



THE DOCKET

Newsletter of the Michigan Association of District Court Magistrates

Fall 2010

THE AFTERMATH OF PEOPLE V. FEEZEL

Submitted by Kenneth Stecker, Traffic Safety Resource Prosecutor, PAAM

On June 8, 2010, the Michigan Supreme Court ruled that it is not illegal to drive while having marijuana metabolites (11-carboxy-THC) in the body, reversing *People v. Derror*, 475 Mich. 316 (2006). *People v. Feezel*, 486 Mich. 184 (2010). The *Feezel* Court held that marijuana metabolites are not a controlled substance under state law, and their mere presence cannot be the basis of a conviction under the state's law prohibiting the operation of a vehicle with any presence of a schedule 1 drug.

The Court stated that "11-carboxy-THC is not a schedule 1 controlled substance under MCL 333.7212 [controlled substances act] and, therefore, a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his or her system."

In the opinion, the Court noted that Michigan is now a medical marijuana state and that allowing *Derror* to stand would unfairly impact medical marijuana patients. The Court stated as follows:

"Moreover, in 2008 the People of the State of Michigan legalized the use of marijuana in limited circumstances. The Michigan Medical Marijuana Act declared that "changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marijuana." MCL 333.26422(b).

Under the majority's interpretation of the statute in *Derror*, however, individuals who use marijuana for medicinal purposes will be prohibited from driving long after the person is no longer impaired. Indeed, in this case, experts testified that, on average, the metabolite could remain in a person's blood for 18 hours and in a person's urine for up to 4 weeks. As a result, "long after any possible impairment from ingesting marijuana has worn off, a person still cannot drive according" to the *Derror* majority's interpretation of the statute.

Thus, under *Derror*, an individual who only has 11-carboxy-THC in his or her system is prohibited from driving and, at the whim of police and prosecutors, can be criminally responsible for choosing to do so even if the person has a minuscule amount of the substance in his or her system. Therefore, the *Derror* majority's interpretation of the statute defies practicable workability given its tremendous potential for arbitrary and discriminatory enforcement."

Also, footnote 16 in the majority's opinion reads as follows:

"We do not, as the partial dissent suggests, imply that the legalization of marijuana for a limited medical purpose is "equated with an intent to allow its lawful consumption in conjunction with driving" or that marijuana itself should no longer be

on the list of schedule 1 controlled substances. We merely note that, under the *Derror* holding, those qualified individuals who lawfully use marijuana in accordance with the Michigan Medical Marihuana Act are prohibited from driving for an undetermined length of time given the potential of 11-carboxy-THC to remain in a person's system long after the person has consumed marijuana and is no longer impaired."

What this decision may mean in the future?

An operator can still be prosecuted for operating while intoxicated or impaired by the ingestion of marijuana. If the chemical test shows the presence of THC, as opposed to just the presence of 11-carboxy-THC, he or she can also still be prosecuted for operating with the presence of a schedule 1 controlled substance. However, if the Michigan State Police Laboratory finds only 11-carboxy THC in the driver's system, then the prosecutor will have to use other evidence to show that the defendant was under the influence of marijuana.

Similar to an OWI with alcoholic liquor where there is no chemical test result, this type of case will have to be proven by other means such as witness statements, calculation as to how long ago the THC might have been present, the manner of driving, and the physical and mental conditions of the defendant at the time of driving.

This is the very reason why the Michigan Office of Highway Safety Planning with the assistance of the Michigan State Police and the Prosecuting Attorneys Association of Michigan will continue to offer Advanced Roadside Impaired Driving Enforcement (ARIDE) training to law enforcement officers and prosecutors.

ARIDE is an impairment based approach training to drugged driving. Decisions such as *Feezel* will lead to an increased emphasis on these impairment-based approaches. ARIDE courses are planned at the Michigan State Police Academy. Please contact Sergeant Michelle Robinson of the Michigan

State Police at 517-322-1507 for information.

For more information on these cases and statutes and PAAM training programs, contact Kenneth Stecker, Traffic Safety Resource Prosecutor, at (517) 334-6060 or e-mail at steckerk@michigan.gov. Please consult your prosecutor before adopting practices suggested by reports in this article. Discuss your practices that relate to these statutes with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practices in reliance on a reported change.

MICHIGAN SPEED MEASUREMENT DEVICE OPERATORS

Submitted by Sgt. Mike Church, MSP

Effective January 01, 2010, the separate certifications for "RADAR operators" and "LIDAR (Light Detection and Ranging) operators" ceased to exist. These certifications have been replaced by the designation "speed measurement device operator." The new certification encompasses both RADAR and LIDAR certification. Obviously, having one certification instead of two streamlines the certification process.

This change only affects newly certified officers. Previously certified officers are grandfathered in, and they continue to be certified to operate whatever speed measurement devices they were trained to use.

The Michigan Commission on Law Enforcement Standards (MCOLES) is responsible for establishing the standards for speed measurement certification. When developing the new certification standards, MCOLES worked with the Office for Highway Safety and Planning with input from the Prosecuting Attorneys Association of Michigan, the Michigan Judicial Institute, the Michigan State Police

Traffic Services Division, and the Michigan Association of District Court Magistrates.

While the new standards formalize, streamline, and professionalize speed measurement, some questions and concerns have arisen about how the new standards may impact informal hearings. In all reality, the new standards should have very little impact on traffic hearings.

People v Ferency, 133 Mich App 526 (1984), established the requirements for admitting RADAR evidence at a judicial hearing. One requirement is that the officer must be adequately trained and experienced in the use of the radar. MCOLES certification satisfies this requirement. Previously, officers had to be able to testify that they were “certified radar operators.” Testimony that an officer is a “certified speed measurement device operator” now serves that purpose. MCOLES also conducts certification for LIDAR use. Again, an officer who testifies that he or she is a speed measurement device operator is certified for LIDAR.

Since MCOLES does not issue a certification card, an officer’s certification is established by that officer’s testimony, and it is the responsibility of each officer to maintain his or her certification. Officers are required to “[m]aintain 100 hours of speed measurement enforcement per year (records to be maintained by the agency).” Normally, a “road” officer will easily meet this requirement during routine patrols. However, there may be exceptions. For example, if an officer has been off duty for several months due to illness, injury, disciplinary action, or educational leave, the magistrate may wish to ask if that officer has met the 100-hour requirement. Magistrates may also wish to make similar inquiries in the rare instance where a desk supervisor, undercover officer, or administrator issues a citation.

Speed measurement device operators are required to recertify once every five years. They can do so by attending update training, by taking a test, or by demonstrating proficiency. It is the responsibility of each officer, or the officer’s department, to ensure that the officer meets this requirement. The five-year requirement will not

be an issue for several years because this process began in 2010. However, magistrates may wish to inquire about the five-year requirement beginning in 2015.

So, an officer’s testimony that he or she is either a certified RADAR operator (grandfathered), a certified LIDAR operator (grandfathered), or a speed measurement device operator will usually be sufficient. But, as discussed, there are some circumstances where a magistrate should ask the officer about the 100-hour rule or the five-year rule. If there is any doubt or concern then the magistrate should ask. It is always better to err on the side of caution.

Sgt. Mike Church is the Traffic Law Resource and Education Unit at MSP, now filling the position previously held by Sgt. Lance Cook, sometimes called the “Traffic Law Guru.” His duties include legislative analysis and vehicle code education. He is a 2008 Thomas M. Cooley Law School graduate and was admitted to the Michigan Bar in 2009. If you have any questions about speed measurement certification, please email him at churchma@michigan.gov.

SOS Error in 2011 License Plate Tabs

From
MSP_TRAFFIC@LISTSERV.MICHIGAN.GOV

A Trooper at the MSP Rockford post has encountered 50 vehicles this year that had license plates with a yellow 2011 expiration tab. 2011 tabs should be orange, not yellow. Yellow tabs should have 2010 expiration.

Representatives from the Secretary of State have confirmed that expiration tabs are color-coded to assist police officers. Yellow tabs should not be used for 2011 expiration tabs. SOS also explained that each SOS branch

keeps blank expiration tabs at the branch. A branch may have inadvertently used yellow tab stock when printing out some 2011 tabs.

Officers who encounter yellow 2011 tabs should e-mail the license plate number to Sgt Church at Traffic Services (churchma@michigan.gov). SOS has requested these license plate numbers so that they can determine where and how this error occurred.

NOTE: Officers should not confiscate or destroy these license plates. These are valid license plates, and the owner of the vehicle is not to blame for this error.

For a chuckle...

Submitted by Magistrate Norene Kastys
86th District Court, Suttons Bay

Letter of explanation from an elderly couple after receiving a DNR ticket for Leaving/Storing Property on DNR Bottomland:

"To Whom It May Concern:

We are a couple in our late 60's and 70's. In August we purchased an old 1970's aluminum fishing boat with a Janson 20 Horsepower motor. We have sunk it twice, sheared 4 prop pins, had to have the gear box replaced, the battery was not working and the trailer was towed. All these issues and we have only got our bait in the water on three occasions, and have had only one batch of perch for dinner.

If we are so inept at handling this 14 foot fishing boat, how in the world would we have even the slightest clue about the DNR regulations regarding, leaving the trailer at a launch overnight. We just assumed that while the boat was sunk, and until we could get it up and running to pull it out of the lake, the trailer was just fine.

We do realize that lack of knowledge of the law is a pretty feeble excuse and as adults we should have been smart enough to check out the regulations and

laws about, 'boat trailer parking in a DNR launch site'. With all that being said we are petitioning the court to consider dropping the charges. Our single perch dinner is becoming more and more expensive but we are certainly not discouraged from yet again drowning our worms in Lake Leelanau.

Any consideration would be greatly appreciated."

Consideration for fines & costs was given.

Do you have a humorous, touching, or just plain bizarre letter or story to share? Email saspinall@twp.waterford.mi.us. Names will be withheld to protect the innocent, and the not-so-innocent, of course.

Resources and links of interest...

National Judicial College Traffic Issues for Judges and Adjudicators: A Self-Study Web Course

New or experienced traffic judges and adjudicators who would like a refresher on traffic issues can now access a new self-study web-based program. NJC, with funding from the National Highway Traffic Safety Administration (NHTSA), developed the web-based program. The program is offered free of charge but prospective participants must register.

The self-study course contains five modules on the following topics:

- Fourth and Fifth Amendments
- DUI
- Special Populations
- Unlicensed and uninsured drivers
- Commercial driver's licensing laws

The modules provide up-to-date information on each topic and provide learners with quizzes to gauge how well they learned the content. To complete the program and take the final exam only takes 8-10 hours. Learners have 30 days

in which to complete the program. Once the learners pass the final exam, they will receive certificates of completion.

To register for this invaluable course for new traffic judges, please complete NJC's course application. <http://register.judges.org> For questions about the course, contact Melody Luetkehans at 800-255-8343 or melody@judges.org.

(Thank you to Magistrate Jim Pahl, 55th District Court, for this information.)

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Cornell University Law School's Legal Information Institute provides the *liibulletin*, a free distribution of the syllabi of U.S. Supreme Court decisions, within hours after their release. For instructions explaining how to subscribe to the *liibulletin* publication go to: http://www.law.cornell.edu/focus/bulletins.html#HOW_LIIBULLETIN

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Drugs.com provides popular, comprehensive and up-to-date drug information online, including free, accurate and independent advice on more than 24,000 prescription drugs, over-the-counter medicines, and natural products.

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SCAO's Magistrate Manual is available online at <http://courts.michigan.gov/scao/resources/publications/manuals/magis.htm>

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If you have any resources you would like to share with your fellow magistrates, please email the details to saspinall@twp.waterford.mi.us.

2011 MAGISTRATE SPECIALITY SEMINAR

SAVE THE DATE!

Michigan Judicial Institute (MJl) is pleased to announce the date of the annual seminar for new and experienced district court magistrates. The seminar will be held from 9:00 a.m. to 4:00 p.m. on **Thursday, July 29, 2011** at the Michigan Hall of Justice in Lansing. Agenda to be announced.

MADCM 2010 Annual Conference

The 2010 Annual MADCM Conference was held September 22 – 24 at the Crystal Mountain Resort and Spa in Thompsonville, Michigan.

Peggy Leece from SOS and Jill Booth from SCAO presented information about new traffic legislation. Sgt. Perry Curtis from MSP and Kenneth Stecker from PAAM presented information about Advance Roadside Impaired Driving Enforcement and Drug Recognition Expert training (ARIDE/DRE) as well as an update on legal issues, including the Medical Marijuana Act, and the recent Court of Appeals decision, People v. Redden (Sept 14, 2010). Laura Hutzel from SCAO provided training on the judicial time study currently underway through the National Center for State Courts. Sgt. Lance Cook of Michigan State Police, in his farewell appearance for MADCM, presented current issues in traffic and speed measurement. Thank you for all of your help and input over the years, Lance!

Elections were held and results are as follows:

Officers (Term: 2011)

- **President:** Kevin McKay, 66th District
- **Vice President:** Norene Kastys, 86th District
- **Secretary:** James Pahl, 55th District

- **Treasurer:** Susan Wilson, 96th District
- **Immediate Past President:** Charles W. Anderson III, 36th District

Board of Directors (Two year terms - the year the term expires is provided.)

- Cora Gregory, 67-2A & B Districts (Term: 2011)
- Charity Mason, 96th District (Term: 2011)
- Millicent Sherman, 36th District (Term: 2011)
- Thomas Truesdell, 14-A District (Term: 2011)
- Dena Altheide, Director of Court Operations (Term: 2012)
- Sidney Barthwell, Jr., 36th District (Term: 2012)
- Robert Clark, Berrien County Trial (5th District) (Term: 2012)
- Jessica Testolin, 73B District (Term: 2012)

Questions? Have an article, announcement, or information you would like distributed in *The Docket*? Contact the editor:

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Magistrate/Research Attorney
51st District Court, Waterford (Oakland County)
Email saspinall@twp.waterford.mi.us
Phone: (248) 618-7611 (Joanne)
FAX: (248) 674-4476

Membership Benefit:
MADCM Google Group

In case you were not able to attend the 2010 MADCM Conference, please be aware that we have established a MADCM Google Group© for our association members. Association members can post questions (and answers) to other members of the association via email. The group is open to anyone who is a current District Court Magistrates (either full-time or part-time) and a current member of MADCM.

To apply, simply complete the attached application (page 7 of this newsletter) and send to Kevin McKay, MADCM President, jmckay@shiawassee.net. You will then be notified by email how to activate your account in the MADCM Google Group©. Please allow 7-10 business days to complete the application process.

By placing your name on the application form, you certify that you are currently a District Court Magistrate (either part-time or full-time) and a current member of MADCM.



Michigan Association of District Court Magistrates

Google Group® Application Form

The Michigan Association of District Court Magistrates is proud to announce the establishment of a Google Group® for our association members. This will allow association members to post questions (and answers) to other members of the association via email. This group is only open to persons who are both: (1) current District Court Magistrates (either full-time or part-time) and (2) current members of MADCM.

To apply, simply fill out the application below and return it to Magistrate Kevin McKay. You will then be notified by email how to activate your account in the MADCM Google Group®. Please allow 7-10 business days to complete the application process.

By placing your name on the application form, you certify that you are currently a District Court Magistrate (either part-time or full-time) and a current member of MADCM.

Name: _____ Court: _____

Address: _____

City: _____ MI Zip: _____

Phone: (_____) _____

E-mail address: _____

Send completed Application Form to:

Magistrate Kevin McKay
66th District Court
110 E Mack St
Corunna, MI 48817
(989) 743-2244
Email: jmckay@shiawassee.net