PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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The Impact of the New Standardized Field Sobriety Test Law on Police Officers and Prosecutors

By: Kenneth Stecker and Kinga Gorzelewski

The Standardized Field Sobriety Tests (SFSTs) are a battery of three tests performed during a traffic stop to determine if a driver is impaired.

The three tests that make up the SFSTs are the Horizontal Gaze Nystagmus (HGN), the Walk and Turn, and the One-Leg Stand tests. Developed in the 1970s, these tests are scientifically validated and admissible as evidence of impairment in Michigan courts.

According to researchers, officers trained to conduct SFSTs correctly identified alcohol-impaired drivers over 90% of the time using the results of SFSTs. Burns and Anderson 1995; Stuster and Burns 1998.

In 1981 the National Highway Traffic Safety Administration (NHTSA) promulgated a federal standard for field sobriety testing procedures. States are not required to adhere to this federal standard.

Admissibility of the HGN test may be treated differently due to its "scientific nature." For this reason, HGN results are vulnerable to challenge and may likely be excluded by a court if the test is not administered in strict compliance with established protocols.

The Michigan Court of Appeals has held that, before an officer is allowed to testify about HGN, it must be shown that he or she was qualified to perform the test (i.e. properly trained) and that the officer properly administered the test. *People v. Berger,* 217 Mich App 213 (1996).

In essence, Public Act 242 states that the police officer has to administer the tests in substantial compliance with NHTSA's standards.

On September 22, 2016, a new law took effect that may impact SFST testimony in Michigan.

Pursuant to Public Act 242 of 2016, a witness is allowed to testify to SFST results and how they relate to impairment if the witness is qualified by knowledge, skill, experience, training, or education.

The law also specifically states that the HGN is admissible under this provision by an officer trained to perform the test.

Furthermore, Public Act 242 will not preclude the admissibility of a non-standardized field sobriety test if it complies with the Michigan Rules of Evidence.

Under Public Act 242, "Standardized Field Sobriety Test" means one of the standardized tests validated by NHTSA. A field sobriety test is considered a SFST under this section if it is administered in **substantial compliance** with the standards prescribed by NHTSA.

In essence, Public Act 242 states that the police officer has to administer the tests in **substantial compliance** with NHTSA's standards.

Webster Dictionary defines "substantial" as follows: "Of or having substance, real actual, strong, solid, firm, of considerable worth or value; important."

Webster Dictionary defines "compliance" as follows: "A complying, or giving in to a request, wish, or demand; acting in accordance with a request, or a command, rule or instruction."

The Preface to NHTSA's Student Manual states as follows:

(Continued on page 7)

Inside this Issue

Let's Revisit the Traffic Stop Case of Rodriguez v. United States

By: Dave Hollenberg

On April 22, 2015, the United States Supreme Court announced its decision in *Rodriguez v. United States*,[1] holding that a police officer may not extend the duration of a completed traffic stop for a simple traffic violation in order to execute a drug-sniffing dog hit on a vehicle absent reasonable articulable suspicion of some other crime. *Rodriguez* represents a logical progression from recent Supreme Court Fourth Amendment jurisprudence, and may lead to a subtle, but important adjustment to law enforcement policy and practice. Prosecutors must be ready to counter suppression motions that the officer extended the traffic stop to look for criminal activity through inefficient police work.

Shortly after midnight in March 2012, K-9 Officer Morgan Struble observed the Defendant, Rodriguez, driving a vehicle that drifted onto the shoulder for one or two seconds, in violation of Neb. Rev. Stat § 60-6,142 (2010). Officer Struble stopped the vehicle and asked Rodriguez why he drove on the shoulder. Rodriguez replied that he was trying to avoid a pothole. Officer Struble performed a records check on Rodriguez while Rodriguez waited in his stopped vehicle. Struble walked back to the vehicle this time to speak to the passenger, and then returned to his cruiser to begin a records check on the passenger.

While performing the records check on the passenger, Struble radioed command to request a back-up officer, and then began writing a warning ticket for Rodriguez. He returned to the vehicle and explained the warning to Rodriguez. Struble testified at trial that once he had returned the Defendant's and passenger's documents, "I got all the reason[s] for the stop out of the way. . . . " Nevertheless, Struble asked Rodriguez to consent to a K-9 scan of his vehicle. Rodriguez refused. Struble ordered Rodriguez to turn off the engine, exit the vehicle, and stand by the police cruiser. Thirty minutes after the stop began, the back-up officer arrived. Struble retrieved the K-9 and walked the dog around Rodriguez' vehicle.

The majority found that this extended detention violated Rodriguez' Fourth Amendment protection from unreasonable seizures.

On the second pass around vehicle, the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine. Rodriguez was arrested and indicted on a single count of possession with intent to distribute 50 grams or more of methamphetamine. Rodriguez moved to suppress the evidence seized from the vehicle on the grounds that Officer Struble had extended the length of the traffic stop without reasonable suspicion to perform the K-9 scan.

The Magistrate Judge that heard the motion recommended that the District Court deny it, finding that though Officer Struble had no reasonable suspicion to detain Rodriguez further, the detention was a *de minimis* intrusion on Rodriguez' Fourth Amendment rights, and was therefore permissible. Accordingly, the District Court denied Rodriguez' motion, and in doing so, noted that the seven to ten minute extension of the stop did not amount to a constitutional violation. Rodriguez pled guilty but appealed the ruling on his motion. The Eighth Circuit affirmed. The Supreme Court granted certiorari, seeking to resolve a long-standing circuit split on the issue of whether police may extend an otherwise completed traffic stop absent reasonable suspicion of a crime.[2]

Writing for the majority, Justice Ginsburg acknowledged *Illinois v. Caballes*, where the Court held that a traffic stop can include an investigatory dog sniff separate from the initial rationale for the stop.[3] However, Ginsburg wrote that in *Caballes* the Court indicated that a roadside detention "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission . . . ."[4] The mission in this case was to issue a traffic warning for driving on the shoulder. Rodriguez was detained for an additional seven to ten minutes following the completion of the traffic stop. The majority found that this extended detention violated Rodriguez' Fourth Amendment protection from unreasonable seizures.[5]

The majority also squares its rationale with its prior Fourth Amendment jurisprudence, most notably *Pennsylvania v. Mimms*[6] and *Maryland v. Wilson*.[7] While the Eighth Circuit relied heavily on the holding in *Mimms*, which balanced a police officer's need for safety with the defendant's right to remain in a vehicle, the majority highlighted the difference between "ordinary inquiries incident to the traffic stop"[8] and conducting a dog sniff, which is a device designed to investigate potential criminal activity.[9]

In doing so, the majority acknowledges that this case highlights the distinction between a stop for a simple traffic violation, and a *Terry*

1. No. 13-9972, 2015 WL 1780927 (U.S. 2015).
2. Compare, *e.g., United States v. Morgan*, 270 F.3d 625 (8th Cir. 2001) (allowing a delay of ten minutes after a traffic stop), with *State v. Baker*, 229 P. 3d 650, 658 (2010) (prohibiting any extension).
3. 543 U.S. 405, 407 (2012).
4. *Id*.
5. *Rodriguez*, No. 13-9972, 2015 WL 1780927, at *6.
6. 434 U. S. 106 (1977) (per curiam).
7. 519 U. S. 408, 413 (1997) (holding that police may require passengers to exit a vehicle that has been stopped for a traffic violation).
8. *Rodriguez*, No. 13-9972, 2015 WL 1780927, at *6 (citing *Delaware v. Prouse*, 440 U. S. 648, 658–660 (1979)) (suggesting that typical inquiries may include license checks, warrant checks, and insurance/registration checks).
9. *See Indianapolis v. Edmond*, 531 U. S. 32, 40–41 (2000).

stop where there is reasonable suspicion of criminal activity.[10] Ginsburg emphasizes that the basic mission of a traffic stop should be to ensure traffic and officer safety; further inquiry on the part of the officer requires reasonable suspicion. Because the Eighth Circuit did not decide whether or not Officer Struble had formulated reasonable suspicion sufficient to continue detaining Rodriguez, the majority did not make a finding as to this issue, and remanded the case for further consideration.

In dissent, Justice Thomas (joined by Justice Alito, and in part by Justice Kennedy) fervently disputes the majority's reasoning on a number of fronts, most notably its perceived divergence from Fourth Amendment precedent.[11] Thomas stresses that the majority has decided to stray too far from the *Caballes* holding, which indicates the stop was "lawful at its inception and otherwise executed in a reasonable manner."[12]

For Thomas, performing a dog sniff is functionally similar to asking questions of a defendant as part of routine police investigation.[13] Additionally, Thomas is concerned that the logic of the decision contradicts the court's holding in *Whren v. United States*,[14] and would disadvantage officers based on their physical and mental characteristics. Justice Alito's sole dissent raises many of the same issues, but he and Thomas agree that Officer Strubel had reasonable suspicion to detain Rodriguez, based on an "overwhelming odor of air freshener" and the fact that to Officer Strubel, Rodriguez's passenger appeared to be nervous.[15]

Both the majority and the dissent allude to, but fail to directly address, the Court's holding in *United States v. Place*.[16] This decision may signal a shift away from that strain of Fourth Amendment jurisprudence. *Place*, at the time of its decision, represented a significant extension of the classic "reasonable expectation of privacy" test. The Court held that a dog sniff is not a "search" under the Fourth Amendment.

(Continued on Page 8)

10. *See Navarette v. California*, 134 S. Ct. 1683 (2014) (holding that an anonymous tip can be enough to allow a police officer to form reasonable suspicion that a crime [driving while intoxicated] was being committed).
11. *See*, *e.g, Brigham City v. Stuart*, 547 U. S. 398 (2006) (holding that reasonableness is the most important Fourth Amendment consideration); *Ohio v. Robinette*, 519 U. S. 33 (1996) (holding that courts must examine Fourth Amendment cases through a totality of the circumstances analysis); and *Virginia v. Moore*, 553 U.S. 164 (2008) (explaining the individual privacy and legitimate governmental interest balancing test).
12. *Rodriguez*, No. 13-9972, 2015 WL 1780927, at *3 (internal citation omitted).
13. *See Hiibel v. Sixth Judicial Dist. Court of Nev.*, Humboldt Cty., 542 U. S. 177 (2004).
14. 517 U. S. 806 (1996) (explaining officers' actions must be viewed objectively, regardless of their state of mind).
15. *See Rodriguez*, No. 13-9972, 2015 WL 1780927 (Thomas, J., dissenting), at *10-11; (Alito, J., dissenting) at *1-2.
16. 462 U.S. 696 (1983) (holding that a dog sniff is not a search under the Fourth Amendment).

Tips to Testify: "*Wait Just a Second!*"

By: The Honorable Earl G. Penrod

Witnesses are often asked questions about the timing or length of an event, and an unwary witness may be inadvertently tripped up or caught off guard. There are a number of common expressions used in informal communication referring to the passage of time that are not meant to be taken literally. For example, in normal discourse, someone may say "just a second" or "in a minute" or "at that moment" to indicate a short but undefined period of time. Because such expressions are common, they find their way into courtroom testimony, even occasionally from law enforcement personnel and other professionals.

Using such expressions or testifying in nonspecific terms regarding time may not always cause a problem, especially if the time or length of events is not in dispute. However, even if the timing of events is not crucial, attorneys may cross-examine about such testimony to try to challenge the officer's credibility or to show that the officer was less than precise in the performance of duties.

It is always preferable for a witness to be as specific as possible on time, but if the person does not have a record, report, log or specific memory to support the detail of the testimony, the witness is well served to testify in more generalized terms without the use of any time related idioms or non-specific terms.

"Upon receiving the dispatch, I activated my lights and siren, headed toward the location, and arrived in approximately 4-5 minutes."

"Upon receiving the dispatch, I activated my lights and siren, headed toward the location, and arrived in a matter of minutes."

"Upon receiving the dispatch, I activated my lights and siren, headed toward the location, and was there almost immediately."

All three statements convey the same basic facts but the first example is preferable if the witness is able to provide the degree of specificity set forth. However, the more general language in the second example is recommended if the officer isn't fully confident about the details.

Finally, the third statement is not preferable because the word "immediately" is too indefinite and can have a variety of meanings.

Tip to testify: Be as specific as possible when referring to a period of time, and avoid time-related idioms or non-specific terms.

The Honorable Earl G. Penrod is a Judge of the Gibson Superior Court in Indiana and serves as American Bar Association Judicial Fellow in cooperation with NHTSA.

This article originally appeared in the January 2016 issue of The LEL, and is reprinted with permission.

National Sobriety Testing Resource Center and Drug Recognition Expert Data System

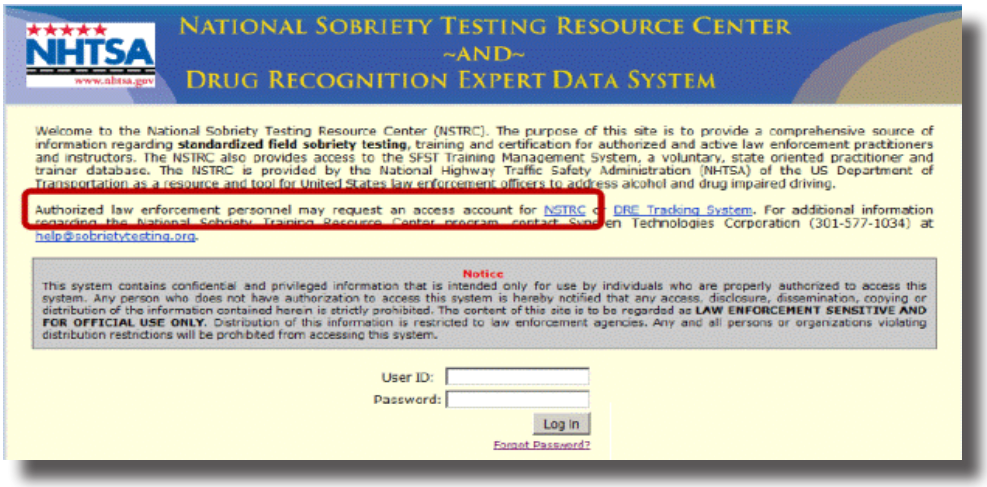
By: Wilfrid K. Price

Impaired driving has long been identified as a significant traffic safety and public health concern. In recent decades, our understanding of impaired driving has increased and shifted from a simple traffic violation to a serious societal issue. Like many public safety issues, impaired driving is continuously changing, requiring rapid analysis of emerging trends to meet the challenges this subject presents. Increasing numbers of drivers and vehicles on our roadways mean a higher number of potentially impaired drivers behind the wheel. With this in mind, increased focus has been placed on drug impaired driving. Emerging trends that impact this problem include an aging population, increasing numbers of prescriptions being issued, and rapidly shifting types of illicit drugs. This situation has required law enforcement, prosecutors, and toxicologists to adjust their approaches and tactics to address drug impaired driving.

The National Highway Traffic Safety Administration (NHTSA) has responded with a broad range of research, enforcement, and data collection tactics. The Office of National Drug Control Policy (ONCDCP) has identified data collection for drug impaired driving as a significant priority area of concern. To help meet the challenge, NHTSA funds and operates the National Sobriety Testing Resource Center and Drug Recognition Exoert (DRE) Data System.

This web-based system is available to certified law enforcement officers, highway safety personnel, and prosecutors to serve as a common point of information and communication among professionals charged with combating impaired driving.

As new DRE states come on line, the evaluators within the state typically begin the process of capturing data on each evaluation they conduct. These records are updated with the results of toxicology testing that is conducted on collected samples from suspected drug impaired drivers. The result is an extremely robust data set that can reveal trends at the local, state, and national levels.



The system also provides the individual DRE user with a rolling log function that captures critical work indicators for each evaluation conducted, the opinions rendered by the DRE, and results of toxicology screening that is conducted. These records can prove valuable when prosecuting drug impaired driving cases to demonstrate the law enforcement officer's experience and proficiency at arriving at informed opinions regarding drug impairment based on their training. One of the many benefits of the system is that the rolling log can graphically depict a DRE's work history and accuracy in forming opinions. This can be critical to establishing the credibility of the individual officer and the state's DRE program in prosecuting drug impaired driving cases.

The system was designed and is operated to collect drug impaired driving information, without collecting personal identifying information on suspects. As a result, there are no suspect names, dates of birth, or other identifiers in the system. The reason for this is to ensure compliance with established federal regulations, and follow guidance from NHTSA on the function of this particular data system. There is also a need to ensure fairness and confidentiality for all subjects, but particularly those situations where evaluations or toxicology testing reflects no drugs being located in a subject's body, or where a medical condition unrelated to drug impairment may be present.

For the State Coordinator, the system provides added benefits of being able to rapidly and accurately track the proficiency and work of DREs within their state. With just a few mouse clicks, a State Coordinator can determine the level of effort for individual DRE's, their accuracy rate, and determine if record keeping is being managed in a timely fashion.

While each state's statutes and practices vary, the quality of the law enforcement officer's investigation, background, and testimony can have a significant impact on individual cases and the perceptions of impaired driving in their community. This system can help support those efforts, and aid state and local entities in ensuring high quality work from DREs. The imperative to ensure that impaired driving enforcement is fair, accurate, and credible cannot be overstated. The information captured in the DRE data system can help to establish and maintain this critical need.

DREs by their nature are highly motivated, well trained, and committed law enforcement officers who have taken on additional responsibility to combat impaired driving. Their use of the national data system helps to build the credibility of the officer as well as the program and can aid in making effective cases in court.

Editor's Note: Wilfrid K. Price is employed by the National Highway Traffic Safety Administration In the Enforcement and Justice Services Division.

Michigan's Traffic Fatalities by the Numbers

By: Sergeant Scott Carlson

By law, all fatal traffic crashes in Michigan must be reported on a UD-10 Traffic Crash Report to the Michigan State Police (MSP). Last year, 963 people lost their lives on Michigan roadways. This represents a ten percent increase from 2014 when 876 traffic crash fatalities were reported. The increase in traffic crash fatalities not only occurred in Michigan, but across the United States by an average of eight percent.

Reporting fatal crashes is mandated by the National Highway Traffic Safety Administration (NHTSA) through the Fatality Analysis Reporting System (FARS). The FARS is a census of fatal motor vehicle crashes with qualifying fatalities that occur within the 50 states, the District of Columbia, and Puerto Rico. To qualify as a FARS case, the crash had to involve a motor vehicle traveling on a traffic way customarily open to the public and must have resulted in the death of a motorist or a non-motorist within 30 days of the crash.

The number of reported traffic fatalities in Michigan is a constantly evolving statistic. This means that the total of traffic deaths can increase or decrease on a daily basis. How can the number of fatalities decrease? Certain factors can contribute to a reduction in the fatalities reported. It is important to understand what constitutes a reportable fatal crash in Michigan and which crashes are considered for our statistical reporting.

A reportable fatal crash must occur on a roadway and involve a motor vehicle in transport. The fatality must also occur within 30 days from the date of the crash. The Traffic Crash Reporting Unit (TCRU) then analyzes the data from that fatal crash and enters the information into the FARS.

There are a few instances where a fatal crash is not reportable in Michigan for statistical purposes. If the fatality is the result of an overt or intentional act by one of the parties involved in the crash, then these are not included. An example would be a suicide attempt by a pedestrian that walks into oncoming traffic and is killed.

If a fatality occurs as a result of a medical condition, such as having a heart attack or stroke while driving, this also would not be a reportable fatal crash. Even though this is a motor vehicle crash with a fatality, it is not counted statistically because the medical condition prior to the crash was the cause of death. Many times these conditions may not be known at the time of the crash and are later determined at an autopsy.

In both instances, what was initially thought to be a reportable fatal crash is not and therefore decreases the overall fatality count.

For more information about fatality statistics or other data requests, please contact the TCRU at 517-241-1699 or email CrashTCRS@michigan.gov

Editor's Note: Sergeant Scott Carlson is employed by the Michigan State Police.

Victor Fitz Receives David Schieber MADD Lifesaver Award at the PAAM Annual Conference

Victor Fitz

Cass County Prosecuting Attorney Victor Fitz was the recipient of the 2016 David M. Schieber Mother Against Drunk Driving/ Office of Highway Safety Planning (MADD/ OHSP) Lifesaver Award at the Prosecuting Attorneys Association of Michigan (PAAM) Annual Banquet. Mr. Fitz was the driving force behind legislative changes to lower the prescribed bodily alcohol limit for watercraft, snowmobiles and off-road vehicles from .10 to .08. His tireless work on this and other changes concerning those means of transportation will bring a greater degree of safety to both operators and the public.

The award is given annually to a Michigan prosecutor whose extraordinary work exemplifies the ideals of MADD and the protection of victims. It is named after the late Kent County Assistant Prosecuting Attorney David M. Schieber. Mr. Schieber was a passionate and skilled prosecutor for 28 years before succumbing to cancer in 2009. The David M. Schieber Memorial Scholarship has been created in his honor. More information can be found at: http://www.grcc.edu/foundation.

MADD Luncheon Honors Law Enforcement Officers and Prosecutors

Through the Lifesavers Law Enforcement Recognition Awards, MADD Michigan recently honored law enforcement officers for their commitment to impaired driving enforcement.

The 2016 MADD Michigan Lifesavers Award recipients included:

OLIVIA CLEVELAND GRATITUDE AWARD:
Lt. Aaron Burgess, Sterling Heights Police Department

OUTSTANDING TROOPER:
Tpr. Travis Peterson, MSP Cadillac Post
Tpr. Jason Darling, MSP Houghton Lake Post
Tpr. Jim Janes, MSP Niles Post
Tpr. Zachary Tebedo, MSP Tri-City Post
Tpr. Randall Rovelsky, MSP Wakefield Post

OUTSTANDING DEPUTY:
Dep. Jason Conklin, Macomb County Sheriff's Office
Dep. Samuel Sukovich, Jackson County Sheriff's Office
Dep. Ryan Dannenberg, Kent County Sheriff's Office
Dep. Theodore Harrison, Ingham County Sheriff's Office

OUTSTANDING OFFICER:
Ofcr. Andrew Wood, Eastpointe Police Department
Ofcr. Rebecca Kuzdek, Fowlerville Police Department
Ofcr. Cary Murch, Mt. Pleasant Police Department
Ofcr. Sean Brown, Oxford Police Department
Ofcr. Andrew Teichow, Port Huron Police Department
Ofcr. Ben Helms, St. Johns Police Department

OUTSTANDING ROOKIE OF THE YEAR:
Ofcr. Benjamin Atkinson, Detroit Police Department
Ofcr. Andrew Shelton, Pleasant Ridge Police Department
Ofcr. Christopher Bennett, Utica Police Department
Ofcr. Ryan Popma, Zeeland Police Department

OUTSTANDING LAW ENFORCEMENT AGENCY:
Dearborn Police Department, MSP St. Ignace Post

RECOGNITION OF EXCELLENCE:
Ofcr. Scott Vierk, Clawson Police Department
Ofcr. Robert Van Dyke, Shelby Township Police Department
Ofcr. John Anthony Janicki, MSP St. Ignace Post

MADD CAREER ACHIEVEMENT (DEPUTY LEW TYLER) AWARD:
Ofcr. Dave Dekorte, East Lansing Police Department

DAVID M. SCHIEBER MADD LIFESAVERS AWARD PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN:
Victor Fitz, Cass County Prosecuting Attorney
Jeffery S. Hall, Oakland County Prosecutor's Office

Mark Your Calendar

Upcoming Traffic Safety Trainings, January – April, 2017

Cops in Court	Jan 19	Kalamazoo
Drug Recognition Expert School	Jan 24 - Feb 3	Lansing
Nuts and Bolts of OWI Investigations	Feb 19	Ann Arbor
OWI Drug Forfeiture	Mar TBD	Lansing
Lethal Weapon	Apr 19-20	Mt. Pleasant

For Your Information

2016 Drive Sober or Get Pulled Over Holiday Campaign December 16-January 1

The holiday season is a time for family, friends, and celebration. For too many it is also a time of tragedy due to drunk driving. To stop the tragedy of drunk driving crashes, injuries and deaths, law enforcement throughout the nation will be out in force as part of the national Drive Sober or Get Pulled Over Enforcement Campaign to remove drunk drivers from the roads. Materials are available here.

New Partnership Aims to End Nation's Traffic Fatalities Within 30 Years

The National Highway Traffic Safety Administration (NHTSA), Federal Highway Administration, and Federal Motor Carrier Safety Administration are joining forces with the National Safety Council to launch the Road to Zero Coalition. The goal is to end fatalities on the nation's roads within 30 years.

The decision comes after 2015 marked the largest increase in traffic deaths nationwide since 1966. Preliminary estimates for the first half of 2016 show an alarming uptick in fatalities–an increase of about 10.4 percent as compared to fatalities in the first half of 2015.

The Road to Zero Coalition will promote proven lifesaving strategies, such as improving seat belt use, installing rumble strips, truck safety, behavior change campaigns, and data-driven enforcement. Additionally, the coalition will lead development of a scenario-based vision on how to achieve zero traffic deaths based on evidence-based strategies and a systematic approach to eliminating risks.

With the rapid introduction of automated vehicles and advanced technologies, officials believe the vision of zero road deaths and serious injuries can be achieved in the next three decades.

The Impact of the Standardized Field Sobriety Test Law *(continued from page 1)*

"The procedures outlined in this manual describe how the Standardized Field Sobriety Tests (SFSTs) are to be administered under ideal conditions. We recognize that the SFSTs will not always be administered under ideal conditions in the field, because such conditions will not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, i.e. the inability to find a perfectly smooth surface at roadside, may have some affect on the evidentiary weight given to the results. However, this does not necessarily make the SFSTs invalid."

It is important to note that SFSTs are designed as divided attention or psychophysical tests which involve requiring the subject to concentrate on both mental and physical tasks at the same time.

These tests are important evidence of impairment in OWI trials. They are designed to mimic the different abilities and tasks involved in operating a motor vehicle. These would include information processing, short-term memory, judgment and decision making, balance, quick steady reactions, clear vision, small muscle control and limb coordination.

In conclusion, in light of this new law it is more imperative than ever that police officers substantially comply with NHTSA standards in administering the SFSTs. Every piece of an OWI investigation is important to painting the whole picture of impairment—SFSTs included.

For more information on this article and PAAM training programs, contact Kenneth Stecker or Kinga Gorzelewski, 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.

Editor's Note: Kenneth Stecker and Kinga Gorzelewski are the Michigan Traffic Safety Resource Prosecutors.

Let's Revisit the Traffic Stop Case of Rodriguez v. United States *(continued from page 2)*

It does not share the same qualities as, for example, rummaging through someone's bag at an airport.[17] The *Rodriguez* majority labels a dog sniff "a measure aimed at detecting evidence,"[18] which in the absence of the word, appears to come about as close as possible to calling the practice a "search" without uttering it.

For prosecutors, the importance of this case largely depends on state case law.

Some states already prohibit extension of a traffic stop to conduct the type of investigation at issue in *Rodriguez*.[19] In other jurisdictions, courts have determined that *de minimis* extensions of traffic stops are constitutional and treat those stops differently from a traditional interaction between police and the public. This decision addresses those distinctions and brings federal and state law into alignment on an important issue for law enforcement. It remains to be seen how the Eighth Circuit will handle the issue of reasonable suspicion on remand — it may very well hold that Officer Struble did have reasonable suspicion to order the dog sniff, based on the facts discussed in both dissents.

The Court's decision in *Rodriguez* will likely require police departments to highlight the importance of efficiency in traffic stops. Defense attorneys could raise two objections: first, that the officer initiated criminal investigation after issuance of a traffic ticket; and second, that the officer deliberately lengthened the stop beyond its necessary purpose. As a result, officers should understand the importance of completing the basic tasks of a traffic stop rapidly. Their supervisors should continue to train them in the art of questioning suspects, while emphasizing efficiency.

Further, officers should fully articulate and document their suspicion so that prosecutors can argue how the officers' suspicions are reasonable. In this case, the officer's suspicion was correct. However, it is now clear that there is no longer a *de minimis* allowable extension of a traffic stop. Therefore, the officer must fully articulate his or her suspicion and the government must argue the reasonableness of the suspicion, not just as an alternative. *Rodriguez* is a further reminder that prosecutors and law enforcement must work together to ensure that future traffic stops are conducted under these clarified requirements.

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Editor's Note: David Hollenber is a Staff Attorney, National Traffic Law Center, National District Attorneys Association.

17. *See Id*. at 707.
18. *Rodriguez*, No. 13-9972, 2015 WL 1780927 at *6 (citing *Indianapolis v. Edmond*, 531 U. S. 32, 40–41 (2000)).
19. *See, e.g., Pryor v. State*, 122 Md. App. 671 (Md. Ct. Spec. App. 1998); *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002).

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PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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 was charged with driving with carrying a concealed weapon, felon-in-possession, possession of ammunition by a felon, receiving and concealing a stolen weapon, felony firearm, and driving with a suspended license. The charges arose from a traffic stop in which a police officer pulled over the vehicle defendant was driving during evening hours because it did not have a metal license plate attached to it.

Defendant moved to suppress the evidence claiming that the search and seizure was unlawful. At the hearing, the officer testified that when approaching the car, he noticed a piece of paper on the left side of the rear window, but could not read it. He again looked at it as he got closer, but could not see any of the letters or numbers. At a suppression hearing, the office explained that he did not stop to read the paper for safety concerns as there was the possibility that the occupants of the car "could harm him, get out of the car or flee the scene."

The officer also admitted that he did not have a specific reason to fear for his safety and that "it would have taken approximately five seconds to verify the temporary license plate." He asked defendant for his identification, proof of insurance, and registration. Defendant provided a state identification card, but not a driver's license or registration. A computer search revealed defendant's license was suspended and he was arrested for that offense. The passenger, who owned the vehicle, gave consent to search the car which lead to the weapons.

The circuit court granted defendant's motion to suppress ruling that the officer "should have taken five seconds to verify the validity of the temporary paper plate in the rear window."

The Court of Appeals disagreed.

The Court of Appeals noted at the motion hearing that the officer testified that he could not see a plate before pulling the vehicle over. He could not read the paper in the window when he approached the vehicle from three or four feet away, and its writing was very dim.

The Court held that the officer was justified in pulling the car over "for a violation of MCL 257.225(2) as the plate was not in a clearly visible position or in a clearly legal condition."

The Court held that the officer was justified in pulling the car over "for a violation of MCL 257.225(2) as the plate was not in a clearly visible position or in a clearly legal condition."

The Court further held the officer's "actions were reasonably related in scope to the circumstances of the stop."

The Court concluded "Officer Cavett had an articulable and reasonable suspicion that there was a violation of the law, and defendant was detained for a reasonable period in order to permit Officer Cavett to ask reasonable questions concerning the violation of the law and its context."

Therefore, the officer was not required to take five seconds to examine the paper plate because the fact that the plate could not be read from three or four feet in the dark meant "it was not in a clearly visible position or in a clearly legible condition."

Reversed.

People v. Simmons, case no. 331116, decided July 19, 2016.

Unpublished Cases

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

The facts show that there was no dispute that the initial traffic stop was proper due to a civil infraction (tinted windows).

At the suppression hearing, the defendant argued that a nearly forty-minute detention after Trooper Moore indicated he was not going to give defendant a ticket and was too long.

According to defendant, there was no particularized reasonable suspicion, and nothing gave rise to a legal right to further detain these "two African Americans in a tinted car" for the time it took to effectuate a K9 "free air search" involving a walk around the car. Defendant also took issue with the fact that the dog put his nose inside the passenger car, which was not permissible.

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.

The prosecutor argued that there was reasonable suspicion based on the information that was gathered in light of the experience of the trooper. The prosecutor highlighted the alleged change in the reason for being at the casino, defendant having an "intentional" demeanor, being "very passive and very calm" which was interpreted as being "nervous," the fact that the vehicle was "extremely clean," and defendant's criminal history.

The issue is whether the Michigan State Police trooper had a reasonable

suspicion, based on articulable facts, to prolong the traffic stop beyond the time necessary to complete the purpose of the traffic stop in order to conduct the canine sniff.

The Court of Appeals ruled that the trooper did not have reasonable suspicion.

The Court of Appeals noted the recent United States Supreme Court decision of *Rodriguez v United States*, ___ US ___, ___; 135 S Ct 1609, 1614; 191 L Ed 2d 492 (2015). The *Rodriguez* Court held "that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures" and that a "seizure justified only by a police-observed traffic violation, therefore, become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission of issuing a ticket for the violation." Id., 135 S Ct at 1612 (quotation marks and citation omitted).

The Rodriguez Court explained that, although police "may conduct certain unrelated checks during an otherwise lawful traffic stop[,]" they "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." Id.

The Court held that the trooper did not have a "reasonable suspicion, based on articulable facts, to prolong the traffic stop beyond the time necessary to complete the purpose of the traffic stop in order to conduct the canine sniff."

The Court reasoned "Although Trooper Moore's testimony establishes that his intuition told him something was 'not right,' the evidence does not establish that his hunch ever rose to the level of reasonable suspicion."

Reversed and remanded for further proceedings.

People v. Malone, Jr., case no. 329989, decided October 4, 2016.

This case involved the *corpus delicti* rule. The circuit court dismissed the charge of operating while intoxicated, second offense, because absent defendant's statements to the police, there was no independent evidence to establish that she had operated a vehicle under the influence of alcohol.

The Livingston County Prosecuting Attorney appealed by leave, which was granted.

The purpose of the corpus delicti rule… requires that a defendant's inculpatory statements are inadmissible unless a preponderance of direct or circumstantial evidence establish the occurrence of a specific injury and criminal agency as the source of the injury…

The facts are that someone called 911 about a female passed out in a vehicle in a bar parking lot. When the responding police officer arrived, defendant was in the front passenger seat, the vehicle was running, and the driver's door was open. Defendant was the only occupant of the vehicle and no one else was around. EMS personnel were attempting to talk to defendant. The officer testified that defendant appeared to be "very intoxicated," and he noted that she had bloodshot eyes and smelled strongly of intoxicants.

The officer asked defendant to step out of the vehicle and she did so. The officer also asked if defendant had consumed alcohol that evening and she replied that she "had too much to drink" and added that she "had a total of six drinks and that she had started drinking earlier in the morning." Defendant also told the officer that she had started driving home from a bar because her friends had not given her a ride, but that she had pulled over because she was tired.

The police officer administered a series of field sobriety tests, which she was unable to successfully complete. The officer than placed her under arrest. Further, the officer administered a breathalyzer test, which registered that defendant's blood alcohol level was 0.21.

Defendant moved to suppress her statements to the police officer, arguing before the district court that they were barred by the *corpus delicti* rule and that, absent the barred statements, there was not probable cause to support her arrest.

The district court disagreed and defendant appealed the decision to the circuit court, which reversed the district court after finding that the statements were barred by *corpus delicti* rule.

The Court of Appeals reversed the circuit court's decision, and ruled in favor of the prosecutor.

The Court noted, "The purpose of the *corpus delicti* rule…requires that a defendant's inculpatory statements are inadmissible unless a preponderance of direct or circumstantial evidence establish the occurrence of a specific injury and criminal agency as the source of the injury… However, the *corpus delicti* rule does not bar admissions of fact that do not amount to a confession of guilt."

Therefore, this case turned on whether defendant's statements amounted to admissions of fact or a confession.

The Court held "Sufficient proof of defendant's intoxication existed apart from any statements she made. She appeared intoxicated, failed the field sobriety tests, and her blood alcohol level was found to be 0.21. There was no alcohol or empty bottles found in the vehicle and based on her level of intoxication it was evident that she had consumed a large amount of alcohol before entering the vehicle."

The Court noted, "The only element of the offense as to which defendant's statements were necessary proofs was whether or not she had been driving since her alcohol consumption. In that regard, her statement that she had driven the vehicle to the location where she was found was an admission of fact, not a confession."

The Court further noted that, "Had the only proof of her intoxication been her statement that she had been drinking earlier and had drank too much, then the *corpus delicti* rule would be implicated because the only evidence of OWI would have come from defendant's statements, meaning that the facts admitted would necessarily show guilt. But that is not the case because defendant's drinking and intoxication were shown by independent evidence. Under these circumstances, the *corpus delicti* rule was not violated."

Reversed and remanded.

People v. Livingston, case no. 330730, decided September 1, 2016.

The facts of the case arise from a fatal crash that occurred on I-96 on the afternoon of September 11, 2013. As defendant attempted to enter the highway, she drove her vehicle across some grass and crashed into a vehicle driven by Raymond Anderson. Anderson's vehicle was pushed across the lanes of traffic into a guardrail. Defendant's vehicle rolled over several times and defendant's four-year old daughter was ejected from the car. Attempts by passersby to resuscitate the child proved unsuccessful. Defendant was intoxicated at the time of the accident, and tests also showed the presence of controlled substances in her blood.

"This level of misconduct goes beyond that of mere drunk driving, and a rational jury could conclude that defendant acted in willful and wanton disregard of the likelihood that her actions would result in death."

On appeal the defendant argued there was insufficient evidence presented at trial to convict her of second-degree murder. The Court of Appeals disagreed.

The Court held, "The prosecutor presented sufficient evidence of misconduct beyond drunk driving to establish malice and sustain defendant's second-degree murder conviction."

The Court noted that the evidence clearly established the defendant's second-degree murder conviction:

- Tests on defendant's blood drawn in the emergency room showed that defendant had an ethanol blood alcohol level of 285 milligram per deciliter and later testing, more than two hours after the accident, detected the presence of 0.15 grams of alcohol per 100 millimeters of blood.

- Two controlled substances—Oxycodone, a schedule 2 narcotic analgesic, and Lorazepam, a schedule 4 drug—were also found in defendant's blood. Evidence established that the potential side effects of Oxycodone include somnolence and dizziness, while Lorazepam can cause sedation, confusion, and lethargy. These side effects can be enhanced by mixing the drugs with alcohol. In short, the evidence amply demonstrated that defendant was in no condition to drive and yet she chose to drive after having consumed a significant amount of alcohol, which she coupled with two controlled substances.

- Defendant greatly exacerbated the risks of drunk driving by also choosing to operate her vehicle on a highway at a high rate of speed, by failing to properly restrain her child, and by disregarding basic rules of the road. In particular, she entered I-96 traveling between 76 to 79 miles per hour. By her own admission, defendant failed to keep her eyes on the road, and instead attempted to merge with her attention focused on the backseat of her car rather than the highway traffic.

- Defendant then failed to stay in the lines, or even on the road, as she merged. She instead crossed a grassy area before colliding with Anderson's vehicle. Indeed, there was testimony from eyewitnesses that defendant entered the highway at a "right angle" and drove "straight across 90 degrees to [traffic]" toward Anderson's vehicle, meaning that she was traveling perpendicular to the flow of traffic.

- Defendant undertook these reckless maneuvers without even affording her daughter the protections of an appropriate restraint in the car. Defendant knew the dangers of failing to properly restrain a child as evinced by testimony that, during a previous traffic stop, she had been cited for "unrestrained child" and educated on the need to use a child restraint seat. Yet, despite this knowledge, defendant drove drunk at a high rate of speed with an unrestrained child in her vehicle as she crossed a grassy area and drove into Anderson's vehicle.

The Court concluded, "This level of misconduct goes beyond that of mere drunk driving, and a rational jury could conclude that defendant acted in willful and wanton disregard of the likelihood that her actions would result in death."
In the dissent, Judge Shapiro would have vacated defendant's second-degree murder conviction because there was insufficient evidence of malice as defined in *People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998). He did however, affirm defendant's conviction of operating a motor vehicle under the influence causing death and her sentence of 10 to 15 years imprisonment on that conviction.
Affirmed.

***People v. Kiogima*,** case no. 326159, July 26, 2016.

Defendant was convicted of operating a motor vehicle while intoxicated, third offense.

Defendant argued on appeal that he was denied his right to present a defense when the trial court granted the prosecution's motion in limine and excluded evidence

that defendant's blood sample was destroyed, which occurred in the normal course more than two years after testing by the Michigan State Police Crime Laboratory.

The Court of Appeals disagreed.

The Court held, "A defendant's statutory rights under MCL 257.625a(6)(d) are not necessarily violated, however, if he fails to request an independent chemical test before his blood sample is destroyed where the sample is destroyed pursuant to policy. *People v Reid* (On Remand), 292 Mich App 508, 510- 511; 810 NW2d 391 (2011)."

The Court concluded, "Thus, defendant had over two years from the time he was arrested and over a year and a half from the time he was charged to exercise his right to an independent chemical test before it was destroyed per protocol. He did not exercise that right."

Affirmed.

***People v. Crampton*,** case no. 326785, decided June 28, 2016.

The defendant appealed his jury trial convictions of reckless driving causing death, MCL 257.626(4), reckless driving causing serious impairment of a body function, MCL 257.626(3), failing to stop at the scene of an accident resulting in death, MCL 257.617, and failing to stop at the scene of an accident resulting in serious impairment of a body function, MCL 257.617.

The Court noted "The statute does not define 'willful or wanton,' and this Court has not defined this phrase in a published opinion in the reckless driving context.

This case arose from a motor vehicle crash involving the defendant and two motorcyclists. Defendant was speeding and ran a red light, which resulted in the motorcyclists hitting the side of his car after they were unable to stop. One motorcyclist died, and the other suffered severe brain damage. The passenger in defendant's car testified that defendant was dazed and confused at the time of the crash. After the crash, defendant fled the scene on foot after a friend of the motorcyclists assaulted defendant. Defendant failed to report the crash to the police until almost 15 hours after the crash.

Defendant argued that there was insufficient evidence to support his convictions.

The Court of Appeals disagreed.

First, the defendant argued that, because there was evidence that he was dazed or incoherent just prior to the crash, he could not have acted willfully or wantonly, and thus, there was insufficient evidence to support his reckless driving convictions.

The element that was at issue was the second element. The second element requires proof that defendant operated the vehicle in a "willful or wanton disregard for the safety of persons or property." MCL 257.626(2).

The Court noted "The statute does not define 'willful or wanton,' and this Court has not defined this phrase in a published opinion in the reckless driving context. However, in People v Goecke, 457 Mich 442, 466-467; 579 NW2d 868 (1998), a second-degree murder case, our Supreme Court explained that one may have a willful and wanton disregard for death or bodily harm when, although not intending harm, he or she acted under circumstances where there was a "plain and strong likelihood" that harm might result."

Affirmed.

***People v. Kern*,** case no. 329446, decided November 17, 2016.

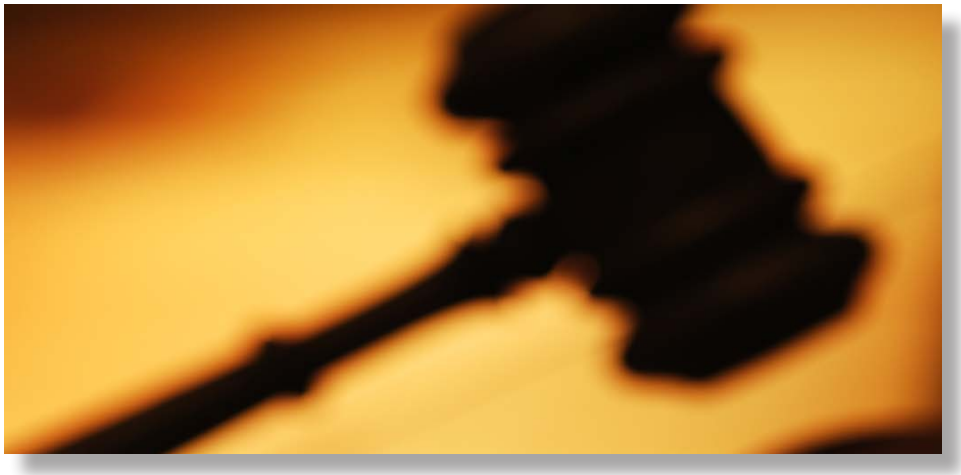
New Laws

Medical Marihuana Laws Effective, December 20, 2016

Public Acts 281, 282, and 283 become effective December 20, 2016. The laws, in pertinent part, do the following:

Public Act 281, Medical Marihuana Facilities Licensing Act:

- Creates the Medical Marihuana Licensing Board within the Department of Licensing and Regulatory Affairs (LARA), and gives it authority to regu-



late the activity and operation of medical marihuana facilities within the State.

- Provides a statutory scheme for licensing and regulating medical marihuana growers, provisioning centers and secure transporters as well as providing for taxes, fees and assessments.

- Creates five types of licenses for growers, processors, secure transporters, provisioning centers and safety compliance facilities.

- Establishes taxes, fees, regulatory assessments that will be deposited into the Medical Marihuana Excise Fund and Marihuana Regulatory Fund and the scheme by which monies are disbursed.

Public Act 282, Marihuana Tracking Act

- Requires LARA to establish, maintain, and utilize a "seed-to-sale" tracking system;

- Track all marihuana grown, processed, transferred, stored, or disposed of under the Medical Marihuana Facilities Licensing Act (marihuana grown by caregivers will not be within the seed-to-sale system.)

- Re Requires all licensees to use a third-party inventory control and tracking system allowing interface with the statewide monitoring system in order to enter and access information

Public Act 283, Amendments to the MMMA

- Allows for the possession, manufacture, and use of marihuana-infused products, such as foodstuffs, oils, lotions, etc.

- Establishes equivalent measures for such products

- Protects patients and caregivers from arrest, prosecution, or penalty for purchasing marihuana from a provisioning center, selling marihuana seeds or seedlings to a licensed grower, or transporting marihuana to and from a safety compliance facility for testing.

- Sets forth requirements for transporting infused products

- Prohibits the use of butane to extract marihuana resin in a public place, motor vehicle, or a residential structure or its curtilage.

- Amendatory act is curative and applies retroactively as to the following: clarifying the quantities and forms of marihuana for which a person is protected from arrest, precluding an interpretation of "weight" as aggregate weight, and excluding an added inactive substrate component of a preparation in determining the amount of marihuana, medical marihuana, or usable marihuana that constitutes an offense.

Good Samaritan Law, Effective, January 4, 2017

Public Acts 307 and 308, effective, January 4, 2016, amend MCL 333.7403 and 333.7404 to provide a "Good Samaritan" exception to use and possession of certain controlled substances for a person seeking medical assistance for him or herself or for another individual for a drug overdose or other medical emergency arising from the use of a controlled substance or controlled substance analogue that he or she possessed in an amount sufficient only for personal use.

The Public Acts amend MCL 333.7403(2)(d) and 333.7404(2)(d) to extend the misdemeanor penalty for possession or use of marihuana to the possession or use of synthetic equivalents of the substances contained in cannabis or in the resinous extractives of cannabis and synthetic substances, derivatives, and their isomers with similar chemical structure and/or pharmacological activity. (Marihuana possession is punishable by up to one year's imprisonment and/or a maximum fine of $2,000. Use of marihuana is punishable by up to 90 days' imprisonment and/or a maximum fine of $100.)

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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