

The GREEN LIGHT NEWS

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BOL Calls in Michigan: What Law Enforcement Needs to Know

By Kinga Canike and Kenneth Stecker

In Michigan it's common for operating while intoxicated investigations to begin with a 911 call. These calls are commonly referred to as "be on the lookout" or BOL calls. This year the Michigan Supreme Court (MSC) published an important case on investigatory stops that involve BOL calls. It is very important that law enforcement be familiar with this case as it will impact how they handle investigatory stops based on BOL calls.

In *People v. Pagano*, the MSC had to decide whether a police officer had legal grounds to stop a vehicle to investigate a possible drunk driver based on information provided by an anonymous caller to 911.¹

In July 2016, a person called 911 to report what they believed was a possible female drunk driver. The caller provided



The MSC held that an anonymous tip must not only reliably identify the vehicle involved, but it must also be reliable in its description in the suspected criminal activity.

the make, model, color, and license plate, as well as the direction in which the vehicle was traveling. Other information relayed by the caller was that the female was outside of her vehicle, that she was yelling at her children, "appearing to be obnoxious," "appear[ing] to be intoxicated," and that the caller believed the female's intoxication "was causing her behavior...with the children."² This information was conveyed through dispatch and within 30 minutes a Huron County law enforcement officer observed a vehicle matching the description. The officer followed the vehicle for a short period to corroborate that it matched the description provided by dispatch and then made an investigatory stop. The officer did not witness any traffic violations in the short period of time he followed the vehicle. The female driver was eventually arrested for and charged with operating while intoxicated with a child passenger and open intoxicants in vehicle.³

In district court, defendant argued that the traffic stop was unlawful and that any evidence obtained because of the stop should be suppressed. The court held a hearing in which the officer testified to the stop. No other evidence was admitted, including the recording of the

911 call. The district court sided with the defendant and ultimately the issue went up to the state's highest court.⁴

In its analysis, the MSC first stated that the proper legal standard for determining the legality of a brief investigative traffic stop is reasonable and articulable suspicion to believe that a person may be engaged in criminal activity. This inquiry is fact specific and decided on a case-by-case basis. Further, the MSC held that an anonymous tip may be reliable enough for an investigatory stop if sufficiently corroborated.⁵

Applying this analysis to the facts in this case, the MSC ruled that the officer did not have the reasonable and articulable suspicion required to make an investigatory stop based on the information provided by the anonymous caller. The MSC held that an anonymous tip must not only reliably identify the vehicle involved, but it must also be reliable in its description in the suspected criminal activity. In this case, the MSC found that what the anonymous caller

(Continued on page 5)

1. *People v. Pagano*, Case No. 159981, Decided on April 22, 2021.
 2. *People v. Pagano*, Case No. 159981, Decided on April 22, 2021 (Zahara J. concurring opinion) at 2.
 3. *Pagano* at 2.
 4. *Id.* at 2-3.
 5. *Id.* at 4-5.

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“Please Stop Big Trucks”

By Miriam Norman, Washington State Traffic Safety Resource Prosecutor

This is my plea to you to please stop commercial motor vehicles. I know that for most officers, the idea of stopping a commercial motor vehicle seems daunting: where do I pull it over? What about officer safety? What about all the regulations around CMVs/CMV operators? I do not know what a logbook looks like, nonetheless what to check for? What about medical certificates?

Because of the high likelihood of danger, the CDL driver/CMV operator is heavily regulated. Many CDL drivers are required to have “logbooks”; the record of how many hours he/she has worked. These records are expected to be available for inspection while on duty. Prior to starting the day’s driving a CDL holder driving a CMV must do an inspection to ensure the CMV is in good proper, working order. CMV operators must possess specialized knowledge and expertise to safely inspect, operate the CMV, and then maintain the records of operation. The weight and force of a moving CMV is potentially deadly; CMVs are not as flexible as passenger cars. They are heavier, cannot be maneuvered as easily, have air brakes, which do not perform as well as hydraulic brakes, and have heavier, harder tires that do not grip the road as well as passenger car tires. Because of this CMVs have more potential to have a deadlier end to anyone who is hit by a CMV.



A CMV is an enormous vehicle with high capacity to kill and injure. Trucks and buses represent: 5% of the registered vehicles in the United States.¹ However, they represent 10% of the vehicle miles traveled, 12% of the fatal crashes, and 13% of the traffic fatalities.²

Crashes involving CMVs all too often have fatal consequences. CMVs are disproportionately involved in motor

Trucks and buses represent: 5% of the registered vehicles in the United States.¹ However, they represent 10% of the vehicle miles traveled, 12% of the fatal crashes, and 13% of the traffic fatalities.²

vehicle crashes and fatalities every year. For this reason, CMV operators/CDL holders are held to a higher standard. A CDL holder will have potentially more significant consequences than a non-CMV operator/non-CDL holder under the

same facts. Driving distracted in a CMV is deadly; focusing on removing dangerous CDL holders from the road will increase safety on our roadways.

Please start by pulling them over for the infractions that you see. Do not worry if you do not know what a logbook looks like. If you see bizarre, dangerous, or illegal driving, enforce that. All of you know how to investigate a DUI or a speeding infraction. Do the same with the CMV operator. A recent study highlights the need for us to be engaging in enforcement action against CMVs/operators. They are professional drivers who are driving big vehicles with great potential to wreak egregious deadly

Table 4: Summary of Crash Likelihood for All Data Analyzed

If a driver had:	The crash likelihood increased:	Sig
A Reckless Driving violation	114%	**
A Failure to Yield Right of Way violation	101%	***
A Failure to Keep in Proper Lane conviction	83%	**
A Failure to Use / Improper Signal conviction	82%	**
A Past Crash	74%	***
An Improper Lane / Location conviction	72%	***
An Improper Pass conviction	70%	**
A Reckless / Careless / Inattentive / Negligent Driving conviction	69%	***
An Improper or Erratic Lane Changes conviction	66%	***
An Improper Lane Change violation	63%	***
An Hours-of-Service violation	50%	***
An Improper Turn conviction	49%	*
A Following Too Close conviction	46%	**
A Speeding violation	45%	***
A False or No Log Book violation	45%	***
A Disqualified Driver violation	44%	***
Any conviction	43%	***
A Speeding More Than 15 Miles over Speed Limit conviction	40%	***
A Speeding 1 to 15 Miles over Speed Limit conviction	38%	**
Any Moving violation	35%	***
A Seat Belt violation	33%	***
A Failure to Obey Traffic Control Device violation	30%	***
Any OOS violation	29%	***
A Failure to Obey Traffic Sign conviction	25%	**
A Driving Too Fast for Conditions conviction	25%	*
A Size and Weight violation	20%	***
A Failure to Obey Traffic Signal / Light conviction	20%	*
A Reckless Driving conviction		ns
An Improper Turn violation		ns
A Failure to Yield Right of Way conviction		ns
An Improper Passing violation		ns
A Following Too Close violation		ns
A Medical Certificate violation		ns
A Failure to Obey Yield Sign conviction		ns
A Failure to Obey Warning Light / Flasher conviction		ns

*Significant at p< .05
 **Significant at p< .01
 ***Significant at p< .001
 ns = non-significant

1. Federal Motor Carrier Safety Administration. (2017, June). 2017 Pocket Guide to Large Truck and Bus Statistics. (FMCSA National Training Center); Washington, DC: Author. Available [here](#)
 2. *Id.*

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Three Phases of an OWI Investigation

By: Kenneth Stecker and Kinga Canike

Phase 1: Vehicle in Motion – In this phase, the officer is observing how the vehicle is being operated and how it stops when pulled over, during which time the officer may see initial signs of a possible OWI violation. Following are 24 cues which police may use to detect impaired drivers. The driving cues were developed from a list of more than 100 that have been found to predict BACs of 0.08 percent or greater.¹

Problems Maintaining Proper Lane Position

1. Weaving
2. Swerving
3. Weaving across lane lines
4. Straddling a lane line
5. Drifting
6. Turning with a wide radius
7. Almost striking a vehicle or other object

Problems with Speed and Braking

8. Stopping problems (too far, too short, or too jerky)
9. Accelerating or decelerating for no apparent reason
10. Varying speed
11. Slow speed (10+ mph under limit)

Vigilance Problems

12. Driving in opposing lanes or wrong way on one-way
13. Slow response to traffic signals
14. Slow or failure to respond to officer's signals
15. Stopping in lane for no apparent reason
16. Driving without headlights at night
17. Failure to signal or signal inconsistent with action

Judgment Problems

18. Following too closely
19. Improper or unsafe lane change
20. Illegal or improper turn (too fast, jerky, sharp, etc.)
21. Driving on other than the designated roadway
22. Stopping inappropriately in response to officer

23. Inappropriate or unusual behavior (throwing, arguing, etc.)
24. Appearing to be impaired

Proper face-to-face observation and interview of a driver requires the ability to recognize the sensory evidence of alcohol and/or drug influence and the ability to describe that evidence clearly and convincingly.

Studies have shown that there is a 65% probability that the driver is intoxicated if weaving plus one of the other above listed cues are present.² If any two cues other than weaving are present, the probability that the driver is intoxicated is at least 50 percent.³ The presence of some cues alone (such as swerving, accelerating for no reason or driving on other than the designated roadway) have probabilities greater than 70 percent.⁴

Phase 2: Personal Contact – In this phase, the officer is determining, based upon face-to-face interview and observation of the driver, whether there is sufficient reason to instruct the suspect to step out from the vehicle.

Face-to-face observation and interview of the driver allows the officer to use three senses to gather evidence of alcohol and/or drug influence:

Sight: bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs or drug paraphernalia, bruises, bumps or scratches, unusual actions



Hearing: slurred speech, admission of drinking, inconsistent responses, abusive language, unusual statements

Smell: alcoholic beverages, marijuana, "cover up" odors like breath sprays, unusual odors

Pre-Exit Questioning of the Driver:

Asking for two things simultaneously, be alert for the driver who:

-forgets to produce both documents; produces documents other than the ones requested; fails to see requested documents while searching through wallet or purse; fumbles or drops wallet, purse, documents; is unable to retrieve documents using fingertips

Asking interrupting or distracting questions, be alert for the driver who:

-ignores the question and concentrates only on the license, insurance, and registration search; forgets to resume the search after answering the question; supplies a grossly incorrect answer to the question

Asking Unusual Questions

-For example, while holding the driver's license the officer may ask the driver, "What is your middle name?"

Exit Sequence:

Be alert to the driver who:

-shows angry or unusual reactions, cannot follow instructions, cannot open the door, leaves the vehicle in gear, "climbs" out of vehicle, leans against vehicle, keeps hands on vehicle for balance

Proper face-to-face observation and interview of a driver requires the ability to recognize the sensory evidence of alcohol and/or drug influence and the ability to describe that evidence clearly and convincingly.

Phase 3: Pre-Arrest Screening: In this phase, the officer administers the three scientifically validated psychophysical Standardized Field Sobriety Tests (SFSTs).

1. <https://www.nhtsa.gov/sites/nhtsa.gov/files/808677.pdf>

2. Id.
3. Id.
4. Id.

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Prince Announces Retirement From OHSP

After a 42-year career in public safety, the last 18 years as Director of the Michigan Office of Highway Safety Planning (OHSP), Michael Prince has announced his retirement from State service effective January 1, 2022.

Mr. Prince was appointed the sixth executive director of the OHSP on June 23, 2003. As Executive Director of the OHSP, he served as the designated Governor's Highway Safety Representative for Governors Whitmer, Snyder, and Granholm and has chaired the Governor's Traffic Safety Advisory Commission (GTSAC) since June of 2011. He was a standing member of the Michigan Truck Safety Commission (MTSC) and the Governor's Highway Safety Association (GHSA), where he served on the Federal Relations Committee.

Prince previously served the Michigan State Police as Public Affairs Director (2001-2003), Director of the Hazardous Materials Training Center (1999-2001), and as Public and Governmental Affairs Officer for the Emergency Management and Homeland Security Division (1996-1999). His career with the department began with the OHSP in 1990, where he worked as a program coordinator in the areas of community traffic safety, police traffic services, impaired driving programs, and the Secondary Road Patrol Program.



Prior to entering State service, Prince spent ten years as a police officer and community services coordinator for the Lansing Township, Eaton Rapids, and Dewitt Township Police Departments. He holds a Bachelor of Arts degree

from Spring Arbor University in Human Resource Management. He and his wife, Deborah, live in Clinton County and have three children, Robert (23), Benjamin (21), and Madeline (19).

For Your Information



According to the National Highway Traffic Safety Administration (NHTSA), a statistical projection of traffic fatalities for the first half of 2021 shows that an estimated 20,160 people died in motor vehicle traffic crashes. This represents an increase of about 18.4 percent as compared to 17,020 fatalities that were projected in the first half of 2020. This also represents the highest number of fatalities during the first half of the year since 2006 and the highest half-year percentage increase in the history of data recorded by the Fatality Analysis Reporting System (FARS). More can be found at this link <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813199>



The national chapter of the Mothers Against Drunk Driving (MADD) has created a roll call video series for law enforcement officers. The videos focus on the impact impaired drivers have on their victims and society, as well as the importance of enforcement to prevent these crimes. Please click on this link for more information and to access the videos: <https://www.madd.org/les>.

BOL Calls in Michigan *(continued from page 1)*

described was nothing more than a hunch that defendant may be intoxicated, which does not amount to reasonable and articulable suspicion.⁶ Justice Brian Zahara stated in his concurring opinion, “[b]eyond these facts, the officer’s testimony tells us nothing more about why the caller or the officer suspected that defendant was driving while intoxicated.”⁷

When dealing with investigative stops that involve BOL calls, it is important to also discuss the United States Supreme Court case of *Navarette v. California*.⁸ In *Navarette*, an anonymous caller to 911 reported that she was run off the road by a vehicle. The caller gave dispatch the make, model, color, and license plate number of the vehicle involved, as well as the direction in which the vehicle was heading and the mile marker where this had occurred. This information was put out by dispatch and approximately 18 minutes later a California Highway Patrol officer observed a vehicle matching

the description. The officer stopped the vehicle despite not witnessing any erratic driving himself. Thirty pounds of marijuana were recovered from the trunk bed, and both driver and passenger were subsequently arrested.⁹

The Supreme Court of the United States (SCOTUS) ruled that the 911 call contained sufficient indicators of reliability for the officer to be able to rely on the caller’s version of the facts.

The Supreme Court of the United States (SCOTUS) ruled that the 911 call contained sufficient indicators of reliability for the officer to be able to rely on the caller’s version of the facts. Therefore, the officer had the required reasonable suspicion to justify the traffic stop to further investigate a possible drunk driver.¹⁰ Justice Clarence Thomas, who wrote the opinion, stated as follows: “[a] driver’s claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously.”¹¹

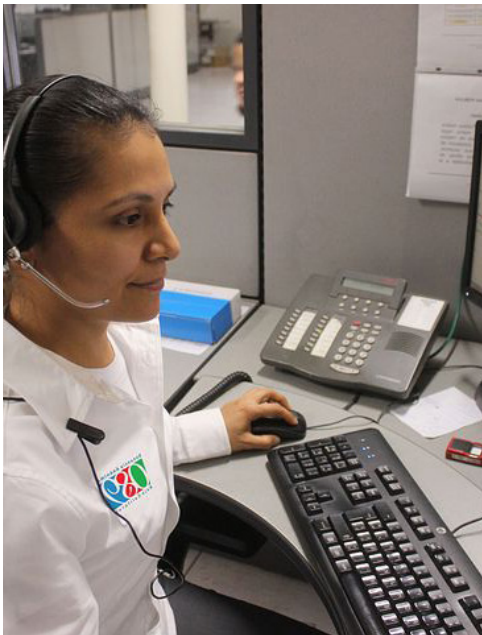
Here lays the key difference between these two cases. Unlike in *Navarette*, the caller in *Pagano* reached the conclusion that defendant may have been intoxicated because defendant was yelling at her kids and acting obnoxious. The MSC held this was “little more than a conclusory allegation of drunk driving, which is insufficient to pass constitutional muster.”¹² In *Navarette*, the reasonable suspicion that defendant may have been driving under the influence was based on the 911 caller’s description of being run off the road, a driving behavior the SCOTUS held was strongly correlated with drunk driving.

Based on the ruling in *Pagano*, it is imperative now for law enforcement

responding to a BOL call that may involve a possible drunk driver to have sufficient information to support a lawful investigatory stop. That information includes not only a reliable description of the vehicle but also the specific driving behavior associated with drunk driving. A great resource that lists these common drunk driving behaviors that was also referred to by the *Navarette* court is the *Visual Detection of DWI Motorists* put out by the National Highway Traffic Safety Administration.¹³ It is a list of driving patterns strongly correlated with drunk driving that all law enforcement officers involved in impaired driving investigations should be familiar with.¹⁴

In conclusion, BOL calls are an important tool in helping investigate potentially dangerous drivers. The *Pagano* decision should not deter law enforcement from moving forward on these calls. It is only a reminder to always make sure that there is reasonable suspicion to support the traffic stop. Justice Zahara reminds us of this when he wrote in his concurring opinion as follows: “[e]ven so, I encourage citizens to continue to report their suspicions of drunk or impaired driving, urge police officers to remain vigilant in protecting our state’s highways, and implore prosecutors to use all available evidence to ensure that an accurate and complete record is developed.”¹⁵

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



6. *Id.* at 5-6.

7. *Pagano* (concurring opinion) at 2.

8. *Navarette v. California*, 572 US 393; 134 S Ct 1683; 188 L Ed 2d 680 (2014).

9. *Id.* at 395.

10. *Id.* at 398-399.

11. *Id.*

12. *Pagano* at 7.

13. *Navarette* at 402.

14. <https://www.nhtsa.gov/sites/nhtsa.gov/files/808677.pdf>

15. *Pagano* (concurring opinion) at 5.

"Please Stop Big Trucks" *(continued from page 2)*

havoc on our roads. Two recent studies are pertinent to this topic. The first one identified the likelihood that a CMV operator would crash based on past behavior. The chart is below. The other study discussed impairment by drugs and driving a CMV.

The results of the study on CMV operators and DUI were alarming. This study showed that the prevalence of overall drug consumption was 27.6% of truckers were using drugs. Stimulants were the most widely consumed drug category. Truck-drivers choose stimulant substances as a form of performance enhancing drug, in order to increase productivity. Compared to the general population, truck-drivers use almost 30 times more than the general population. In previous studies, stimulant consumption among truck-drivers has been associated with night shifts, length of travel and younger

age. Other authors have suggested that also external factors play a role, such as productivity-based payments. In the present analysis, being younger and having less professional experience showed the most significant correlations with stimulant use. Drivers often take stimulants as a form of Performance Enhancing Drugs (PEDs), in order to sustain ever increasing work-loads and busy work schedules. The study also discussed other drug categories showing that prevalence among truckers is more than compared to the general population. The most alarming finding from the study, though, was this: "Based on the prevalence of overall drug use obtained through biological sampling, **around 1 every 20 workers was driving under the influence of drugs.**" 1 out of 20 truckers is DUI; that is abnormally high, especially when they are driving lethal, deadly, heavy, bigger trucks.

CDL holders/CMV operators are professional drivers with far more knowledge and experience as it pertains to driving than that of a non-CMV driver. With enforcement action against "just infractions," there can be a deterrent effect and an increase in safety on our roadways as the more dangerous CMV operators/CDL holders are identified, held accountable, and possibly removed from the road. CDL holders cannot get a DUI in their personal vehicle, nonetheless their CMV. Stop big trucks. Enforcement action against CMV operators and CDL holders has a deterrent effect. The goal is to prevent crashes, injury, and fatalities involving CMV transportation. With education, regulation, and enforcement action, fatalities and serious injury crashes will decrease. Please be part of the solution...not the problem.

Three Phases of an OWI Investigation *(continued from page 3)*

Horizontal Gaze Nystagmus (HGN) Test

– The HGN test is the most reliable field sobriety test. HGN refers to an involuntary jerking occurring as the eyes gaze toward the side. Involuntary jerking of the eyes becomes readily noticeable when a person is impaired.

In administering the HGN test, the officer has the suspect follow the motion of a small stimulus (approximately 12-15 inches from the subject's face) with the eyes only. The stimulus may be the tip of a pen or penlight.

When the HGN test is administered, the officer always begins with the subject's left eye. Each eye is examined for three specific clues.

-as the eye moves from side to side, does it move smoothly or does it jerk noticeably?

-when the eye moves as far to the side as possible and is kept at that position for several seconds (minimum of four seconds), does it jerk distinctly?

-as the eye moves toward the side, does it start to jerk prior to a 45-degree angle?

The maximum number of clues that appear in one eye is three. The maximum total

number for any subject is six. Research shows that if four or more clues are evident, the test is 88% percent reliable at indicating a person's BAC is .08 grams or higher.⁵

Walk and Turn (WAT) – It is a divided-attention test consisting of two stages: 1) Instruction Stage and 2) Walking Stage.

The WAT Test consists of eight clues: 1) can't balance during instructions; 2) starts too soon; 3) stops while walking; 4) doesn't touch heel-to-toe; 5) steps off line; 6) uses arms to balance; 7) loses balance on turn or turns incorrectly; and 8) takes the wrong number of steps.

Research shows that if a subject exhibits two or more of the clues, the test is 79% reliable at indicating a person's BAC is .08 grams or higher.⁶

One-Leg Stand (OLS) – It is a divided-attention test consisting of two stages: 1) Instruction Stage and 2) Balance and Counting Stage.

The OLS consists of four clues: 1) sways while balancing; 2) uses arms to balance; 3) hops; and 4) puts foot down.

Research shows that, when the suspect produces two or more clues, the test is 83% reliable at indicating a person's BAC is .08 grams or higher.⁷

Preliminary Breath Test (PBT) – The basic purpose of a PBT is to demonstrate the association of alcohol with the observable evidence of the subject's impairment. The PBT result is only one of many factors the officer considers in determining whether the subject should be arrested for OWI. It should never be the sole basis for an OWI arrest. In Michigan, the PBT has evidentiary limitations.

The Arrest Decision: Your arrest/no arrest decision is "based on the totality of the circumstances" of the three phases of an OWI investigation. If all the evidence, taken together, establishes probable cause to believe an OWI has been committed, you should arrest the subject for OWI.



5. https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst_full_participant_manual_2018.pdf

6. Id.

7. Id.

Prosecuting Attorneys Association of Michigan

116 West Ottawa, Suite 200

Lansing, Michigan 48913

Phone: (517) 334-6060

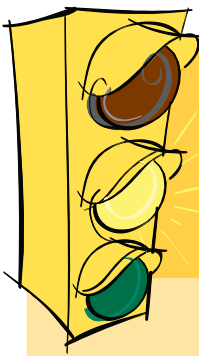
Fax: (517) 334-6787

Email: steckerk@michigan.gov,

canikek@michigan.gov



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The YELLOW LIGHT LEGAL UPDATE

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

Published Cases Michigan Court of Appeals

The Michigan Court of Appeals (COA) held that the Michigan Regulation and Taxation of Marijuana Law (MRTMA) does not bar a person under 21 years of age from being prosecuted for operating a motor vehicle with a schedule 1 controlled substance (marijuana) pursuant to MCL 257.625(8).

“Using or consuming marijuana is a necessary step leading to the operation of a motor vehicle with marijuana in the driver’s system, in violation of MCL 257.625(8); simple possession, however, is not.”

In December 2019, the 18-year-old defendant was driving her car when she was involved in a crash. Responding police officers detected an odor of burnt marijuana coming from defendant’s car and she admitted to smoking marijuana. Defendant participated in standard field sobriety tests and submitted to a preliminary breath test, which produced a test result of .000 blood alcohol content. A consent blood draw produced a test result of 4 nanograms of THC per milliliter of blood.

Defendant moved to dismiss the charge in district court, arguing the MRTMA prohibited any criminal prosecution against her for a violation of MCL 257.625(8) and that she could only be found responsible for a civil infraction if she drove her car with marijuana in her system. The district court denied the motion to dismiss. Defendant appealed to the circuit court, which affirmed the district court’s denial of the motion to dismiss. The COA granted defendant’s application for leave to appeal.

Defendant specifically argued that the MRTMA, at MCL 333.27965(3)(a)(2), decriminalizes marijuana use and sets forth a civil infraction fine schedule for possession of marijuana by those under 21 years of age. The COA rejected this argument, relying on the distinction in Michigan law between the possession and use of marijuana. The COA stated that whereas the MRTMA, at MCL 333.27965(3), decriminalizes the “possession” and “cultivation” of marijuana for those under the age of 21, MCL 257.625(8) criminalizes the “use” of marijuana. Further, the COA ruled that, “Using or consuming marijuana is a necessary step leading to the operation of a motor vehicle with marijuana in the driver’s system, in violation of MCL 257.625(8); simple possession, however, is not.”



The COA also stated the following in support of its ruling:

“We can conceive of no reason for treating a person under 21 who drives with marijuana in his or her system (although not legally permitted to possess or consume it) more lightly than a person who does so while legally permitted to possess and consume it, just as we do not deem it appropriate to treat such a person more lightly than a person under 21 who drives with alcohol in his or her system. In sum, the MRTMA did not remove all criminal

penalties for persons under the age of 21 who operate a motor vehicle with marijuana in their system, is under the influence of marijuana while driving, or consumes marijuana while operating a vehicle.”

People v. Perry, No. 355330, decided on August 12, 2021

Unpublished Cases

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

On an evening in March 2018, an Oakland County sheriff deputy was out on patrol when he saw a white Kia Forte vehicle parked in the parking lot of a closed elementary school. It was the only vehicle in the lot. The engine of the vehicle was running, the interior overhead lights were on, and a single person sat in the driver’s seat. The deputy parked his patrol car 10 feet away, at a 45-degree angle, behind the vehicle. For his safety, the deputy pointed his spotlight at the driver’s side of the vehicle. He did not activate his overhead lights or siren. The deputy walked up to the driver’s side of the vehicle to speak with the occupant, at which point he noticed his eyes were bloodshot and glossy, and that he was slurring his speech. The deputy also detected the odor of alcohol. The occupant was subsequently arrested and charged with operating a motor vehicle while intoxicated, third offense.

Defendant made a motion to suppress his blood test results, arguing that the deputy lacked reasonable articulable suspicion to believe that criminal activity was afoot when he seized defendant. The prosecution counter-argued that the deputy was lawfully performing his duty when he approached defendant’s vehicle, and that initiating an encounter for the purpose of an inquiry does not

constitute a seizure. The trial court initially denied defendant's motion to suppress. The defendant filed a delayed application for leave to appeal to the COA, which was denied, and then filed a delayed application for leave to appeal to the Michigan Supreme Court. The Supreme Court remanded the case back to the trial to determine whether defendant was seized for purposes of the Fourth Amendment. This time, the trial court ruled in favor of defendant, and the prosecution appealed to the COA.

On appeal, the COA agreed with the prosecution. First, the court held that there was no evidence to support the trial court's conclusion that defendant's only means to exit was to drive over the grass in front of his vehicle. The COA ruled that, "[t]his assertion was unsupported by any evidence, however. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, 'If [defendant] would have turned his wheel as he was backing out, he would have cleared my vehicle.'"

Secondly, the COA also held that the deputy partially obstructing defendant's vehicle did not constitute behavior that would have communicated to defendant that he was not free to leave.

People v. Duff, No. 354406, decided on November 23, 2021

In December 2018 at around 10:30 pm, defendant had been attempting to pass a vehicle on I-696 in Oakland County that was being driven by Jeremiah Goemaere. Defendant crashed into Goemaere, and Goemaere's front seat passenger was seriously injured in the crash. Defendant failed field sobriety tests at the scene and a search warrant blood draw came back with a BAC of .113 grams per 100 ml of blood. Defendant was charged with operating a motor vehicle while intoxicated causing serious impairment of body function (OWICSI) pursuant to MCL 257.625(5).

According to defendant, the road was slippery after a fresh snowfall and Goemaere's vehicle fishtailed into defendant's lane of travel, thereby causing the collision. The prosecution filed a motion in limine to exclude this

evidence, arguing among other things that neither the snowy road conditions nor Goemaere's driving amounted

... the COA held that the prosecution is only required to show that defendant's operation of a motor vehicle while intoxicated was a factual and proximate cause of the victim's injury, not that defendant's intoxicated or negligent manner of driving caused or proximately caused the injury.

to intervening, superseding causes that break the causal link between defendant's operation of his vehicle while



intoxicated and the victim's injuries. The trial court agreed with the prosecution, and defendant filed a delayed application for leave to appeal.

The COA ruled that the trial court did not abuse its discretion in granting the prosecution's pretrial motion to exclude. Applying the rationale in *People v. Schaefer*, 473 Mich 418; 703 NW2d 774 (2005), the COA held that the prosecution is only required to show that defendant's operation of a motor vehicle while intoxicated was a factual and proximate cause of the victim's injury, not that defendant's intoxicated or negligent manner of driving caused or proximately caused the injury. The COA ruled that the evidence of the snowy road conditions and the fishtailing of Goemaere's vehicle were not relevant to either component of the causation element of the charged offense.

As to the factual component, the prosecution must prove that "but for" the defendant's operation of the vehicle, the serious impairment of a body function of another person would not have occurred. The COA stated that, "defendant's 'operation of the vehicle was undeniably

a factual cause' of the victim's injuries because, but for defendant's operation of the vehicle, the collision between defendant and Jeremiah Goemaere would not have occurred." Any evidence of snowy road conditions or Goemaere's vehicle fishtailing would not be relevant to this component of the causation element.

As to the proximate component, the prosecution must prove that the victim's injuries were a direct and natural result of defendant's operation of the vehicle. To make this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. The key question will be whether the intervening cause was foreseeable based on an objective degree of reasonableness.

In this case, the COA held that it was reasonably foreseeable that there would be snowy road conditions in Michigan in December. Therefore, the evidence could not be used to establish an intervening cause that superseded defendant's conduct. The COA held the same for evidence of Goemaere's vehicle fishtailing on a highway during snowy road conditions.

Finally, the COA held that even though this evidence is not relevant to the causation element of OWICSI, these facts may still be admitted at trial to provide background information for the jury if the trial court provides a limiting instruction.

People v. Welch, No. 355030, decided on October 14, 2021

A Jackson City police officer pulled over defendant's vehicle after he observed it to be traveling 20 miles per hour in a 30-mile-per-hour zone at 3 am. The officer suspected that the driver was intoxicated based on the speed, that the vehicle was impeding traffic and that its slow speed "could have caused a traffic hazard." Following a roadside investigation, the officer arrested defendant for operating while intoxicated. Defendant moved to dismiss the charge, arguing that the officer lacked reasonable suspicion to justify the stop.

The trial court denied defendant's motion and defendant filed an interlocutory appeal.

The COA agreed with defendant, holding first that the officer in this case lacked reasonable suspicion to stop defendant's vehicle for impeding traffic because there was no evidence that defendant's vehicle blocked, obstructed, impeded, or interfered with the normal flow of traffic in any other way.

Second, the COA relied on the Michigan Supreme Court decision *People v. Parisi*, 393 Mich 31 (1974) to hold that traveling below a posted speed limit in the early morning hours did not create a reasonable suspicion of criminal activity to justify a *Terry* stop.

People v. Estelle, No. 356656, decided on September 16, 2021

Defendant pled guilty to reckless driving causing serious impairment of a body function and operating while intoxicated causing serious impairment of a body function. The trial court sentenced her to 38 to 60 months' imprisonment for each offense. Defendant appealed as on leave granted arguing that offense variable (OV) 3, concerning physical injury to a victim, was erroneously assessed at 25 points.

... the COA held that mom's victim impact statement, which was read at sentencing and extensively described her and her husband's injuries, provided sufficient evidence to support scoring OV 3 at 25

The case involved defendant driving while intoxicated (.286 BAC) when she crashed into a car carrying a couple and their two young children. The 3 and 1 year old were unharmed for the most part, but the father "suffered a fractured vertebra in his back and facial injuries between his eyes due to his glasses striking him in the face at the time of the collision" and the mother "had neck injuries, broken ribs, a lung contusion and a herniated disc."

The COA held that the trial court did not clearly err to the extent it found by a preponderance of the evidence that the combination of the mom's injuries was life-threatening. Even though the victim's

medical records had not been admitted, the COA held that mom's victim impact statement, which was read at sentencing and extensively described her and her husband's injuries, provided sufficient evidence to support scoring OV 3 at 25.

People v. Kiogima, No. 353815, decided on July 22, 2021

New Laws

Public Act Number 78 of 2021

Statute: MCL 780.621
Effective Date: February 19, 2022

What it Means: It amends the statute to include the definition of "first violation operating while intoxicated offense," and modifies the definition of "operating while Intoxicated."



In essence, pursuant to MCL 780.621(16) (g) "operating while intoxicated" means the following:

(g) "Operating while intoxicated" means a violation of any of the following:

- (i) Section 625 or 625m of the Michigan vehicle code, 1949 PA 300, MCL 257.625 and 257.625m.
- (ii) A local ordinance substantially corresponding to a violation listed in subparagraph (i).
- (iii) A law of an Indian tribe substantially corresponding to a violation listed in subparagraph (i).
- (iv) A law of another state substantially corresponding to a violation listed in subparagraph (i).
- (v) A law of the United States substantially corresponding to a violation listed in subparagraph

Public Act Number 79 of 2021

Statute: MCL 780.621c
Effective Date: February 19, 2021

What it Means: It allows the setting aside of a conviction for a first violation operating while intoxicated (OWI) under certain circumstances. A first violation OWI is not eligible for automatic set aside under MCL 780.621g. Rather, it permits the court to consider whether the applicant had benefited from rehabilitative or educational programs (if ordered by the sentencing court) or whether such steps were taken before sentencing on the first offense OWI conviction. It allows the court to deny the application if it is not convinced that the applicant has either availed himself or herself or benefited from educational or rehabilitative programming.

Public Act Number 82 of 2021

Statute: MCL 780.621d
Effective Date: March 9, 2022

What it Means: It amends the statute to prescribe the time period in which an application to set aside a conviction for a first violation OWI offense would have to be filed. Under the statute, the applicant would have to wait 5 or more years to file an application for a first violation OWI offense.

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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