruction 15. 3 defines "Under the influence" as follows:

"Under the influence of [alcohol / a controlled substance / an intoxicating substance] means that because of [drinking alcohol / using or consuming a controlled substance / consuming or taking into (his / her) body an intoxicating substance], the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be falling down or hardly able to stand up. On the other hand, just because a person has [drunk alcohol or smells of alcohol / consumed or used a controlled substance / consumed or used an intoxicating substance] does not prove, by itself, that the person is under the influence of [alcohol / a controlled substance / an intoxicating substance]. The test is whether, because of [drinking alcohol / using or consuming a controlled substance / consuming or taking into (his / her) body an intoxicating substance], the defendant's mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner." [22]

During an impaired driving investigation, if a police officer has probable cause to believe a driver is under the influence of kratom, that driver can be arrested. To establish probable cause that a driver may be under the influence of kratom, the officer should look for the general indicators of kratom. According to a 2018 study in the Journal of Analytical Toxicology, some of these general indicators may include "leg tremors, continual clenching fingers and hands, fidgety and exaggerated movements, slurred and rapid speech, and dilated pupils." [23] In addition, a Drug Recognition Expert-trained (DRE) officer should be called to evaluate any suspect who may be under the influence of kratom or any other controlled or intoxicating substance.

We have a responsibility for road safety in Michigan, and as we go forward, we need to continue to reassess our efforts to combat the dangers on our roads. One way we can make a difference is by making sure those drivers under the influence of kratom are kept off Michigan roads.

For more information on this article and PAAM training programs, contact Kenneth Stecker or Kinga Gorzelewski Canike, Traffic Safety Resource Prosecutors, at (517) 334-6060 or e-mail at steckerk@michigan.gov or gorzelewskik@ Michigan.gov. Please consult your prosecutor before adopting practices suggested by reports in this article. Discuss your practices that relate to this article with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practice.

20. MCL 257.625, et. al.
21. MCLA 257.625(1)(a)
22. https://courts.michigan.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions/Documents/HTML/Criminal%20Jury%20Instructions-Responsive%20HTML5/index.html#t=Criminal_Jury_Instructions%2FCrim_Jury_Ch_15%2FM_Crim_JI_15_2_Operating_While_Intoxicated_OWI.htm
23. https://academic.oup.com/jat/article/42/7/e65/4989296

Safer Roadways through CDL and CMV Enforcement *(continued from page 4)*

prosecutors, and courts "to determine the threat posed by that driver and what remedial actions should be taken to correct [their] poor driving. Driver's histories are also relevant to those handling impaired driving cases, as well as serious or fatal crashes caused by impaired or reckless driving."[16] Further, potential employers rely on motor vehicle histories for CDL holders in order to make decisions regarding hiring, firing, and disciplining employees.

The goal of traffic enforcement is safer roadways. Traffic enforcement achieves this goal in two ways: driver deterrence and discipline. Drivers who receive citations for bad driving behaviors ideally are deterred from continuing that behavior. In addition, motorists who observe other drivers being pulled over or cited for their behavior may also be deterred. This secondary deterrence is the concept behind high-visibility enforcement programs. Driver discipline occurs through state regulations that impose sanctions on drivers convicted of bad driving behaviors. Many states have rules that impose a suspension or withdrawal of operating privileges if the motorist accumulates a certain number of points on their driving record or obtains too many speeding convictions within a certain period. SDLAs can impose this penalty because data systems allow the ticket number to be connected to the driver's motor vehicle record via a motorist's identification number.

For CDL holders, this system is even more important, because in addition to SDLAs tracking the driver's motor vehicle identification number, SDLAs must also connect this driver by linking two other critical pieces of information that a police officer typically provides: the type of license the driver holds and the type of vehicle the driver is operating. An officer, once determining a ticket will be issued, should indicate on the citation that the motorist who committed the offense has a CDL (the type of license the driver holds) or that the offense occurred in a CMV (the type of vehicle the driver was operating). If the ticketing officer notes this information at the roadside, the conviction for that offense should be connected to the driver's record by the SDLA, leading to the proper sanctions (suspension or disqualification of CDL privileges). In this way, the goal of a safer roadway is achieved because a problem driver is removed from the road.

Former FMCSA administrator Raymond Martinez once said, "We all own safety."[17] To achieve the goal of zero highway deaths by 2050, effective traffic enforcement for all drivers and vehicle types must occur. Therefore, it is imperative for non-CVE officers to realize that their role at the roadside can make a dramatic impact on the conviction reporting process and, by extension, overall traffic safety.

The National District Attorneys Association's National Traffic Law Center (NTLC) is a resource center for prosecutors, law enforcement officers, judges, and other stakeholders in the criminal justice system. "The mission of NTLC is to improve the quality of justice in traffic safety adjudications by increasing the awareness of highway safety issues through the compilation, creation, and dissemination of legal and technical information, and by providing training and reference services." The NTLC accomplishes its mission in large part through funding provided by the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier Safety Administration (FMCSA).

Romana Lavalas has worked as a senior attorney for the National District Attorneys Association's, National Traffic Law Center since 2017. She provides education and technical assistance to prosecutors, judges, law enforcement and other allied professionals and develops resource materials addressing commercial drivers' license issues in the criminal justice system.

16. Peter Grady et al., *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations*, 2nd ed. (Arlington, VA: National District Attorneys Association, 2017), 41.
17. Collaboration the Key to Safety, FMCSA's Martinez Says at ATA Conference, *The Trucker*, October 7, 2019.

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The Yellow Light Legal Update

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

Published Cases

Michigan Court of Appeals

Defendant appealed by leave granted the circuit court's order denying defendant's application for leave to appeal the district court's denial of his motion to allow him to use medical marijuana while on probation.

The COA futher held, "... the revocation of probation upon the MMMA-compliant use of marijuana constitutes a "penalty" in violation of MCL 333.26424(a) of the MMMA."

The facts are that the defendant was involved in a road-rage incident for which he was charged with assault and battery, MCL 750.81. He ultimately pleaded guilty and was sentenced to one year of probation. As a condition of probation defendant was not to use marijuana, including medical marijuana.

Defendant filed a motion to modify the terms of his probation to allow him to use medical marijuana. The district court denied defendant's motion to modify the terms of his probation. The Circuit Court denied leave to appeal. The Court of Appeals (COA) granted the defendant's leave.

On appeal to the COA, the defendant argued that revoking his probation upon the use of medical marijuana would constitute the imposition of a "penalty" in violation of MCL 333.26424(a)4 of the MMMA. Defendant also argued that MCL 333.26427(e) of the MMMA overrides the Michigan Probation Act, MCL 771.1 et seq., prohibiting the imposition of such a condition. The People argued the district court had the ability to place restrictions on a defendant's medication. The COA agreed with the defendant.

The COA noted the following: "The MMMA provides that '[t]he medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act,' MCL 333.26427(a), and '[a]ll other acts and parts of acts inconsistent with this act do not apply to the medical use of marijuana as provided for by this act.' MCL 333.26427(e). The immunity provision of the MMMA, MCL 333.26424(a), provides in pertinent part that '[a] qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act . . . .'

The COA further held, "[t]provisions of the Michigan Probation Act that allow a court to prohibit a probationer's MMMA-compliant use of marijuana impermissibly conflict with MCL 333.26427(a) and (e) of the MMMA and are unenforceable. Further, the revocation of probation upon the MMMA-compliant use of marijuana constitutes a "penalty" in violation of MCL 333.26424(a) of the MMMA."

Therefore, the COA concluded, "[t]he district court erred in prohibiting defendant from MMMA-compliant marijuana use as a term of his probation and defendant's motion to modify the terms of his probation to allow him to use medical marijuana should have been granted."

Reversed.

People v. Thue, No. 353978, decided on February 11, 2021

After leaving a 2018 Christmas day gathering at approximately 6:20 p.m., defendant lost control of his car and slid off the roadway. Defendant then "backed down [an] embankment" and into a "flat area" that turned into a field. Defendant spent the next 30 to 35 minutes attempting to return his car to the roadway. Unable to extricate his car, a tow truck driver was called to assist him. Shortly after the tow truck driver arrived at the scene, he called the police because he suspected that defendant was intoxicated. The Manistee County Sheriff's Office dispatched Sergeant Paul Woroniak to the scene at 7:08 p.m. He arrived approximately ten minutes later and saw defendant's car stuck "in the ditch," five to 10 feet from the roadway.

Sergeant Woroniak suspected that defendant was intoxicated. He noted that defendant smelled like alcohol, had "bloodshot and watery" eyes, and had "labored" speech. After defendant denied that he had consumed alcohol, Sergeant Woroniak attempted to administer a field sobriety test to defendant, but abandoned the test because defendant was not following his instructions. About this time, defendant showed Sergeant Woroniak "his badge" "[a]nd inquired if anything could be done." Undeterred, Sergeant Woroniak continued his investigation. Defendant consented to a PBT at the scene. The PBT result showed an unlawful blood alcohol concentration (BAC) of 0.109.

Sergeant Woroniak informed defendant that the PBT result suggested that defendant was operating his vehicle over the legal limit. In response, defendant told Sergeant Woroniak "that he was going to lose a quarter of his pay," and defendant again asked him "what could be done." Sergeant

Woroniak placed defendant under arrest for operating while intoxicated, MCL 257.625(1), and transported defendant to a hospital where his blood was drawn at 8:08 p.m. The chemical test revealed that defendant's BAC was 0.152 grams of alcohol per 100 milliliters of blood. Defendant was then charged with operating while intoxicated.

In preparation for trial, defendant retained an expert, Ronald Henson, who would testify that, at the time defendant was operating his vehicle on the roadway, his BAC was likely below the legal limit and increased above the legal limit after the crash. Specifically, the expert believed that "at all relevant times prior to about 7:10 p.m., [defendant's] blood-alcohol concentration would be expected to be less than the per se level of 0.080g/dL" required for a conviction. Defendant asserted that his PBT result must be admitted at trial because the result supported his rising BAC defense.

The district court decided several motions that are at issue in this appeal. Specifically, the district court granted the prosecutor's motion to exclude any reference to the PBT result at trial under MCL 257.625a(2)(b). The district court denied defendant's motion requesting the court to hold that the area where defendant's car was found was not "generally accessible to motor vehicles" under MCL 257.625(1). Lastly, the court denied defendant's motion to exclude any reference to defendant's occupation and his display of a "badge" under MRE 401 and MRE 403.

First, the defendant argued the district court erred when it excluded "[t]he PBT because the application of the evidentiary statute—MCL 257.625a(2)(b) — unreasonably offends [his] [c]onstitutional right to present a complete defense." His argument was twofold. He first argued that MCL 257.625a(2)(b)'s restrictions are arbitrary. The COA disagreed.

The COA noted, "[t]his Court has previously held that '[t]he long-range goal of the drunk driving laws is to reduce the carnage caused by drunk drivers by preventing intoxicated persons from driving.' *People v Tracy*, 186 Mich App 171, 179; 463 NW2d 457 (1990). Additionally, this Court has concluded that the Legislature's 'purpose of the PBT use restrictions seems to be to prevent unwarranted convictions based solely on evidence obtained from a testing system which is comparatively unreliable; the breath, blood, and urine test to which all drivers impliedly consent are more accurate and may be administered in more controlled environments than PBTs.'"

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The defendant also argued that MCL 257.625a(2)(b) is disproportionate because the statute's exceptions favor the prosecution. The COA disagreed and held that "[i]n MCL 257.625a, the Legislature equalized how both defendants and the prosecution can use PBT results. The plain language of the statute treats defendants and the prosecutors the same: neither may use PBT results, unless the result rebuts certain testimony regarding the defendant's BAC at the time of the offense. MCL 257.625a(2)(b)(ii) and (iii)."

Next, the COA considered whether the application of MCL 257.625a(2)(b) in this case would deprive defendant of his constitutional right to present a complete defense. The COA disagreed and held, "[w]hile the PBT result may be helpful to the defense, defendant—like defendants before him—may still present expert testimony that his BAC was lower at the time he was driving because his BAC was increasing as the evening continued. He simply may not use his PBT result to do so. Therefore, we conclude that defendant is not deprived of the meaningful opportunity to present a complete defense. Consequently, the district court did not err when it held that the PBT result is inadmissible as substantive evidence under MCL 257.625a(2)(b)."

Defendant also argued the PBT results are admissible under MRE 702 and MRE 703 and that MRE 702 and MRE 703 prevail over MCL 257.625a(2)(b). The COA disagreed. The COA held, "[t]here are legitimate policy reasons underlying the Legislature's decision to allow admission of PBT results only in limited circumstances. Therefore, even to the extent that MCL 257.625a(2)(b) irreconcilably conflicts with MRE 702 and MRE 703, MCL 257.625a(2)(b) prevails."

The defendant next argued the district court erred by denying his motion to dismiss his criminal charge because, under the plain language of MCL 257.625(1), his vehicle was not found in an area that was "generally accessible to motor vehicles." The COA disagreed and stated the following: "[t]he district court did not err by concluding that the field where defendant's vehicle was found was generally accessible to motor vehicles. Although it appears to be undisputed that there were some obstacles, such as bushes lining the uncultivated field, it is clear that defendant was nonetheless able to access the field without extraordinary effort. Specifically, defendant testified that, after he slid on the snow into the brush on the edge of the travelled portion of Chrestensen Road, he backed his vehicle down an embankment and onto the flat area that became a field. Indeed, the photographs that were taken by defendant and admitted into evidence do not depict any objects that would prevent a vehicle from entering the field. Thus, there was nothing in the area that prevented defendant's vehicle from entering the field."

Finally, defendant argued the the district court improperly denied his motion to exclude any reference to his occupation at trial. The COA disagreed.

The COA held, "[t]hat, contrary to defendant's assertions, his statements and actions are relevant to proving his consciousness of guilt. In this case, a jury could infer from defendant's conduct that defendant knew he was unlawfully operating a vehicle while under the influence. Defendant's conduct and statements could also support an argument that he was attempting to curry favor with law enforcement and influence the investigation's outcome to avoid arrest. Therefore, we conclude that defendant's conduct of displaying his badge and his statement whether 'something could be done' are relevant."

Affirmed.

People v Parrott, No. 350380, decided February 4, 2021

Unpublished Cases

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

Defendant was convicted of operating while under the influence, third offense, MCL 257.625. Defendant appealed as of right, arguing that evidence at trial was insufficient to show that he was operating the vehicle. The Court of Appeals disagreed.

In the early hours of June 3rd, 2018, a motorist was nearing his home when he had to drive around a vehicle that was obstructing his lane of travel. The motorist observed a person slumped in the driver's seat and notified the police. The police arrived to find defendant asleep in the driver's seat, and woke him. Defendant was visibly impaired and failed a field sobriety test. Defendant stated that he was unsure how the vehicle had arrived at this location before stating that his daughter had been driving. His blood alcohol level was determined to be .227 grams of alcohol per 100 milliliters of blood. At trial, defendant stated that he had been asleep for approximately four hours in the vehicle. Defendant claimed that he had walked to the location to secure the van after a friend, who had been loaned and was driving the van, called to tell him that it had broken down and that he was leaving it. Defendant claimed that he wanted to make sure tools in the van were secure.

In reaching its decision, the Court of Appeals relied on *People v. Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), in which the Michigan Supreme Court held that a person sleeping in a motionless car could "be held to be presently operating a vehicle while sleeping." In *Wood*, the Supreme Court reasoned that operating a vehicle "should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of an intoxicating liquor with other persons or property." *Id*. at 404.

In this case, the Court of Appeals held that the prosecutor presented sufficient circumstantial evidence to support, beyond a reasonable doubt, that defendant had operated the vehicle while intoxicated and had yet to put the vehicle in a position posing no significant risk of collision. The Court of Appeals stated the following: "[t]he vehicle was in a location that created a significant risk of a collision. It had come

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to rest in a driving lane, a hundred yards from a stop sign. The motorist who alerted the police had to drive around the vehicle because it obstructed the lane of travel. The vehicle was not running and there was evidence that only its parking lights were on. Moreover, keys were in the vehicle's ignition. This evidence demonstrated that someone had operated the vehicle."

Affirmed.

People v. Zagorodnyy, No. 349778, Decided on December 22, 2020

Defendant appealed as of right his jury trial convictions for operating while intoxicated-third offense and driving while license suspended.

The case arose out of a traffic crash involving a Dodge Journey and a GMC Yukon. The driver of the Journey testified at trial that she saw defendant get out of the driver's seat of the Yukon after the crash. She also testified that the only other person in the Yukon was a male. An officer who responded to the crash scene questioned defendant. The officer testified that defendant admitted being the driver of the Yukon.

At trial, defendant acknowledged telling the officer he was the driver, but asserted he was lying at the time to protect his sister to whom the Yukon was registered. Defendant admitted to being in the Yukon at the time of the crash and having a few drinks earlier that day. Despite his testimony, the jury convicted defendant on both counts.

On appeal, defendant argued there was insufficient evidence of identity. The Court of Appeals (COA) disagreed.

The COA stated, "[t]he prosecution offered two witnesses on this issue: Harris and Chavies. Harris identified defendant as the driver of the Yukon. She testified that she saw defendant exit the Yukon from the driver's seat. Harris also testified that she did not see a woman exit the Yukon. Chavies testified that defendant admitted to being the driver of the Yukon."

The COA further noted, "[v]iewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support a finding that defendant was driving the Yukon. It was the jury's responsibility to evaluate the credibility of the witnesses, weigh the evidence, and determine what the facts of the case were."

Affirmed.

People v Carswell, No. 349970, decided December 29, 2020

Defendant was convicted by a jury of OWI Causing Death and OWI Causing Serious Impairment. The crash occurred in February 2018 in Oakland County. Defendant lost control of his Ford Edge on a two-lane road, crossed the centerline, and collided head-on with a Ford Fiesta. Both heavily-damaged vehicles came to rest in the middle of the traffic lane. There were no working lights, and it was dark outside. The road was covered by a dusting of snow. The two individuals in the Fiesta were gravely injured and trapped inside their vehicle. A Good Samaritan in a Jeep Wrangler stopped and turned on his hazard lights to alert oncoming motorists of the two vehicles laying in the middle of the lane. Unfortunately, it did not work. A motorist in a Buick LeSabre did not see the vehicles until the last second, was unable to avoid the crash scene, and collided into the back of the Fiesta. The female in the Fiesta later died in the hospital and the male's feet

were "totally crushed." Defendant's blood, which was taken three hours after the crash, revealed a blood alcohol content of .130.

"The linchpin in the superseding cause analysis . . . is whether the intervening cause was foreseeable based on an objective standard of reasonableness."

On appeal, defendant argued that the second collision involving the Buick supported a jury instruction on intervening and superseding causation, and that the trial court abused its discretion in denying his request for such an instruction. At trial the court instructed the jury on the elements of OWI causing death, M Crim JI 15.11, and OWI causing serious impairment, M Crim JI 15.12, which explained the concepts of factual and proximate cause. Defendant argued that these instructions were inadequate because the second collision with the Fiesta was an intervening cause of the victims' harm that superseded his criminal conduct. Thus, defendant argued he was entitled to have the jury further instructed that "[y]ou may find that a superseding act, not the defendant's operation, was the cause of the victims[']' death/serious injury only if there is gross negligence or intentional misconduct."

The Court of Appeals disagreed and held that to warrant this instruction, there must be evidentiary support from which the trier of fact could reasonably conclude that the second collision broke the causal link between defendant's collision and the victims' harm.

The Court of Appeals relied on two cases in providing guidance in determining if the evidence warrants this instruction: *People v Bailey*, 451 Mich 657; 549 NW2d 325 (1996); and *People v. Schaefer*, 473 Mich 418; 703 NW2d 774 (2005).

The Court of Appeals found the following rulings from *Bailey* instructive:

- "In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found."
- "Where an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm."

The Court of Appeals also applied the following analysis from *Schaefer* to its decision in this case:

- "The linchpin in the superseding cause analysis . . . is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., gross negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death."

Applying the above to the facts in this case, the Court of Appeals held that the trier of fact could not reasonably conclude from the evidence that the second collision constituted the sole, intervening cause of death/injury. Rather, the court found that the only reasonable conclusion from the evidence presented was that defendant's head-on collision with Ford Fiesta was a substantial factor in producing the resultant harm, if not the exclusive cause. That evidence included the following:

- The front end of the Fiesta was so "compressed" after the head-on collision that the victims were trapped inside.
- A crash reconstructionist testified at trial that defendant's head-on collision was so severe it would normally result in death or serious injury because it involved two moving vehicles that came to a "violent abrupt stop" in milliseconds.
- The Buick collided with the victims' rear passenger side with less velocity and force because the Fiesta was stopped.

Finally, the Court of Appeals stated that there was no evidence to suggest that the second collision with the Fiesta was unforeseeable or that the driver's conduct was grossly negligent to break the causal chain between defendant's conduct and the victims' harm.

People v. White, No. 351017, Decided on February 18, 2021

Defendant appealed as of right his jury trial convictions of operating a vehicle while intoxicated or impaired by alcohol or a controlled substance, third offense (OWI), possession of a controlled substance under 25 grams, driving with a suspended license (DWLS), and failure to report an accident.

This case arose from a motor vehicle crash. Defendant drove his girlfriend's vehicle off US-31 and into a ditch while having a blood alcohol level over twice the legal limit. Another motorist called 911. Police officers responded to the scene, and arrested defendant and took him to the hospital.

An evidence technician examined the vehicle and collected evidence, including blood from the driver's side airbag which was later shown to be that of defendant. There was no indication that a second person had been in the vehicle. The vehicle was unoccupied when the evidence technician arrived, and there was only one set of footprints in the snow outside the car. The technician also found mail addressed to defendant in the glove compartment, and some white powder later confirmed to have been 1.643 grams of cocaine in a baggie in the cup holder. Defendant did not challenge his OWI conviction on appeal.

Defendant first argued the evidence of possession was insufficient because he did not have physical possession of the cocaine

and plaintiff failed to establish constructive possession. The Court of Appeals (COA) disagreed.

The Court noted, "[d]efendant did not physically possess the cocaine, but the circumstantial evidence established that he had been in close proximity to it before he left the vehicle."

The Court further noted, "[t]he evidence reflected that defendant was the only person in control of the vehicle at the time of the accident. His presence in the vehicle was established by the blood DNA evidence on the airbag, establishing that he was the driver. Only one set of footprints led away from the vehicle. Additionally, he ran when an officer found him coming out of the ditch, yet defendant claimed that he fell while out for a walk."

Lastly, the Court stated, "[h]is possession of the vehicle was further established by the fact that his mail was in the vehicle and by the testimony of his girlfriend that both he and the vehicle were present at their home when she left for work and both were gone when she returned. And while her children had access to the vehicle, she also testified that neither drove the vehicle that evening. She further testified that she did not put the cocaine in the car, and it was not hers."

Therefore, the Court held, "[w]here defendant was the sole occupant of the vehicle at the time of the accident, gives rise to a reasonable inference that he had dominion and control over the cocaine in the cup holder."

Next, the defendant next argued the evidence was insufficient to support his conviction of DWLS because he did not receive notice from the Secretary of State informing him of the suspension. In essence, the defendant argued the notice effect is still in effect for the crime of DWLS because it also appears in MCL 257.212. The COA disagreed.

The Court noted, "[t]here is no conflict between the legislature and the courts in this case. The legislature clearly stated its intention, both when it made notice an element of the statute and when it amended that statute in 2015 to eliminate the notice element."

The Court further held that, "[t]here is no notice requirement within this section, whose plain language instead explains how notice is to be given when the secretary of state is required to do so. Because the secretary of state is no longer required to give notice under MCL 257.904(1), the methods set forth in MCL 257.212 are not implicated."

Therefore, the Court held "[t]he trial court erred when it included the notice requirement element in the jury instructions for the DWLS charge in this case."

Next, the defendant argued MCL 257.622 is unconstitutional to the extent that it required him to incriminate himself by reporting that he was involved in an accident in which he was the only person injured. The COA disagreed.

The Court held "[b]ecause the current version of this statute also precludes the use of the required report in any court action, it does not deny any person his or her constitutional privilege against self-incrimination."

Affirmed.

People v Delarosa, No. 351883, decided February 25, 2021.

New Laws

Criminal Justice Reform

A bipartisan criminal justice reform package was passed in December 2020. Some of the new laws will affect OWI investigations and prosecutions. For a complete analysis of the new legislation put together by the State Court Administrator's Office, please click on this link: https://courts.michigan.gov/News-Events/Documents/JTF-LegislativeAnalysis.pdf

Michigan Vehicle Code

The Michigan Vehicle Code amended to eliminate the requirement to provide an audible signal when overtaking another vehicle.

Public Act 263 of 2020, effective March 29, 2021, amended MCL 257.636 of the Michigan Vehicle Code to require that except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right

in favor of the overtaking vehicle and shall not increase the speed of his or her vehicle until completely passed by the overtaking vehicle.

Previously, the driver of the overtaken vehicle was not required to give way to the right in favor of the overtaking vehicle unless the overtaking vehicle gave an "audible signal" to the overtaken vehicle.

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.

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