PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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Just Stop the Vehicle

By: Michael L. Prince

While traffic crash fatality and injury data for 2016 is still weeks away from being final, one thing is clear: 2016 was another devastating year on our state's roadways. For the first time since 2007, Michigan exceeded 1,000 traffic crash fatalities. Five times in 2016, traffic fatalities exceeded 100 in a given month. Provisional numbers indicate overall crashes are still down from previous years, another clear indication that the number of severe crashes are up.

According to the University of Michigan Transportation Research Institute, the increase in fatalities is a national problem

being fed by gradual improvements to the economy, an increase in median household income, decreasing fuel costs, young drivers, and increases in motorcycle and pedestrian fatalities. If not for improved safety technology, advancements on roadways, and in motor vehicles, many more people would have been lost.

With all the excitement over autonomous vehicles, we are many years away from seeing any dramatic impact on fatalities caused by driverless cars. New technology saturates the market very slowly in the U.S. As an example, Electronic Stability Control, first released in 1996, has only saturated about 80 percent of the U.S. vehicle fleet after 20 years. Clearly, the common denominator is and will continue to be the driver. According to the NHTSA, 94 percent of crashes continue to be the fault of the driver, due to errors in judgement, excessive speed, impairment, distractions, or carelessness.

For the first time since 2007, Michigan exceeded 1,000 traffic crash fatalities. Five times in 2016, traffic fatalities exceeded 100 in a given month.

On December 8, 2016, the OHSP hosted a Law Enforcement Leadership Roundtable in East Lansing for officials from the NHTSA along with 20 representatives from state, county, and municipal law enforcement. Like similar roundtables taking place around the country, the purpose of the event was to discuss with law enforcement leadership the recent increase in traffic fatalities across the country and how we can address the obstacles that prevent law enforcement from placing a greater emphasis on traffic safety.

A number of common threads were identified during Michigan's roundtable, as well as those that are being conducted in other states. The most often cited being that of diminished staffing, coupled with increased calls for service, has reduced traffic enforcement to a lower priority. That's a fair assessment since the number of police officers in Michigan has dropped by nearly 4,000 since 2001.

The comments from Michigan's roundtable that I found most interesting were that, (1) officers today are more community oriented; (2) public perceptions are that traffic enforcement is only about revenue generation; and (3) there is a greater focus on community policing and outreach. These factors, and others undoubtedly, have at least played a role in officers being less likely to engage in traffic enforcement, and agencies being less inclined to make traffic enforcement a priority.

However, the suggestion that traffic enforcement is about revenue generation is not supported by the evidence. First, ticket quotas are illegal in Michigan. Second, if revenue generation is the goal, we are doing a terrible job of it as traffic enforcement is down significantly. Between 2007 and 2016, issuance of moving traffic citations fell 32 percent in Michigan. The adjudication of speed citations by the courts, probably the easiest way to generate revenue if that is one's motive, fell by 66 percent between 2005 and 2015. So the idea that law enforcement is engaged in aggressive traffic enforcement only to generate citation revenue is not supported by citation data.

While the OHSP continues to fund supplemental enforcement on an overtime basis to support the national traffic safety campaigns, this is not going to be a problem that we can solve with federal overtime

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Inside this Issue

Revisiting *Navarette v. California* and the Reliability of 911 Tips

By: Will Lathrop

The Supreme Court's decision in *Navarette v. California* is a modest victory for law enforcement, adding clarity to "reasonable suspicion" based exclusively on an anonymous tip. Interestingly, in deciding the veracity of an anonymous tipster, the Court gave greater weight to tips received in the 911 dispatch system, reasoning that there are inherent safeguards that enhance the reliability of anonymous 911 tips.[1]

Navarette Facts

In 2008, an anonymous caller phoned a Mendocino County, California 911 dispatcher to report being run off the road by a reckless driver five minutes prior to the call. The caller identified the offending driver's license plate information, as well as the make, model, and color of the vehicle. Specifically, the caller explained that the offending driver had run the caller off the road at approximately mile marker 88 on Highway 1. Dispatch relayed the caller's information to a California High Patrol (CPH) officer who located the vehicle approximately 20 minutes later at mile marker 69, and initiated a traffic stop. While the officer did confirm the information provided by the anonymous caller, the officer did not personally witness the driver make any driving infractions. Once the vehicle was stopped, the officer noticed a strong smell of marijuana emanating from the vehicle. A subsequent search of the vehicle revealed that the driver and passenger were transporting 30 pounds of marijuana. After both men were convicted of transporting marijuana, they filed appeals claiming that, supplied with only the information provided by the anonymous caller, the CHP officer did not have reasonable suspicion to initiate a stop.[2]

The Legal Analysis

In *Navarette,* the Court again rejected the defense assertion that reasonable suspicion must be based solely on an officer's personal observation,[3] but cautioned that an "anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."[4] In other words, when it comes to anonymous tips and reasonable suspicion, the poles are set. At the safe end, an officer bases reasonable suspicion on his or her first-hand observations. At the other, an officer develops reasonable suspicion relying exclusively on information provided by an anonymous source.

In Navarette, the Court again rejected the defense assertion that reasonable suspicion must be based solely on an officer's personal observation

Navarette adds clarity to the bounds of the latter. The Court reiterated that sufficient reasonable suspicion based solely on an anonymous tip is rarely sufficient because it is difficult for an officer to ascertain the informant's basis of knowledge or veracity.[5] However, in certain circumstances an anonymous tip can include "sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop."[6] So, that begs the question: what constitutes "sufficient indicia of reliability?"

In their analysis, the Court explained that anonymous tips become more reliable with: 1) specific details that can be corroborated by police; 2) evidence that a tip has been made contemporaneous to the event; and 3) evidence that the tipster has first-hand knowledge of the event.[7]

As to the first assertion, the Court has repeatedly deduced that "an informant who is proved to tell the truth about some things is more likely to tell the truth about other things."[8] Police corroboration of specific details establishes the accuracy of anonymous information, and thus adds to its veracity.

Contemporaneousness is also useful for establishing veracity and credibility. The closer to the event a report is made the less the "likelihood of deliberate or conscious misrepresentation"[9] —logic similar to that used in the present sense impression exception to hearsay evidence rules.

Put simply, the closer in time a report is made to an event, the less time an informant has to make up facts. Finally, establishing the tipster's firsthand knowledge of the event is important to show that the informant police are relying on is the same person who actually witnessed a crime or infraction.[10]

Applying these three parameters to the *Navarette* facts, the Court found that the 911 call "bore adequate indicia of reliability for the officer to credit the caller's account."[11] The Court went on to emphasize that the caller provided very specific details to the dispatcher (make, model, color, and license plate of the suspect and the mile post where the incident occurred), and that the officer had been able to confirm those details.

(Continued on page 8)

1 *Prado Navarette Et Al* v. *California,* 572 U.S.___(2014).
2 *Prado Navarette Et Al* v. *California,* supra.
3 *Adams* v. *Williams,* 407 U.S. 143, 147 (1972).
4 *Alabama* v. *White,* 496 U.S. 325, 330 (1990).
5 *Alabama* v. *White,* supra.
6 *Alabama* v. *White,* supra.
7 *Prado Navarette Et Al* v. *California,* supra.
8 *Prado Navarette Et Al* v. *California,* supra (citing Illinois v. Gates, 462 U.S. 213, 244 (1983)).
9 *Prado Navarette Et Al* v. *California,* supra (citing Advisory Committee's Notes on Fed. Rule Evid. 803(1), 28 U.S.C. App., P. 371).
10 *Illinois* v. *Gates* 462 U.S. 213, 234 and Spinelli v. United States, 393 U.S. 410, 416 (1969).
11 *Prado Navarette Et Al v. California,* supra.

Autonomous Vehicles – The Future of Michigan

By: Kenneth Stecker and Kinga Gorzelewski

An autonomous vehicle is capable of sensing its environment and navigating without human input.[1] In essence, it is a vehicle that can guide itself without a human driver—a driverless car.[2]

Absence of vehicle operator liability will create interesting questions about who assumes the responsibility and liability for a driverless car crash.

An autonomous vehicle detects surroundings using techniques such as radar, lidar, GPS, odometry, and computer vision.[3] Advanced control systems interpret sensory information to identify navigation paths, obstacles, and signage.[4] It has a control system that analyzes sensory data to distinguish between different vehicles on the road, which is very beneficial in planning a path to the final destination.[5]

In 2011, Nevada was the first state to authorize the operation of autonomous vehicles.[6] Since then, seven other states including Michigan have passed similar legislation.[7]

Michigan considers autonomous vehicles to be a significant part of the future of the automotive industry.

In his 2013 State of the State address, Governor Rick Snyder stated, "Michigan is the automotive capital of the world. By allowing the testing of automated driverless cars today, we will stay at the forefront in automotive technological advances that will make driving safer and more efficient in the future."[8]

In December 8, 2016, Governor Snyder signed into law Public Acts 332, 333, and 334. They went into effect the next day. The laws regulate the testing, using, and selling of autonomous vehicles in this state. They allow vehicles that have no human controls, no steering wheel, and no pedals to be tested in Michigan.

Public Act 332 allows an autonomous vehicle to operate without a human driver, and specifies that an automated system is considered the vehicle's operator with respect to traffic laws.[9]

Public Act 333 sets eligibility standards for motor vehicle manufacturers to participate in a SAVE project.[10] A SAVE project authorizes motor vehicle manufacturers to make on-demand automated vehicle networks available to the public. An on-demand network will digitally connect passengers to automated motor vehicles for the purpose of traveling from one point to the other.[11]

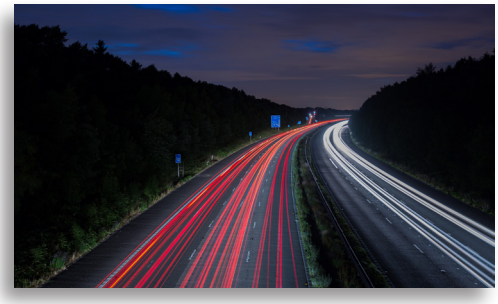
Public Act 334 defines what is allowed on roads within mobility research centers. A mobility research center is a nonprofit organization that receive federal funds for building and operating facilities that test autonomous vehicles.[12]

From an economic cost perspective, the American Automobile Association (AAA) estimates that car crashes cost around $300 billion annually. This equates to about $1500 per every person in the United States.[13]

During 2015, our Nation lost 35,092 people in crashes on roadways, an increase from 32,744 in 2014.[14] This 7.2% increase is the largest percentage increase in nearly 50 years.[15] The estimated number of people injured on the highways also increased in 2015—from 2.34 to 2.44 million.[16] NHTSA research suggests that 93% of crashes are caused by human error.[17]

By doing away with the need for a driver, and therefore all the risks introduced by continuous human decision making and driver distraction, the Michigan autonomous vehicle law may go a long way toward cutting down these figures by offering significant improvements in automotive safety.

On the other hand, law enforcement will face new issues, such as who is at fault in a crash where driver error will no longer be a factor. Absence of vehicle operator liability will create interesting questions about who assumes the responsibility and liability for a driverless car crash.



In conclusion, as Michigan moves forward with autonomous vehicles, it is important that there is a balance with protecting our citizens on the roadways and providing autonomous vehicle manufacturers an environment that fosters advancements in this groundbreaking technology.

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.

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New Electronic Outline Resource to Combat Defense Experts

By: The National Traffic Law Center Staff

Making sense of confusing technical or scientific information offered by the defense expert in everyday terms can be one of the more challenging aspects of any trial. Effectively cross examining an expert witness can be another. In cases involving impaired driving, prosecutors often face both of these challenges. Therefore, adequately addressing those challenges can be the difference between obtaining a conviction or an acquittal.

Defense counsel have offered an ever increasing number of experts in trials in the past few years, such as ophthalmologists and other medical doctors, engineers, computer scientists, crash reconstructionists, statisticians, psychologists, pharmacologists, as well as a host of others. These experts have testified on a variety of topics from physical limitations, diseases, mechanical failures, design flaws, software bugs, and others. Other experts, including former government toxicologists, law enforcement, and drug recognition experts present additional challenges for the prosecutor because they have first-hand knowledge of the states' programs.

In some cases, experts have addressed legitimate issues and prosecutors need to understand the science to elicit helpful information. However, more often, experts generally try to obfuscate the evidence or science. To overcome the confusion, a prosecutor must understand the science offered by an expert, effectively cross examine the expert to obtain testimony that supports the government's theory, and then artfully and convincingly explain the information to the factfinder.

Over the years, Traffic Safety Resource Prosecutors (TSRPs) and other prosecutors have provided a substantial amount of information to the National Traffic Law Center (NTLC) on more than 400 experts. NTLC continues to accumulate information on experts and issues pertinent to impaired driving and houses more than 37,000 documents for that purpose. NTLC maintains a database, cataloged under the expert by name or topic.

To help effectively cross examine an expert, the National Association of Prosecutor Coordinators (NAPC), NTLC, several TSRPs throughout the United States, and prosecutors have developed a cross examination outline (Outline Sample) for prosecutors to utilize in preparation for trial and trial itself. The Outline contains a summary or background section and additional sections with statements previously made by the expert. The Outline is designed to save time for the prosecutor because an experienced traffic safety prosecutor reviewed the transcripts, resumes, articles, and other expert information and synthesized it into a standardized format.

In essence, the Outline provides points taken from previous testimony that prosecutors can use to cross examine the expert in the current case.

In essence, the Outline provides points taken from previous testimony that prosecutors can use to cross examine the expert in the current case. It is as if the prosecutor deposed the expert and made an outline from which to utilize in his or her trial.

After an experienced prosecutor has reviewed the material on an individual expert, he or she enters pertinent information into an electronic form, along with the citation to the transcript or other document where he or she found the information. NTLC staff then organizes the information into the Outline format for use. Because the Outline is in Word format, a prosecutor who requests the Outline can delete categories that are not relevant to his or her case, add information for the specific case, or otherwise modify the Outline and print out a copy to take to court to use in cross examining the expert. The Outline can aid the prosecutor by providing a basic outline of the topics and specific areas for cross with citations to transcripts and other documents available for impeachment. The printed Outline may be used similar to a deposition summary.

As an alternative to printing a paper copy of the Outline, the prosecutor can use the electronic version, which provides some additional features. In its electronic version, the Outline is linked to other documents for instant retrieval of those documents, cross referencing, and fact checking simply by clicking the link. The electronic version also contains a table of contents, linked to other sections of the Outline, which makes it easier to navigate to the expert's background and points for cross examination. The points for cross examination may be taken from prior testimony of the expert, his or her curriculum vitae (CV), articles or other published work, National Highway Traffic Safety Administration (NHTSA) information, or other sources.

Because the Outline is available electronically and linked to other documents, the prosecutor can access the entire database anywhere he or she has access to the web, even in the courtroom. This can be very advantageous in some jurisdictions where defense counsel are not required to identify expert witnesses prior to trial. Even if defense counsel are required to identify experts prior to trial, it can be helpful for prosecutors when experts testify about a certain issue unexpectedly. Most linked documents in the database can also be searched electronically for specific words, providing an avenue for the prosecutor to "fact check" the expert.

An example of how a prosecutor can utilize the Outline follows. The prosecutor is prosecuting a DUI case and the defense notifies him that the defense intends on calling a certain expert. The prosecutor contacts the local TSRP and/or NTLC and requests information on the expert. The TSRP and/or NTLC provides the Outline to the prosecutor as an attachment in an email with links to supporting material. In reviewing the Outline, the prosecutor learns that the expert testified in a previous trial about the Tyndall effect. When cross

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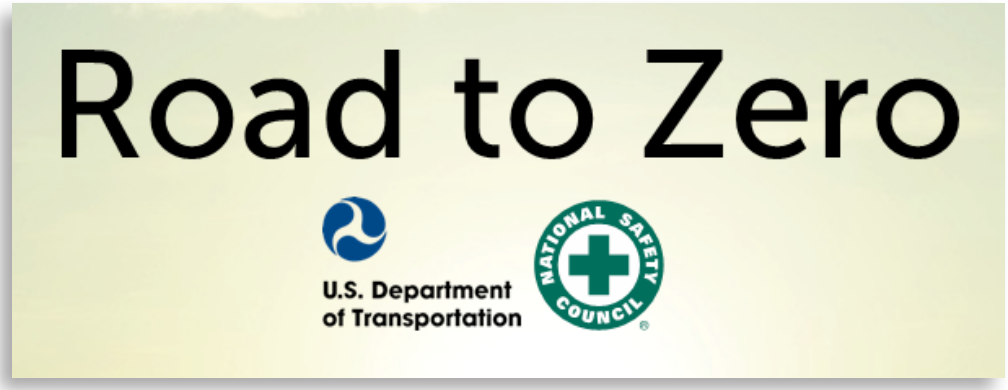
On the Road to Zero



Before leaving office, President Obama ordered the Department of Transportation (DOT) to develop a strategy to respond to the increasing number of deaths on the roads (17,700 in the first six months of 2016, a 10.4% increase), with a goal of reducing that number to zero in three decades.

The DOT's plan, "The Road to Zero," is essentially a "Moon shot" to eradicate impaired driving and driver error, which accounts for 94% of crash fatalities.

"Our vision is simple—zero fatalities on our roads. We know that setting the bar for safety to the highest possible standard requires commitment from everyone to think differently about safety—from drivers to industry, safety organizations, and government at all levels."

The measure is based on Sweden's Vision Zero, initiated in 1997, and on recent initiatives in Toronto and the Netherlands. Vision Zero's premise is that no loss of life in a vehicle crash is acceptable.

The federal coalition—NHTSA, Federal Highway Administration, and Federal Motor Carrier Safety Administration—will start with "proven lifesaving strategies," which include seatbelts, rumble strips, truck safety, behavior change campaigns, and smart enforcement that is data driven. Significantly, the Road to Zero campaign includes an emphasis on improved technology such as self-driving vehicles, which some safety advocates including Ralph Nader have strongly criticized.

With recent developments in traffic safety roadway engineering and the rapid introduction of automated vehicles such as Google and Tesla self-driving automobiles and advanced technologies, DOT claims it is now possible that the goal of zero road deaths and serious injuries can be achieved in the next 30 years. If road fatalities continue to accumulate at their present rate, 30 years represents over 1 million highway deaths.

Updates from the Traffic Crash Reporting Unit

By: Sgt. Scott Carlson

Extent Of Damage

As of January 2016 the UD-10 no longer includes a 0-7 scale to record the vehicle damage from a traffic crash. This scale was too subjective and was replaced with a much simpler Extent of Damage field with five basic choices:

1. No Damage was sustained by this unit.

2. Minor Damage to the unit, which would be cosmetic types of damage.

3. Functional Damage means a function of the vehicle is no longer operable like the hood doesn't open or the trunk won't latch, but the vehicle is still drivable.

4. The unit has Disabling Damage if it is not drivable and has to be towed from the scene because of the damage. For all units with Disabling Damage, the Towed To and Towed By fields must be completed.

5. The amount of damage is Unknown or cannot be reasonably determined.

Note: The Drivable YES/NO field was also removed as this information is now captured in the above descriptions.

Drug And Alcohol Reporting

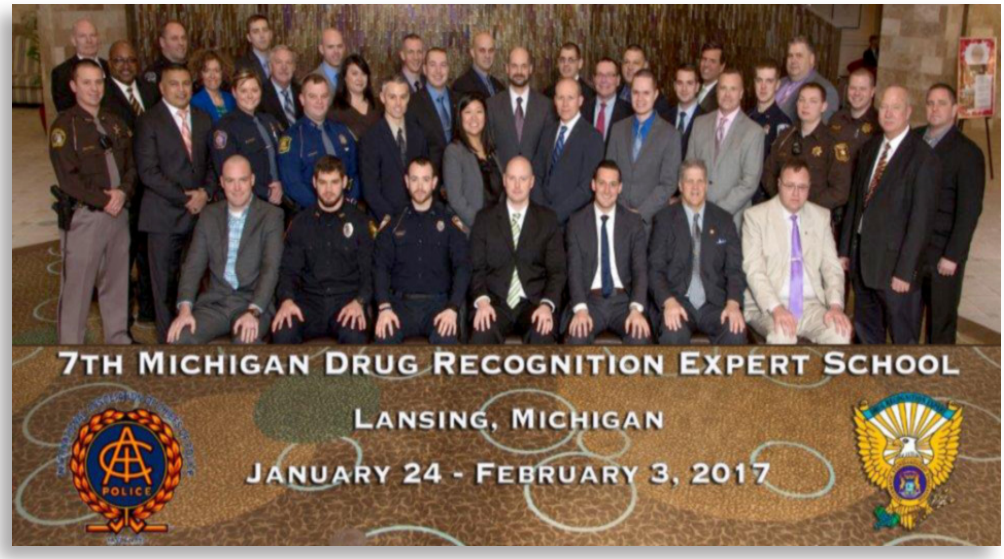
A recent change was made on how driving records will reflect crashes involving alcohol and/or drugs. To be consistent with past practices, the Contributing Factor was removed as a trigger for the driving record, and the following rationale will now be used. Selecting Alcohol Suspected YES will result in the crash being posted to a driving record as involving alcohol, and likewise selecting Drug Suspected YES will result in the crash being posted to a driving record as involving drugs.

Reporting Train Crashes

Michigan requires all crashes involving a train and another motor vehicle to be reported on a UD-10. Recently the Michigan Railroad Association revised its guide for law enforcement response to railroad incidents. Along with several railroad laws and contact information, pages 25-28 specifically provide detailed instructions on how to properly report these crashes on the UD-10. A PDF download of this guide can be found in Resources under the Training Division, Traffic Services Section on the MSP website www.michigan.gov/msp.

Michigan Completes its Seventh DRE School

Twenty law enforcement officers and seven prosecutors successfully completed Michigan's seventh Drug Recognition Expert (DRE) training earlier this year. There are now 113 DRE-trained officers and 32 DRE-trained prosecutors in Michigan. DRE officers are trained to recognize signs of drug impairment in drivers and to identify the category or categories of drugs causing that impairment. They do this through a 12-step evaluation which includes divided attention tasks, taking vital signs, and measuring pupil size in three different light conditions.



Having DRE-trained officers and prosecutors increases the chances of detecting and prosecuting drivers suspected of driving under the influence of drugs. The new DREs are from the following departments: Almont, Bloomfield Township, Dearborn, Ferndale, Grand Blanc Township, Grand Rapids, Marquette City, Oscoda, and Oxford police departments; Berrien, Ingham, Kalkaska, Kent, Macomb, and Mason sheriff offices; and the Michigan State Police Brighton, Flint, Jackson, Rockford, and Wayland posts. Prosecutors attending this year were from Alpena, Berrien, Charlevoix, Ionia, Kent, and Saginaw counties.

For Your Information

Cinco de Mayo May 5, 2017

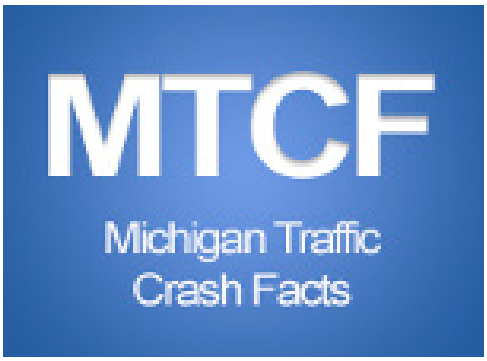
In the United States, Cinco de Mayo has become synonymous with festive fiestas and salty margaritas. Historically, the fifth of May commemorates Mexico's 1862 victory over France at the Battle of Puebla during the Franco-Mexican War.

Unfortunately, there is no victory when partygoers drink and drive. NHTSA's Buzzed Driving is Drunk Driving campaign reminds those celebrating Cinco de Mayo to always plan ahead—designate a sober driver or find another way to get home safely. Click here for campaign materials.

2015 Michigan Traffic Fatal Crash (MTCF)

The 2015 Michigan Traffic Fatal Crash (MTCF) Report was completed by University of Michigan Traffic Research Institute and is now published on the Michigan Traffic Crash Facts Website: www.MichiganTrafficCrashFacts.org

The Michigan Traffic Crash Facts (MTCF) website provides users with annual official Michigan crash data. There are two sections to the website: the Publications section that contains crash data statistics dating back to 1992; and the Data Query Tool, which allows users to perform advanced searches on the data over specific elements. The MTCF Data Query Tool allows users to build unique queries using Michigan crash data and see the results in the form of maps, tables, lists, bar and pie charts, on a timeline, or by downloading the actual police reports.



Using the Data Query Tool, it is possible to select data from a specific time frame or location in the state of Michigan. The pre-built crash data filters come directly from the police officer crash reports. Depending on what is selected, crash, unit, and person counts are always on display. The data can be displayed in a variety of formats. A query can be displayed on a map of Michigan, with color coding based on hot spots related to that query. Bar graphs, pie graphs, and timelines can be constructed and downloaded. Tables, lists, and calendars can be generated with queries. Crash reports can also be downloaded directly from the current selection.

Just Stop the Vehicle *(continued from page 1)*

funding alone. Enforcement is one of the four crucial E's of traffic safety, and the concern of a receiving a citation is scientifically shown to be the primary influence on driver behavior.

But surveys of driver attitudes and beliefs clearly indicate that perception of the "risk" of a citation continues to be rather low in Michigan. If there is any hope to seeing reductions in these fatality numbers in the near term, it will require a resurgence of traffic enforcement and safety as part of a police officer's core priorities. That will require increased support for law enforcement staffing and the commitment of top law enforcement leadership that traffic safety and enforcement are a priority.

A good place to start is simply encouraging officers to be highly proactive in stopping vehicles for violations and talking to the driver. Stopping a vehicle and simply talking to the driver, educating them about the problem, why law enforcement engages in traffic, and asking them for voluntary compliance, is where we need to begin the process of making traffic safety a priority again.

This is particularly true of young, inexperienced drivers who need all the coaching they can get. And the bonus is that there is no better tool to engage the community in a positive way than coaching a driver on a traffic stop, especially if you send them on their way with a warning. Some will say that verbal warnings don't do anything to change driver behavior, but public perceptions are driven in large part by what they see, not necessarily what they personally experience.

Every motorist passing you when you have someone stopped assumes two things. First, that police are cracking down, and second, that someone is getting a ticket. If you want to increase "general deterrence" and generate voluntary compliance with traffic laws, start by increasing the number of vehicle stops and talking to drivers. Regardless of what national media coverage may imply, the vast majority of the public still respects, appreciates, and admires law enforcement for the job they do and the risks they take. And when a police officer activates those overhead lights, drivers still get that sinking feeling in their gut.

It's OK to tell drivers that contrary to popular belief you are not out here doing this to raise revenue but because fatalities are increasing at an alarming rate of 10 percent a year, alcohol- and-drug involved fatalities are up over 20 percent, and fatalities involving young drivers are up by nearly 50 percent in one year. Tell them that traffic crashes are the number one killer of teens in the U.S. Tell them how much you despise making death notifications to people in the middle of the night. Tell them about your last serious injury crash or the last fatality you policed. Ask them to stay off their phone and put it away while behind the wheel. Ask them to buckle-up, slow down, and pay attention.

It's a great way to promote traffic law compliance, and still maintain a positive relationship with your community. And if an officer thinks that a verbal warning is not going to get the message across, they know what to do. Start by just stopping the vehicle.

Editor's Note: Michael Prince is the Director of the Michigan Office of Highway Safety Planning.

New Electronic Outline Resource to Combat Defense Experts *(continued from page 4)*

examined by the prosecutor in that case, the expert admitted that a subsequent study in Virginia concluded that the substances released by the deployment of an airbag in a crash does not increase the reading of a breath-alcohol instrument. In the Outline, the admission is listed under the category for Tyndall effect and provides a citation and link to the transcript where the defense expert made the statement. The prosecutor could then click on the link to the transcript and review that portion of the transcript. In addition, the Outline also includes information about the Virginia study. It contains a simple statement in the body of the Outline under the same category with this conclusion and provides a link to the study for the prosecutor to review and utilize at trial as necessary (to get the defense expert to admit to the results of the study or indicate that he has not done his homework because he is unaware of the study).

In this example, that information, recorded in the transcript or published in the article, would be linked to the outline. The prosecutor could cross examine or impeach the expert through information in the outline and then back it up with the transcript or article as needed. Remember, it is still the best practice to read the entire transcript because it may contain information that is unique to your state or circumstances, which was not included in the outline. Prosecutors must efficiently prepare as best as possible within the time available.

Another example presented in the below linked expert cross Outline involves Standardized Field Sobriety Tests (SFSTs) generally. The expert testified in the past that the One-Leg Stand (OLS) is only 65 percent reliable and the Walk and Turn (WAT) is only 68 percent accurate. Note, some courts will not allow the expert to testify as to the accuracy of the tests. The expert supports this with the first study sponsored by NHTSA conducted in 1981 when the BAC was .10. In cases where accuracy testimony is allowed, NHTSA provides information on a subsequent study that shows that OLS is 83 percent accurate, WAT is 79 percent accurate, HGN is 88 percent accurate, and, when all three are combined, 91 percent accurate in determining impairment at the .08 BAC level in 1998. This study is linked to the Outline for impeachment of the expert and prosecutor review.

The electronic version is currently undergoing migration to remote storage for easier access and connection to all the supporting documents. This will make access and navigating to additional documents easier and seamless for the end user. Users must establish that they are prosecutors or otherwise employed by law enforcement to gain access. In addition, the Outline does not generally provide "setup" questions, which are left to the prosecutor to adequately set up the expert for the cross point.

A sample Outline is provided as a link to this document (click on the word "Outline" in this sentence). Please contact NTLC or your state TSRP if you have any questions.

Revisiting *Navarette v. California* and the Reliability of 911 Tips *(continued from page 2)*

The Court found that the call was made contemporaneously with the event. The Court noted that the suspect was located 19 miles from where the caller reported the incident had occurred about 18 minutes after the call.

Finally, the Court deduced that the caller had personally witnessed the event because the caller reported that she had been run off the road by the suspect.[12]

New Development in Anonymous Tip Analysis

In deciding that the anonymous tip in the *Navarette* case "bore adequate indicia of reliability" by which to establish reasonable suspicion, the Court expounded upon the traditional inquiry and made an important comment on the reliability of information transmitted via the 911 emergency phone system.[13]

Essentially, the Court elevated anonymous 911 tips over other anonymous information, creating a quasi-anonymous category. In doing so, they identified various safeguards with the 911 system as follows: 1) 911 calls can be recorded; 2) It's a crime to falsely report or harass another person using 911, and violators are subject to prosecution for such acts; and, 3) 911 caller information, such as phone number and call location, cannot be blocked per FCC regulations.[14]

These safeguards work to bolster the reliability of 911 tips in two important ways. First, the caller isn't truly anonymous. Police have access to a recording of the caller's voice, the telephone number of the caller, the location from which the call was made, and potentially other personal information of the caller electronically stored by the 911 operating system. Second, with such personal information easily collected by 911 systems, subsequent prosecution for false reporting is a realistic deterrent.[15]

The new treatment of 911 tips is not without bounds. The Court was careful to mention that none of these safeguards "suggest that tips in 911 calls are per se reliable," just more reliable than the average anonymous tip.[16] Justice Thomas explained, "given the foregoing technological and regulatory developments . . . a reasonable officer could conclude that a false tipster would think twice before using such a system." [17]

In sum, due to technological and legal safeguards, anonymous 911 tips are inherently more trustworthy than most anonymous tips, but not so much so that they can always be deemed reliable. The ultimate question, even when dealing with 911 tips is whether, given the totality of the circumstances, the officer can substantiate an informant's "basis of knowledge [and] veracity."[18]

Best Practices

Going forward, police and dispatchers need to be vigilant and gather as much specific detail from tipsters as possible, including establishing whether the offense occurred at or near the time of the report and if the tipster has first-hand knowledge of the offense. Further, it is imperative that officers attempt to corroborate as much of the anonymous information as possible and document those details in a report. When possible, officers should combine their own personal observation of a suspect's suspicious behavior with an anonymous tip to greatly increase the objective strength of the reasonable suspicion.

With regards to the role of prosecuting attorneys, the risk of losing a case because the investigating officer relied on a 911 tip can be substantially mitigated by establishing a complete and detailed record. In reality, this case did not involve an anonymous tip at all.

A footnote in the *Navarette* holding revealed that the prosecutor did not introduce the 911 recording because neither the caller nor the dispatcher were available as witnesses (presumably to lay a foundation for the recording).19 On the 911 recording, the caller actually identified herself by name, but unfortunately, the Court could not consider that evidence as it was not part of the record.20 Most prosecutors would agree that calling witnesses and introducing evidence in practice can be very challenging for a myriad of reasons.

The takeaway for prosecutors is to try to introduce 911 recordings at motions hearings if possible—or, other evidence identifying an anonymous caller. If doing so proves to be a practical impossibility, prosecutors should glean as much specific information as possible from the police officer about the details he or she received (contemporaneousness, personal observation, specificity of the incident) and the ways the officer verified the detail in the subsequent investigation.

Conclusion

While the *Navarette* ruling did not drastically change the standing rules and analysis surrounding anonymous tips and reasonable suspicion, it was a minor victory for law enforcement. The unique takeaway from Navarette is the Court recognizing anonymous 911 tips hold fundamental safeguards that make them, at least to a degree, more reliable than other standard tips.

Editor's Note: Will Lathrop is formerly a Staff Attorney for the National Traffic Law Center. This article is reprinted with the permission of the National Traffic Law Center.

12 *Prado Navarette Et Al v. California,* supra.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 *Alabama v. White*, supra.
19 *Prado Navarette Et Al v. California*, supra.
20 Id.

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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, Callen Latz, a medical marijuana patient, appealed by leave granted from an order affirming the denial of his motion to dismiss his charge of illegal transportation of marijuana, MCL 750.474. Defendant pleaded guilty subject to his right to appeal the legality of the statute, which he asserted was an unconstitutional amendment of the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 et seq., and was superseded by the MMMA.

Thus, MCL 750.474 clearly subjects persons in compliance with the MMMA to prosecution despite that compliance, and it is therefore impermissible.

The question before the Court was whether an irreconcilable conflict exists between the MMMA and the illegal transportation of marijuana statute under the circumstances of this case, and if so, whether the MMMA precludes defendant's conviction.

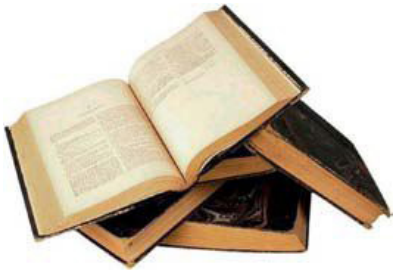
The Court held, "The illegal transportation of marijuana statute expressly refers to this provision and unambiguously seeks to place additional requirements on the transportation of medical marijuana beyond those imposed by the MMMA. Thus, MCL 750.474 clearly subjects persons in compliance with the MMMA to prosecution despite that compliance, and it is therefore impermissible." People v. Koon, 494 Mich at, 7; Braska v. LARA, 307 Mich App at 357-358. Because MCL 750.474 is not part of the MMMA, defendant, as a compliant medical marijuana patient, cannot be prosecuted for violating it.

The dissenting opinion concluded, "There is no irreconcilable conflict between the MMMA and the transportation statute and that this defendant may have immunity from prosecution. Accordingly, I would remand this case to the trial court for a factual determination of whether the defendant is in compliance with the MMMA. If defendant is in compliance, the defendant should have immunity from prosecution and the trial court should dismiss the charges."

Defendant's conviction is reversed, and remanded for entry of judgment.

People v. Latz, case no. 328274, decided December 20, 2016.

Unpublished Cases



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

Defendant appealed his jury trial conviction of operating while intoxicated, third offense.

The defendant argued the prosecution failed to present sufficient evidence to convict defendant of operating while intoxicated because defendant was not "operating" the vehicle. The Court of Appeals disagreed.

The Court relied on three Michigan cases to rule in favor of the People. *People v Wood,* 450 Mich 399 (1995); *People v Lechleitner,* 291 Mich App 56 (2010); *People v Burton,* 252 Mich App 130 (2002).

The Court stated "When read together, these cases show that if a vehicle poses some sort of significant risk of causing a collision, either because it is not in park and in danger of moving while the defendant is asleep or unconscious, or because it is in the path of traffic when officers arrive, even if it is not operational, then the intoxicated person behind the wheel is operating the vehicle. When a vehicle is partially in a roadway or could possibly regain motion, and the driver is asleep or unconscious, this creates a situation where a crash is likely to occur."

The Court further noted, "The truck that defendant was in created a significant risk of collision because the engine was running, it was in drive, and partially in the roadway. The truck was blocking part of the roadway and still presented a danger of veering into traffic if defendant's foot came off the brake. It is mere speculation that the truck would only have moved forward into a field and that this presented no danger to anyone else." Further, "under *Lechleitner*, even if the truck was no longer operational, the fact that it was still in the roadway presented a danger of causing a collision." Thus, "the vehicle was at significant risk of causing a collision."

The Court held all the elements were met. "Defendant does not contest that he was intoxicated, and the evidence supports that he was operating a motor vehicle on a public roadway. Defendant was found in the driver's seat of a truck that was running and in drive, meaning the truck was in danger of being put into motion if defendant were to remove his foot from the brake." Further, "the truck was still partially on a public roadway, which created a risk of collision." As such, "the evidence, viewed in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant was operating motor vehicle on a public road while intoxicated."

Affirmed.

People v. Kucharski, case no. 330221, decided February 14, 2017.

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.

Defendant appealed the trial court's order denying his motion to amend an order of probation to allow him to use medical marijuana while on probation.

On January 26, 2015, defendant pled no contest to operating while intoxicated (OWI), third offense, MCL 257.625, and operating without a valid license, MCL 257.301, arising from an incident on October 17, 2014. On March 2, 2015, the trial court sentenced defendant to three years' probation, with 60 days to be served in jail and one year of SCRAM tether.

Among the conditions of defendant's probation were that he not use or possess any controlled substance without a prescription, that he submit to drug testing as directed by his probation officer, that he participate in an outpatient or residential substance abuse

"The trial court did not abuse its discretion in denying defendant's request to use medical marijuana while on probation."

treatment program, and that he not violate any criminal law of any unit of government. On March 17, 2015, defendant sought an order from the trial court allowing him to use medical marijuana while on probation.

At the time of sentencing, defendant possessed a valid registry identification card for the medicinal use of marijuana, issued pursuant to the Michigan Medical Marihuana Act.

On May 22, 2015, the trial court denied defendant's motion to allow him to use medical marijuana while on probation.

On appeal, defendant argued that the trial court erred in denying his motion to amend the probation order to allow for his medical use of marijuana while on probation.

The Court of Appeals disagreed.

The Court held, "The trial court did not abuse its discretion in denying defendant's request to use medical marijuana while on probation."

The Court reasoned, "The trial court considered the need to provide defendant with pain treatment, but it also took into consideration additional factors, such as defendant's history of substance abuse, the need to deter additional

criminality, and the need to protect the public from further crimes by defendant.

Defendant has failed to offer any persuasive argument for the proposition that the MMMA prohibits a trial court from ever imposing a probationary condition barring the use of medical marijuana. The challenged probationary condition is reasonably related to the goal of defendant's rehabilitation, including preventing future criminality, as well as protecting the public."

Affirmed.

People v. Magyari, case no. 327798, decided January 12, 2017.

In January 2015 at around midnight, defendant was traveling westbound on McNichols in Detroit. He was driving at a speed of over 75 mph while the posted speed limit was 35 mph. The pavement was wet, and he was intoxicated—having a blood alcohol content of 0.155.

At about the same time, Janitta Simpson was traveling eastbound on McNichols and also intoxicated, having a blood alcohol content of 0.147. At about the intersection of Greenfield and McNichols, as defendant was attempting to go through a yellow light Simpson was attempting to make a left turn from McNichols. They crashed. Defendant's vehicle struck the passenger side of Simpson's vehicle. Simpson's front seat passenger, Yvette Brown, died from her injuries.

Both defendant and Simpson were charged with operating a motor vehicle while intoxicated causing death pursuant to MCL 257.625(4). Defendant was convicted during a bench trial, but Simpson was acquitted of that charge. Instead, she was found guilty of operating a motor vehicle while intoxicated. The trial court concluded that, while Simpson was intoxicated, her act of turning her vehicle at that particular point amounted to only ordinary negligence on her part.

On appeal, defendant argued that his actions were not a proximate cause of Brown's death, and that the trial court's conclusion—that Simpson's act of swerving into the path of his oncoming vehicle was not a superseding cause which broke the causal chain—went against the great weight of the evidence. The COA disagreed.

The Court of Appeals relied on two prior Michigan Supreme Court cases to determine when a superseding cause exists so as to sever criminal liability—*People v. Feezel*, 485 Mich 184 (2010) and *People v. Schaefer*, 473 Mich 418 (2005).

"Ordinary negligence by the victim or a third party is reasonably foreseeable, and thus will not break the causal chain as a superseding cause so as to sever criminal liability. *Feezel*, 486 Mich at 195. 'In contrast, gross negligence or intentional misconduct on the part of the victim [or a third party] is considered sufficient to break the causal chain between the defendant and the victim because it is not reasonably foreseeable.' *Id*. (citation and quotation marks omitted); see also *Schaefer*, 473 Mich at 437-438. 'The linchpin in the superseding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness.' *Schaefer*, 473 Mich at 437. If '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.' *Id*. at 437-438." *Id*. at 3.

The Court of Appeals held that defendant failed to show that the trial court's factual findings were clearly erroneous. Evidence at trial included that defendant was traveling at 78 mph a second before the crash in a 35 mph speed zone and while the roads were wet. An accident reconstruction expert testified at trial that defendant had accelerated through the intersection after the light had turned yellow and that Simpson's vehicle's brake lights were activated as she moved to the left.

Affirmed.

People v. Lewis, case no. 329383, decided December 22, 2016.

The defendant was convicted of possession with intent to deliver 45 kilograms or more of marijuana. He appealed as of right.

This facts in the case arise out of a traffic stop. A Michigan State Police Trooper pulled over defendant after observing him commit several traffic violations. The Trooper approached the vehicle, asked defendant for his license, registration, and proof of insurance, and asked defendant about the purpose of his trip. Defendant provided the documentation and informed him that "he

was going to Grand Rapids" "to see his aunt and nephew but later "changed his story" to his "aunt and cousin, and then started to giggle a little bit," in what the Trooper took to him making light of the fact that he had stumbled in conversation about what he was truly doing." The Trooper then returned to his patrol vehicle to review defendant's documentation.

The Trooper then returned defendant's documentation, issued a verbal warning, and concluded the traffic stop. Shortly thereafter, however, he asked defendant whether he would be willing to answer additional questions. Defendant agreed.

After defendant denied that "there was anything illegal going on," the Trooper asked defendant if he could search the vehicle, and defendant affirmatively agreed that he could. He proceeded to search defendant's vehicle and found seven "20 to 25 pound packages" of marijuana in "red and black duffle bags in the" trunk. Defendant was arrested and charged with possession with intent to deliver 45 kilograms or more of marijuana, MCL 333.7401(2)(d)(i).

On appeal, defendant first argued that the Trooper did not have an articulable and reasonable suspicion for the initial traffic stop. The Court of Appeals disagreed.

"defendant had the opportunity to leave after his documentation was returned to him and that defendant did not have to answer any additional questions. Given defendant's consent, his reliance on Rodriquez is misplaced."

The Court noted that the Trooper testified that he observed defendant's vehicle cross the fog line and divider lines several times. Video footage from his patrol vehicle supported this testimony.

Therefore, the Trooper had articulable and reasonable suspicion to stop defendant's vehicle. Second, defendant argued that, pursuant to the United States Supreme Court's decision in *Rodriquez v United States,* ___ US ___; 135 S Ct 1609; 191 L Ed 2d 492 (2015), the Trooper's detention of defendant after returning his documentation was not reasonably related to the underlying reason for the stop. Thus, he claimed, any statements made or evidence found after returning his documentation should have been suppressed. The Court of Appeals disagreed.

The Court held that the "defendant had the opportunity to leave after his documentation was returned to him and that defendant did not have to answer any additional questions. Given defendant's consent, his reliance on Rodriquez is misplaced."

Affirmed.

People v. Ramos, Jr., case no. 329057, decided December 15, 2016.

Defendant appealed by right his conviction of operating a vehicle while intoxicated, MCL 257.625(1). Defendant was sentenced to 4 to 20 years' imprisonment. The case arose out of a traffic stop that occurred in northern Kent County.

Defendant argued that the prosecution presented insufficient evidence at trial to support his operating a vehicle while intoxicated conviction, specifically that there was insufficient evidence to establish that he was intoxicated.

The COA held there was sufficient evidence presented at trial to support a conviction under the theory that defendant operated a vehicle while under the influence of alcohol. At trial, the police officer testified that he could smell intoxicants on defendant's breath and that defendant had bloodshot, glassy eyes. In addition, defendant admitted to drinking three or four 12-ounce mixed drinks made with rum. The police officer also testified regarding defendant's performance on the sobriety tests. For instance, he testified that defendant's eyes were jerky or jumpy during the nystagmus tests and that defendant could not complete the one-leg stand test. Finally, the jury was able to view the patrol car dash cam video and observe defendant's performance on the sobriety tests.

In addition, the COA ruled that there was also sufficient evidence presented at trial to support a conviction under the theory that defendant operated a vehicle with a blood alcohol content of 0.08 or more. At trial, the prosecution admitted the toxicology laboratory report into evidence, which showed that defendant's blood alcohol content was 0.109 after his arrest. From this evidence, the jury could have reasonably concluded that defendant operated a vehicle with a blood alcohol content of 0.08 or more.

The COA disagreed with defendant's argument that it was improper for the trial court to instruct the jury that they could find defendant guilty if some jurors believed defendant was operating the vehicle under the influence of alcohol and other jurors believed defendant was operating the vehicle with a blood alcohol content of 0.08 or more. The COA held that the third element of operating a vehicle while intoxicated "is disjunctive; that is, it can be satisfied in either of the two ways." *People v. Hyde*, 285 Mich App 428, 447-448; 775 NW2d 833 (2009). The third element can be satisfied by showing that defendant was either operating a vehicle under the influence of alcohol or that defendant operated a vehicle with a blood alcohol content of 0.08 or more. *Id*.

Affirmed.

People v. Kessler, no. 329960, Decided February 23, 2017

New Laws

A Misdemeanor to Operate a Motorcycle Without an Endorsement Law Effective, February 7, 2017

Public Act 318 of 2016, effective February 7, 2017, amended the Michigan Vehicle Code, MCL 257.312a, to increase the penalty for operating a motorcycle upon a public street or highway without first obtaining a motorcycle indorsement. As amended, a first violation is punishable as a 90-day misdemeanor and a second or subsequent offense is punishable as a 1-year misdemeanor.

Speed Limit Law Effective, January 5, 2017

Public Acts 445 and 447 of 2016, effective January 56, 2017, amended the Michigan Vehicle Code, MCL 257.627 and MCL 257.628. The amendments include moving speed limit provisions previously found in MCL 257.628 to MCL 257.627 and modifying a number of current speed limits listed in MCL 257.627. Relevant moved or amended provisions are discussed below. Pursuant to MCL 257.627(1), a person operating a vehicle on a highway shall operate that vehicle at a careful and prudent speed not greater than nor less that is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition existing at the time. A person shall not operate a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead. A violation of MCL 257.627(1) shall be referred to as a violation of the "basic speed law" or "VBSL."

Pursuant to MCL 257.627(2), it is lawful to operate a vehicle on the below listed highways at the listed speeds, unless doing so would result in the person being in violation of the "basic speed law" detailed in MCL 257.627(1):

- 15 miles per hour (mph) on a highway segment within the boundaries of a mobile home park as defined by MCL 125.2302. MCL 257.627(2)(a)
- 25 mph on a highway segment within a business district. MCL 257.627(2)(b)
- 25 mph on a highway segment within the boundaries of a public park. MCL 257.627(2)(c)
- 25 mph on a highway segment within the boundaries of a residential subdivision, including a condominium subdivision, consisting of a system of interconnected highways with no through highways and a limited number of dedicated highways that serve as entrances to and exits from the subdivision. MCL 257.627(2)(d).

It should be noted a highway segment adjacent to or lying between two or more areas described above shall not be considered to be within the boundaries of those areas. MCL 257.627(5)(a).

Pursuant to MCL 257.627(4), where the posted speed limit is greater than 65 mph, a person operating

- A school bus;
- A truck with a gross limit of 10,000 pounds or more;
- A truck-tractor; or
- A truck-tractor with a semi-trailer or trailer or a combination of these vehicles shall not exceed a speed of 65 mph on a limited access freeway or a state trunk line highway.

The previous speed limit of 55 mph that applied to the above persons was removed.

The following general speed limits are the maximum speed limits allowed on the below listed highways, unless a speed limit is otherwise fixed:

- 70 mph is the "limited access freeway general speed limit" on all limited access freeways. 55 mph is the minimum speed limit on all limited access freeways. MCL 257.627(8)
- 55 mph is the "general speed limit" on all trunk line highways and all county highways. MCL 257.627(9)
- 55 mph is the "general gravel road speed limit" on all county highways with a gravel or unimproved surface. MCL 257.627(10)

Pursuant to MCL 257.627(12), speed limits established under MCL 257.627 are not valid unless properly posted. In the absence of a properly posted sign, the speed limit in effect is the "basic speed law" established in MCL 257.627(1).

However, the speed limits listed below are valid without posting:

- The "basic speed law." MCL 257.627(1)
- The residential subdivision speed limit of 25 mph. MCL 257.627(2)(d).
- The "general speed limit" of 55 mph. MCL 257.627(9).

The term "absolute speed limits" previously found in MCL 257.628(10) was removed.

The 45 mph speed limit for a person operating a modified agriculture vehicle previously found in MCL 257.627(6) was removed.

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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