

## Risky-Driving Behaviors What Prosecutors and Law Enforcement Need to Know

By: Joshua Saucier, Maine TSRP

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As a prosecutor, have you ever wondered why traffic-safety-oriented officers are so focused on a particular set of offenses? As an officer, have you ever questioned why funding was available for some details but not others? This article addresses those questions.

### Risky Driving: What Is It?

The National Highway Traffic Safety Administration (NHTSA) spotlights six driving behaviors as the most risky.<sup>1</sup> These six driving behaviors are drunk driving, drug



**These six driving behaviors are drunk driving, drug impaired driving, distracted driving, not wearing a seatbelt, speeding, and drowsy driving.<sup>2</sup>**

impaired driving, distracted driving, not wearing a seatbelt, speeding, and drowsy driving.<sup>2</sup> Though other factors may also have been involved,<sup>3</sup> these six behaviors "largely explain the fatality increase from 2019 to 2020."<sup>4</sup> This increase brought the number of fatalities to its highest since 2007.<sup>5</sup> NHTSA determined those six most-risky behaviors by annually collecting, compiling, and reviewing data from traffic crashes across the country and by conducting studies that focused on those behaviors.<sup>6</sup>

The National Center for Statistics and Analysis (NCSA) is the NHTSA office responsible for providing this analytical and statistical information.<sup>7</sup> Its goal is to "[p]rovide the data and the analysis to allow complete understanding of: the nature, causes and injury outcomes of crashes and the strategies and interventions that will reduce crashes and their consequences."<sup>8</sup>

For example, as traffic safety professionals became more aware of the prevalence of drug-impaired driving, NHTSA responded.<sup>9</sup> Not only did the states and NHTSA begin tracking drug-impairment data, NHTSA also funded a study analyzing and comparing the riskiness of drug impaired driving, alcohol impaired driving, and combined alcohol and drug impaired driving.<sup>10</sup> The study indicated that of the three behaviors, alcohol impaired driving was the most prevalent cause of crashes.<sup>11</sup> It also appeared that marijuana impaired driving was a significant contributor to crashes, but further study was needed to better understand marijuana's role in causing death and injury on America's roadways.<sup>12</sup>

Below are the pertinent statistics regarding each of the six risky driving behaviors:

**1. Drunk Driving:** In 2020, drunk driving killed 11,654 people in the United States.<sup>13</sup> This was a fourteen percent increase from 2019 and equates to drunk drivers killing 32 people every day or one person every 45 minutes.<sup>14</sup>

*(Continued on page 5)*

1. See *Risky Driving*, Nat'l Highway Traffic Safety Admin, [www.nhtsa.gov/risky-driving](http://www.nhtsa.gov/risky-driving) (last visited August 9, 2022).
2. *Id.*
3. Nat'l Highway Traffic Safety Admin, in email correspondence with the author, July 29, 2022 ("These behavioral factors largely explain the fatality increases from 2019 to 2020, although we cannot say that these factors were the only ones contributing to the rise in fatalities.")
4. Nat'l Highway Traffic Safety Admin, in email correspondence with the author, July 29, 2022.
5. The number of fatal crashes increased by 6.8 percent from 2019 to 2020, and the fatality rate per 100 million vehicle miles traveled increased 21 percent. In total, 38,824 lives were lost in traffic crashes nationwide. That number marks the highest number of fatalities since 2007. Timothy Stewart, *Overview of motor vehicle crashes in 2020*, DOT HS Doc. No. 813 266 (March 2022). See also, Nat'l Highway Traffic Safety Admin, *Traffic Safety Facts: Early Estimates of Motor Vehicle Traffic Fatalities and Fatality Rate by Sub-Categories in 2021*, DOT HS Doc. No. 813 298 (May 2022).
6. C.f., *Behavioral Research*, Nat'l Highway Traffic Safety Admin, [www.nhtsa.gov/behavioral-research](http://www.nhtsa.gov/behavioral-research) (last visited August 10, 2022); *Risky Driving*, *supra* note 1.
7. *National Center for Statistics and Analysis (NCSA)*, Nat'l Highway Traffic Safety Admin (last visited August 17, 2022).
8. *Id.*
9. See, e.g., John H. Lacey et al., *Drug and alcohol crash risk: A case-control study*, DOT HS Doc. No. 812 355 (December 2016) (readers should also note the prior studies cited in this report and review the same).
10. *Id.* at v-vi.
11. *Id.*
12. *Id.* at 68.
13. *Drunk Driving*, Nat'l Highway Traffic Safety Admin, (last visited August 9, 2022).
14. *Id.*

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## An Overview of *People v. Lucynski*

By Eric Wanink, Tuscola County Chief Assistant Prosecuting Attorney

The Michigan Court of Appeals issued a published decision recently on a unique case with issues one would have thought were well-settled. The case is *People v. Lucynski*, No. 163833, decided on July 26, 2022.

On January 20, 2020, Sgt. Ryan Robinson from the Tuscola County Sheriff's Department was on routine patrol on Old State Road in Northern Tuscola County when he came across the defendant in his vehicle that was sitting stationary in the middle of the road. Defendant was talking to another driver in a second, stationary car facing in the opposite direction. The deputy believed the situation was suspicious and continued towards the two cars. Seeing the patrol car approaching, the two vehicles separated, and the deputy continued to follow the defendant's vehicle into a nearby driveway. The deputy pulled in behind the defendant's vehicle and exited the patrol car. The deputy never turned on his overhead lights or siren. By now, the defendant had exited his vehicle. The deputy approached

The deputy then detained the defendant to investigate whether he was operating while intoxicated (OWI). After a roadside investigation involving sobriety tests, the deputy determined that defendant was intoxicated and arrested him for OWI. A subsequent blood draw showed that defendant had THC in his blood. Defendant was ultimately charged with OWI -Third Offense, Driving While License Suspended-Subsequent Offense, and Open Intoxicants in a Motor Vehicle.

**The MSC found that a reasonable person in the defendant's position would have felt that his liberty was restrained because there was nowhere for him to escape the contact with deputy, even though the defendant walked towards the deputy voluntarily and engaged the deputy in conversation upon exiting his vehicle.**

A preliminary examination was conducted on March 4, 2020. At the conclusion of the proofs, the district court asked the parties to brief whether the stop made by Sgt. Robinson was valid under the Fourth Amendment. Ultimately the district court ruled that the stop was invalid under MCL 257.676b because Sgt. Robinson had been the only other car on the roadway besides the defendant's vehicle and the third-party vehicle. The district court ruled that the statute required the active flow of traffic, despite the lack of language in the statute to support such a conclusion. Further, the district court found that the violation of the Fourth Amendment was unreasonable, suppressed the evidence that resulted from the sergeant's investigation, and did not bind over on any of the charges. The prosecution sought leave to the circuit court. The circuit court denied leave to appeal.

The prosecution then sought leave to the Michigan Court of Appeals (COA) and oral arguments were heard on December 2, 2020. On December 17, 2020, the COA entered an order reversing the trial court and remanded the matter to the district court to enter an order of bind over. The COA found in its opinion that there was not a traffic stop of the defendant's vehicle

under the totality of the circumstances, finding that not every contact between an officer and a citizen constitutes a stop and detain under the Fourth Amendment. The COA's opinion was that the Fourth Amendment was not implicated until such time that the defendant admitted that he did not have a valid driver's license. The COA declined to rule on the issue surrounding the lower court's interpretation of MCL 257.676b. However, it did reference in dicta that even if the stop was not consistent with the statute, the mistake of the deputy was a reasonable mistake of law and suppression was not warranted in either case.

The defendant sought leave to appeal to the Michigan Supreme Court (MSC). On October 6, 2021, the MSC granted leave to appeal, but limited the issues to (1) whether the defendant impeded traffic, in violation of MCL 257.676b(1), where there was no actual traffic to impede at that time; (2) if not, whether the deputy sheriff made a reasonable mistake of law by effectuating a traffic stop of the defendant for violating MCL 257.676b(1); and (3) whether the deputy sheriff seized the defendant when he pulled his patrol vehicle behind the defendant's vehicle in a driveway.

The MSC issued its ruling on July 26, 2022, reversing the COA on the three issues briefed for oral argument. The MSC found that a reasonable person in the defendant's position would have felt that his liberty was restrained because there was nowhere for him to escape the contact with deputy, even though the defendant walked towards the deputy voluntarily and engaged the deputy in conversation upon exiting his vehicle. The MSC also felt that MCL 257.676b was clear in its language that active flow of traffic was required despite the lack of language in the statute indicating such was the case. Furthermore, the MSC held that the language of the statute was so clear, that any mistake of law by the deputy was unreasonable. Consequently, the MSC found that the defendant's Fourth Amendment rights were violated. The MSC ordered that the matter be remanded to the COA for consideration on



the defendant, believing he had been in violation of MCL 257.676b for impeding traffic. The deputy also believed that the behavior he had witnessed was suspicious and wanted to investigate the situation further. The deputy engaged the defendant in general conversation and the encounter was voluntary and casual. The defendant admitted during this conversation that he had been fishing on a nearby lake and had consumed alcohol and marijuana. The deputy noted visible signs of intoxication. Defendant also mentioned he did not have a valid driver's license.

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# 2022 David M. Schieber MADD Lifesaver Award Recipient

Each year the Michigan chapter of Mothers Against Drunk Driving (MADD) recognizes a prosecutor who has gone above and beyond the call of duty in prosecuting cases involving intoxicated drivers. This year's recipient of the David M. Schieber MADD Lifesaver Award was John Dewane, a Deputy Chief Assistant Prosecuting Attorney with the Ingham County Prosecutors Office.

John was recognized for his vertical prosecution of the high-profile case of *People v Dameron Church*, which involved Second Degree Murder and Operating While Intoxicated (OWI) Causing Death charges.

Multiple witnesses saw defendant driving over 100 miles an hour, tailgating, and passing vehicles on I-96. When attempting

to pass a vehicle on the shoulder, he lost control of his vehicle and eventually hit a tree rear end first. Defendant's eight-year-old son and nine-year-old daughter, the only other passengers, were killed in the crash. Defendant's hospital blood results revealed an ethanol plasma level of 130.

At jury trial, a toxicologist converted the plasma findings to whole blood to meet the legal criteria for OWI (1.16-.112 g/ml blood). Defendant took the stand and lied about drinking despite recorded jail calls wherein he admitted to doing shots of alcohol while driving. A jury convicted defendant of two counts of Second Degree Murder and two counts of OWI Causing Death.

John and the lead investigator now utilize the case as a training aid for the local



John Dewane (l) and Ingham County Chief Assistant Prosecuting Attorney Michael Cheltenham (r)

Ingham Regional Crash Investigation Team. The training focuses on factors that elevate a fatal alcohol crash to a possible murder charge.

## 2022 MADD Lifesavers Awards Recipients

Every year MADD Michigan honors law enforcement officers who help further MADD's mission—to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. This year's Lifesavers Awards recipients are listed below and were honored at an award luncheon held in East Lansing on June 17th, 2022. They were selected from a list of over 100 nominees from all over the state. Congratulations to all the award recipients!

### Outstanding Officer

Officer Tim Sjostrom, Farmington Hills Police Department  
Officer David Richmond, Village of Fowlerville Police Department  
Officer Jacob Minch, Garden City Police Department  
Officer Brandon DeVita, Holly Police Department  
Officer Shane Waskevich, Mt. Pleasant Police Department

### Outstanding Rookie of the Year

Officer Joshua Jackson, Auburn Hills Police Department  
Deputy Thomas Randell, Baraga County Sheriff's Office  
Trooper Maxwell Miniati, Michigan State Police-Paw Paw Post

### Outstanding Trooper

Trooper Peter DeKryger, Michigan State Police-Calumet Post  
Trooper Travis Fountain, Michigan State Police-Flint Post  
Trooper Tyler Varney, Michigan State Police-Iron Mountain Post  
Trooper Matthew Okaiye, Michigan State Police, Metro North Post  
Trooper Roger Lee-Scott, Michigan State Police, Metro North Post

### Outstanding Deputy

Deputy Nathan Withington, Berrien County Sheriff's Office  
Deputy Mitchell Hoffman, Grand Traverse County Sheriff's Office  
Deputy Ryan Gerke, Kent County Sheriff's Office  
Deputy Bilal Bazzi, Monroe County Sheriff's Office  
Deputy Jeremy Yono, Washtenaw County Sheriff's Office

### Recognition of Excellence

Officer Michael Frazee, Boyne Police Department  
Trooper Kevin A. Lee, Michigan State Police-Niles Post  
Impaired Driving Action Team (IMPACT), Michigan State Police-3rd District  
Deputy Brian Webb, Washtenaw County Sheriff's Office

### Outstanding Law Enforcement Agency

Grand Blanc Township Police Department  
Michigan State Police – Flint Post  
Monroe County Sheriff's Office



## Katie Bower, Director of Office of Highway Safety Planning

Katie Bower was recently named director of the Office of Highway Safety Planning at the Michigan State Police.

Bower brings a wealth of experience and versatility to the OHSP:

- She began her career with MSP in 1994 as a grant administrator with the Michigan Commission on Law Enforcement Standards (MCOLES).
- In 2001, transferred to the MSP Criminal Justice Information Center (CJIC) to become manager of firearm programs. Also oversaw the crime analysis unit and the financial section, and served as the department's Freedom of Information Act coordinator.
- From 2007 to 2018, Bower served as the assistant division director for CJIC, with a wide breadth of oversight, which included the traffic crash records unit – part of the Traffic Records Coordinating Committee – where she served as chair for two years.

- From 2018 to 2022, was the division director of the Business Compliance and Regulation Division at the Department of State, overseeing the licensing and regulation of automotive dealers, repair shops, and mechanics. Also oversaw the licensing and regulation of teen and motorcycle driving programs, as well as skills testing for teen, motorcycle and commercial vehicles.

Bower earned a bachelor's degree in human resources management from Spring Arbor University.

She succeeds Michael L. Prince, who served as OHSP director for 18 years before retiring in December 2021.

Katie's husband, Dave, recently retired from MSP after 31 years of service. The Bowers, who have been married for 25 years, live in DeWitt and have two children: Kelcie, an MSP crime analyst, and Trent, a student in his fourth year of college.



Katie Bower, Director of Office of Highway Safety Planning at the Michigan State Police

## For Your Information

### Michigan Annual Drunk Driving Audit

#### Statistical Reports and Data

##### [2021 Michigan Annual Drunk Driving Audit](#)

The crash program has been in existence since Public Act 300 of 1949. All law enforcement agencies in Michigan submit accident data to the MSP Criminal Justice Information Center on UD-10 Traffic Crash Reports. A crash report is completed when: the driver of a motor vehicle involved in a traffic crash injures or kills any person, or damages property totaling \$1000.00 or more. It is also completed when, the driver of a snowmobile or ORV is involved in a crash resulting in injuries to or the death of any person, or property damage in an estimated amount of \$100.00 or more.

The Michigan State Police Criminal Justice Information Center (CJIC) and the Office of Highway Safety Planning

(OHSP), in conjunction with the University of Michigan Transportation Research Institute (UMTRI) compiles and publishes an annual report. In addition, the MSP



also works with the Secretary of State (SOS) to produce a drunk driving audit report annually. This report contains

cumulative and individual information regarding judge's dispositions and fines involved with drunk driving.

Reports are processed and sent to the Department of State to be applied to individual driving records. Fatal records are maintained on both the state system and the federal Fatality Analysis Reporting System (FARS) (supported by the National Highway Traffic Safety Administration).

Traffic Crash Report data is also supplied to the Michigan Department of Transportation for analysis of high crash locations and to bill for damage to state property. The Michigan Department of Community Health receives data to bill the appropriate no-fault carrier for reimbursement of expenses under the Medicaid program and the Michigan Department of Natural Resources receives data for analysis of snowmobile and car/deer crashes.

## Risky-Driving Behaviors *(continued from page 1)*

**2. Drug Impaired Driving:** Based on a study of trauma centers in October and December of 2020, 56 percent of drivers involved in serious injury or fatal crashes had at least one drug in their system.<sup>15</sup>

**3. Distracted Driving:** Distracted driving killed 3,142 people in 2020<sup>16</sup> and injured an estimated additional 324,652 people.<sup>17</sup>

**4. Not Wearing a Seatbelt:** 51 percent of people killed in crashes in 2020 were not wearing a seatbelt.<sup>18</sup> In 2017, “[s]eat belts saved an estimated 14,955 lives and could have saved an additional 2,549 people if they had been wearing seat belts”<sup>19</sup>

**5. Speeding:** Speeding killed 11,258 people in the United States in 2020.<sup>20</sup> It was a factor in 29 percent of all traffic fatalities.<sup>21</sup>

**6. Drowsy Driving:** Drowsy driving killed 633 people in 2020.<sup>22</sup>

With the recent increases in fatal crashes, it is incumbent upon prosecutors and law enforcement officers to consider their role in reversing that increase.

### What Do These Numbers Mean for Prosecutors and Officers?

Changing risky driving behaviors begins with officers recognizing their role in so doing. For example, stopping a speeder and issuing a citation is important, but it might not be everything. With a simple stop and citation, one speeder is, at a minimum, slowed for an evening. The data, however, tells us that there is a greater aim in stopping a speeder, and it can be achieved during the traffic stop. That aim is to change the driver’s future behavior.

An officer who understands and conveys why speeding is dangerous can affect lifelong changes in that driver, and this will save lives.<sup>23</sup> Keep in mind that officers are often a person’s first contact with the justice system and taking that initial opportunity to inform a driver of the reasons why it is important not to speed can help that person understand the risks of their behavior. Hopefully, that knowledge will keep the driver from having any future involvement with the justice system and keep them and others alive.

**An officer who understands and conveys why speeding is dangerous can affect lifelong changes in that driver, and this will save lives.<sup>23</sup>**

Two examples of programs implemented by law enforcement to better communicate with the public are Round Rock, Texas Police Department’s *Tom’s Traffic Tips* and Concord, North Carolina Police Department’s roadside strategy. Both are programs implemented at the local level and are tailored to meet their communities’ needs.

Round Rock’s *Tom’s Traffic Tips* is a social media campaign designed, among other things, to educate viewers about the dangers of risky driving and the related laws.<sup>24</sup> The ultimate product is a series of videos, available on the City of Red Rock’s YouTube Channel.<sup>25</sup> The videos combine humor, data, and the law to create informative, entertaining, and short videos. The campaign facilitated an improvement in communication with the public.<sup>26</sup> More importantly, “[a]fter implementing *Tom’s*

*Traffic Tips*, crashes actually decreased [in the area] by four percent while the population continued its upward trajectory.”<sup>27</sup>

Just as Round Rock recognized a new approach was necessary to better educate the public, so did Chief Gary Gacek. When Gacek took over as Chief of Police for the City of Concord, North Carolina, he brought with him a fresh approach to traffic safety.<sup>28</sup> During his tenure, the number of traffic stops dramatically increased, and the nature of those stops significantly changed.<sup>29</sup> Officers in Concord know their local crash data, and they tap into that



knowledge when interacting with drivers on the side of the road. High visibility stops occur in dangerous, high-crash locations or areas, and officers are seen conducting them.<sup>30</sup> Here’s where things get even more interesting: following such a data- and knowledge-driven stop, the officer informs the driver of both the legal reason for the stop, e.g., speeding, and the strategic purpose behind it.<sup>31</sup> So, one of an officer’s initial statements in interacting with a stopped driver might look something like this:

15. *Drug Impaired Driving*, Nat’l Highway Traffic Safety Admin., [www.nhtsa.gov/risky-driving/drug-impaired-driving](http://www.nhtsa.gov/risky-driving/drug-impaired-driving) (last visited August 9, 2022); see also Nat’l Highway Traffic Safety Admin., *Traffic Safety Facts: Update to Special Reports on Traffic Safety During the COVID-19 Public Health Emergency: Fourth Quarter Data*, DOT HS Doc. No. 813 135 (June 2021).

16. *Distracted Driving*, Nat’l Highway Traffic Safety Admin., [www.nhtsa.gov/risky-driving/distracted-driving](http://www.nhtsa.gov/risky-driving/distracted-driving) (last visited August 9, 2022).

17. Nat’l Highway Traffic Safety Admin, in email correspondence with the author, July 29, 2022.

18. *Seatbelts*, Nat’l Highway Traffic Safety Admin., [www.nhtsa.gov/risky-driving/seat-belts](http://www.nhtsa.gov/risky-driving/seat-belts) (last visited August 9, 2022).

19. *Id.*

20. *Speeding*, Nat’l Highway Traffic Safety Admin., [www.nhtsa.gov/risky-driving/speeding](http://www.nhtsa.gov/risky-driving/speeding) (last visited August 9, 2022).

21. *Id.*

22. *Drowsy Driving*, Nat’l Highway Traffic Safety Admin., [www.nhtsa.gov/risky-driving/drowsy-driving](http://www.nhtsa.gov/risky-driving/drowsy-driving) (last visited August 9, 2022).

23. See, c.f., Nat’l Highway Traffic Safety Admin, *Countermeasures That Work*, 10th Edition, at

1-58, 2-25, 3-32, 4-17, 10-12 (discussing the effectiveness of communication and outreach programs in reducing impaired driving, seatbelts, speeding, distracted driving, and drowsy driving, respectively).

24. Round Rock Police Department, City of Round Rock, Texas, *Tom’s Traffic Tips*, YouTube (June 10, 2021) [www.youtube.com/playlist?list=PLk7nkdisby9g2rZGcZZFP3ZBhmtgmsANt](https://www.youtube.com/playlist?list=PLk7nkdisby9g2rZGcZZFP3ZBhmtgmsANt).

25. *Id.*

26. See Tom Sloan, *Traffic Safety Initiatives: “Tom’s Traffic Tips,” Police Chief Magazine*, [www.policechiefmagazine.org/traffic-safety-initiatives-toms-traffic-tips](http://www.policechiefmagazine.org/traffic-safety-initiatives-toms-traffic-tips) (last visited August 17, 2022).

27. *Id.*

28. Gary Gacek, Chief of Police, Concord, NC, Address at the Traffic Safety Resource Prosecutor Conference (May 2, 2022).

29. Telephone Interview with Gary Gacek, Chief of Police, Concord, NC (August 18, 2022).

30. *Id.*

31. Telephone interview with Gary Gacek, *supra* note 29; Gacek, *supra* note 28.

## Risky-Driving Behaviors *(continued from page 5)*

**Officer:** Hi, I stopped you for running that red-light back there. We've had three recent serious injury crashes at that intersection in the past year, and some of them were caused by people running that light. So, we are out trying to prevent that behavior from happening and hopefully stop some crashes and keep people safe.<sup>32</sup>

It's through this education and communication that Chief Gacek continues to simultaneously increase traffic safety and improve relations between the police and the other citizens of Concord.<sup>33</sup>

Just as law enforcement agencies should tailor their activities to reduce the occurrence of the six risky driving behaviors, so should prosecutors' offices. The first obstacle for prosecutors in implementing changes in driving behavior is getting buy-in from colleagues and courts. Most citations involving the six risky driving behaviors are written to drivers in cases where no injury occurs. These offenses are often referred to as "victimless crimes" and are typically non-jailable offenses or misdemeanors. Thus, in the realm of criminal justice, they are frequently considered low priority cases. In busy, overworked, and under-staffed prosecutors' offices, lower priority cases may be pled down or even dismissed. Yet the data gathered by NHTSA suggests these cases should be treated seriously because the risk of injury or death resulting from the behavior is high. It is the role of the traffic prosecutor, therefore, to reconcile the pressure to dismiss or plead down these cases with the need to give them the attention necessary to change

drivers' behaviors and ultimately save lives. Ideally a prosecutors' office should consider the six risky driving behaviors in designing its case management policy.

The next obstacle that prosecutors face is seeking an adjudication and sentence that satisfies justice and changes the driver's risky behavior. This is in line with one of the general principles of sentencing: to reduce future crimes and, thus, have fewer victims.<sup>34</sup> This is why, in the case of impaired driving—whether impairment caused by alcohol, drugs, or polysubstance—treatment is often a necessary component of the sentence. DUI Courts are an example of an effective sentencing or programmatic tool proven to achieve lasting changes in driving behavior.<sup>35</sup> These courts are designed to target two of the six risky driving behaviors: drunk driving and drug impaired driving. NHTSA has long recognized the effectiveness of DUI Courts and, thus, supported through research and education these Courts nationwide.<sup>36</sup>

As for sentencing options designed to address the other risky driving behaviors, an example of a program supported by NHTSA is the National Safety Council's *Alive at 25*. This program is a four-hour classroom course and is available in some states virtually.<sup>37</sup> It targets teens and adults under 25 years of age and is designed to change risky driving behavior through education.<sup>38</sup> Participants learn about the dangers of "speeding, tailgating, distracted, impaired, aggressive, and drowsy driving."<sup>39</sup> It culminates in a final exam, after which participants receive a certificate of completion.<sup>40</sup> The course is attributed with

reducing the "death toll among teenage drivers [in Kentucky] . . . 60%"<sup>41</sup> and is recognized throughout the United States.

Not all risky driving behaviors, however, have such well-established or researched solutions. For example, how do prosecutors recommend a sentence for an adult in a way that ensures they will always wear a seatbelt? Do prosecutors need to rethink whether dismissing seatbelt tickets in DUI cases minimizes or enables that behavior? In sum, how can prosecutors design sentencing recommendations with an eye toward addressing the six most risky driving behaviors? These are the questions leadership in prosecutors' offices need to ask, consider, and strive to resolve.

### Conclusion

Given the identification of the six risky driving behaviors, all traffic safety professionals should recognize the role of effective traffic stops, public education, adjudication, and the appropriate sentencing of offenders in changing these behaviors. To reduce crashes and injuries on our roadways and thereby save lives, prosecutors and law enforcement should prioritize the detection, education, and rehabilitation of those who commit any of the six risky driving behaviors.

### About the Author

Joshua Saucier is the Assistant Traffic Safety Resource Prosecutor for the State of Maine. He is a former Assistant District Attorney, a former Impaired Driving Special Prosecutor, and a former assistant city attorney and acting city attorney for the City of Bangor, Maine.

32. Telephone interview with Gary Gacek, *supra* note 29; Gacek, *supra* note 28.

33. Gacek, *supra* note 28. Police administrators should note that Chief Gacek sees this approach as a way to turn an inherently negative interaction into a positive one. In fact, he receives emails and voicemails from citizens thanking him and his officers for the way that they handle traffic stops. Telephone interview with Gary Gacek, *supra* note 29.

34. See *Seven Sentencing Principles*: December 2011, Nat'l. Coll. of State Legislators, [www.ncsl.org/research/civil-and-criminal-justice/seven-sentencing-principles.aspx](http://www.ncsl.org/research/civil-and-criminal-justice/seven-sentencing-principles.aspx) (last visited August 17, 2022).

35. See *DUI Courts*, Found. for Advancing Alcohol Resp., [www.responsibility.org/end-drunk-driving/strategies/treatment-and-rehabilitation/dwi-courts/](http://www.responsibility.org/end-drunk-driving/strategies/treatment-and-rehabilitation/dwi-courts/) (last visited August 17, 2022) (stating that "[a] large body of research supports the effectiveness of DUI Courts in reducing recidivism"); James C. Fell et al., *An Evaluation of Three Georgia DUI Courts*, DOT HS Doc. No. 811 450 (March 2011) (concluding that "DUI courts in Georgia worked as intended and were effective in reducing the recidivism of these repeat DUI offenders compared to traditional DUI sanction programs in Georgia").

36. See, e.g., Fell, *supra* note 35; Alan Block, *Survey of DUI Courts*, DOT HS Doc. No. 812

283 (June 2016). For additional effective sentencing programs, readers should review *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices*, Nat'l Highway Traffic Safety Admin, DOT HS Doc. No. 809 850 (March 2005) and *Staggered Sentencing*, Found. for Advancing Alcohol Resp., [www.responsibility.org/wp-content/uploads/2020/01/Staggered-Sentencing-2020.pdf](http://www.responsibility.org/wp-content/uploads/2020/01/Staggered-Sentencing-2020.pdf) (last visited August 17, 2022).

37. See, e.g., *Alive at 25 – 4 Hours Virtual (Zoom Format)*, Safety and Health Council of NC, [www.safetync.org/product/alive-at-25-4-hours-virtual/](http://www.safetync.org/product/alive-at-25-4-hours-virtual/) (last visited August 22, 2022); *Saving Lives Through Education*, Texas Alive Team, [texasaliveteam.org](http://texasaliveteam.org) (last visited August 22, 2022).

38. *Teach Young Adults to be Safe Drivers with Alive at 25*, Nat'l. Safety Council, [www.nsc.org/safety-training/defensive-driving/teen-young-adult-defensive-driving-courses](http://www.nsc.org/safety-training/defensive-driving/teen-young-adult-defensive-driving-courses) (last visited August 17, 2022).

39. Nat'l. Safety Council, *Alive at 25* (4th Ed. 2019).

40. See Nat'l. Safety Council, *Alive at 25 Instructor Guidelines* (4th Ed.).

41. *Teach Young Adults to be Safe Drivers with Alive at 25*, *supra* note 38.

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whether suppression was warranted in light of the Fourth Amendment violation, finding that not every violation of the Fourth Amendment warrants application of the Exclusionary Rule.

At this time, the matter awaits further ruling by the COA on this unresolved issue. The prosecution intends to argue against suppression because the Exclusionary Rule is a heavy-handed remedy

to be implemented as a deterrence against unreasonable police conduct.

In conclusion, this is a dangerous ruling that could have far-reaching implications for law enforcement as it restricts even further what constitutes a police contact, injects judicial interpretation into the clear and unambiguous language of MCL 257.676b, and puts more

burden on law enforcement officers to act as attorneys on the roadway and make snap interpretation of statutes that have language that may be contrary to the interpretation of the law from the bench. If suppression is granted in a case like this, it will create a precedent that could have negative consequences for other law enforcement agencies and prosecutor's offices throughout Michigan.

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**Prosecuting Attorneys Association of Michigan**

116 West Ottawa, Suite 200

Lansing, Michigan 48913

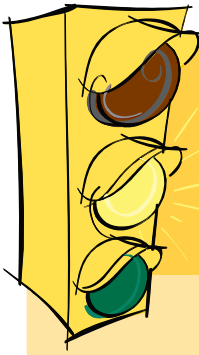
Phone: (517) 334-6060

Fax: (517) 334-6787

Email: [steckerk@michigan.gov](mailto:steckerk@michigan.gov),  
[canikek@michigan.gov](mailto: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 Supreme Court

In this case, the Michigan Supreme Court (MSC) held that Datamaster calibration logs are nontestimonial and therefore do not trigger a defendant's confrontation rights under the Sixth Amendment. This means that the prosecution does not need to produce at trial the 120-day inspector to admit his/her statements appearing in the Datamaster calibration logs. The MSC also held that calibration logs are not automatically "business records" for purposes of the hearsay exception in Michigan Rule of Evidence 803(6). The MSC held that trustworthiness is a condition of admissibility.

[People v Fontenot Jr](#), No. 162211, decided on July 8, 2022



A deputy observed two vehicles in the distance stopped in the middle of a two-lane road. The vehicles were facing opposite directions with the driver windows next to one another and the drivers appeared to be talking to one another. The deputy suspected a drug transaction might be occurring but did not observe any specific narcotics activity. Both vehicles began moving when the patrol car was about 800 feet away. There was no other traffic on

**The MSC held that because the impeding traffic statute was not ambiguous, the deputy's mistake that it did not require any actual interruption of traffic was not objectively reasonable under *Heien*.**

the road. The deputy followed defendant's car with the intention of stopping him for impeding traffic. When defendant pulled into a residential one-lane driveway, the deputy pulled up behind and parked a few feet behind, blocking the exit. The deputy approached defendant who was out of his vehicle and eventually arrested him for drunk driving, driving with a suspended license, and open intoxicants in the vehicle.

In a 5-2 decision, the MSC ruled as follows:

- Defendant was seized when the deputy blocked the only path of egress from the driveway.
  - The MSC stated the following: "Under the circumstances of this case, including the rural setting, the way the encounter was initiated by the officer swiftly following defendant down a private driveway, and the fact that the officer's police vehicle blocked defendant's car in the driveway, a reasonable person would not have felt free to leave the scene, even though the police officer did not activate emergency lights or a siren. The same facts would cause a reasonable person to feel compelled to answer questions posed by the officer who had followed him and blocked his path of egress from the driveway of a home he did not own."
- MCL 257.676b(1) requires an actual interference of the normal flow of traffic.
  - As to this issue, the MSC held the following, "[t]he statute's clear terms thus require some evidence that the accused's conduct *actually affected* the usual smooth, uninterrupted movement or progress of the *normal flow* of traffic on

the roadway, which requires an assessment of traffic at the time of the alleged offense."

- The deputy's mistake of law when he investigated defendant for violating the impeding traffic civil infraction was not reasonable, see *Heien v. North Carolina*, 574 US 54 (2014).
  - The MSC held that because the impeding traffic statute was not ambiguous, the deputy's mistake that it did not require any actual interruption of traffic was not objectively reasonable under *Heien*.

[People v Lucynski](#), No. 162833, decided on July 26, 2022

## Unpublished Cases

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

**D**efendant appealed as of right his jury-trial convictions of operating a motor vehicle while intoxicated (OWI), third offense, operating a motor vehicle while license suspended, and having an open alcoholic container in a motor vehicle. The Michigan Court of Appeals (COA) affirmed.

At trial, the arresting officer identified defendant as the driver. Defendant admitted at trial that he was in the driver's seat when police approached the vehicle. However, he further testified that his nephew was the one driving the van, and they had switched seats after the van was pulled over.

On appeal, defendant argued the trial court abused its discretion when it denied his motion for a pre-trial adjournment. The reason for the adjournment was for defense counsel to conduct its own investigation into the then ongoing Michigan State Police (MSP) investigation into potential fraud by Intoximeters' contract employees and breath testing instruments throughout the



**“... In short, Officer Chaprnka’s testimony that defendant was the driver of the van was sufficient to support a finding that defendant was the driver of the van, and therefore operated the van.”**

state. The COA disagreed, holding that the information before the trial court when it denied defendant’s motion established that the Datamaster instrument used in this case was not affected by the alleged fraud, and that, even if it was, that fraud did not affect the results of defendant’s breath test.

Another argument defendant raised in his appeal was that the trial court erred by denying his motion for a directed verdict because there was no evidence that he had operated the van. The COA disagreed, holding that the arresting officer’s testimony provided adequate support for a finding that defendant had operated the van for purposes of the OWI statute. The COA stated the following, “[w]hile Officer Chaprnka could have elaborated more on how he concluded that defendant was the driver—such as that he saw defendant sitting in the driver’s seat or saw defendant exit out the driver’s-side door—such additional testimony was not necessary for a jury to conclude that defendant was the driver of the van. In short, Officer Chaprnka’s testimony that defendant was the driver of the van was sufficient to support a finding that defendant was the driver of the van, and therefore operated the van.”

***People vs Eller***, No. 353416, decided on March 24, 2022

This is the second time the COA issued an opinion on this case. Defendant was involved in a crash with another vehicle (it was later determined that defendant was not the at-fault driver). An officer on the scene asked defendant to blow into a PBT, which showed a .114 BAC. After the PBT, defendant admitted to having a drink, but he was unclear as to how much he had drunk. The PBT was referenced in an affidavit supporting a search-warrant application that led to a blood draw that confirmed defendant’s BAC was above the legal limit (no mention in the affidavit that defendant was not the at-fault driver).

Defendant moved to suppress the blood draw on the basis that the PBT was improper because the officer did not wait 15 minutes before administering the test. The trial court denied his motion, but the COA reversed the trial court’s order in *People v Robe*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2021) (Docket No. 355005). On remand, the trial court concluded that the warrant was supported by probable cause independent of the PBT results. When making its factual findings, the trial court stated that there was “an accident, regardless of, of whose fault it was,” and that it did not “think it’s uncommon for a defendant to maximize the amount of time between drinking and driving.” Defendant moved for reconsideration, and the trial court denied that motion. This appeal followed, on leave granted.

The COA held that the affidavit lacked probable cause to support the search warrant. In support of its ruling, it stated the following: “These facts do not suggest that defendant was intoxicated or that he even appeared intoxicated to the officer. In fact, no references to alcohol remain because defendant only admitted to drinking any alcohol after Officer Norris administered the improper preliminary-breath test. Rather, when properly considered, the affidavit merely states that defendant was in a crash that he claimed was not his fault and he did not take any standard-field-sobriety tests. None of those facts suggest that defendant was intoxicated.”

Next, the COA addressed the issue of whether the good faith exception to the exclusionary rule applies in this case. In so doing, the COA held the following:

“The affidavit states that, according to defendant, the other car failed to yield to defendant. It also states that the preliminary-breath test showed that defendant’s blood-alcohol content was 0.114 and no standard-field-sobriety tests were performed. Those statements, on their face, are true, but they do not reveal all of the pertinent facts. For example, the affidavit makes no mention of the eyewitness who told at least one other officer that defendant was not at fault for the accident. It also does not address the deficiencies in the preliminary-breath test



that caused this Court to omit the results from the probable-cause analysis.”

The COA remanded the case back to the trial court to further develop the record to determine whether the good faith exception applies in this case.

***People vs Robe***, No. 358655, decided on April 21, 2022

Defendant was pulled over by a trooper because he was allegedly driving 40 miles per hour on a road where the trooper mistakenly believed the speed limit was 35 miles per hour. There were no posted speed limit signs for the direction that the defendant was traveling. Because there were no posted speed limit signs, the speed limit was 55 miles per hour. Defendant argued the traffic stop was unconstitutional and the trial court erred in denying his motion to suppress the evidence seized during the traffic stop. The prosecution argued the trooper made a reasonable mistake. The COA agreed with the defendant.

The COA stated, “[t]he Motor Vehicle Code is clear and unambiguous. Because the road did not have posted speed limit signs, the speed limit was 55 miles per hour under the statutory ‘general speed limit.’ Michigan has had a statutory ‘general speed limit’ of 55 miles per hour since 2006.”

The COA further held, “[u]nder the totality of the circumstances, Trooper Lindsay lacked an articulable and reasonable basis for making the traffic stop. His subjective belief that the speed limit was 35 miles per hour was not objectively reasonable. Therefore, the traffic stop was unconstitutional.”

***People vs Bodnar***, No. 359696, decided on July 14, 2022

The People appealed as of right the circuit court's order to quash the bindover and dismiss the sole charge against defendant which was for possession of cocaine. The circuit court did so on the basis that the cocaine seized from the vehicle that defendant was driving, the only evidence against him, was the fruit of an unlawful search.

A Detroit Police officer observed a vehicle speeding on a residential street. The officer made a traffic stop of the vehicle and there were two persons in it. Defendant was in the driver's seat. The officer approached the vehicle on the driver's side, spoke with defendant, and smelled an odor of freshly burned marijuana from the vehicle. Defendant gave the officer his license, insurance, and registration when asked to do so. The officer explained that, because of "the freshly burnt marijuana that was emitting from the vehicle," he asked defendant to step out of the car. Immediately after defendant stepped out, the officer began to search the vehicle. This search resulted in the finding of cocaine.

The People argued the officer had probable cause to search the vehicle for marijuana, and therefore, the cocaine was not the fruit of an unlawful search. Defendant argued that the search was illegal because the smell of burned marijuana did not establish probable cause to search the car as the use of marijuana is now legal in Michigan.

The COA held that the search of defendant's vehicle did not violate the Fourth Amendment. It stated the following: "[t]he facts in *People v Anthony*, 327 Mich App 24 (2019), are similar to the present matter, where the smell of freshly burned marijuana justified the search of defendant's

**"[t]he facts in *People v Anthony*, 327 Mich App 24 (2019), are similar to the present matter, where the smell of freshly burned marijuana justified the search of defendant's vehicle.."**

vehicle. Although *Anthony* concerned the Michigan Medical Marijuana Act (MMMA), whereas this case concerns the Michigan Regulation and Taxation of Marijuana Act (MRTMA), both statutes contain similar prohibitions against smoking marijuana inside a motor vehicle on a public street. See MCL 333.26427(b)(3)(B) (MMMA); MCL 333.27954(1)(g) (MRTMA)."

*People vs Coppernoll*, No. 360107, decided on August 25, 2022

### New Laws

#### Public Act 92

Effective, June 6, 2022, Public Act 92 of 2022 amends the Michigan Vehicle Code to require a driver of a vehicle at a location other than an intersection intending to turn to the left across a lane of traffic traveling in the opposite direction shall yield the right-of-way to all vehicles approaching from the opposite direction that are so close to the driver as to constitute an immediate hazard.

An individual who violated the bill would be responsible for a civil infraction under MCL 257.649a.

Please see the link below from MLive for background on this new law.

<https://mlive.com/public-interest/2022/06/gov-whitmer-signs-law-making-unsafe-left-turns-a-civil-infraction.html>

#### MSP Legal Update No. 152

The Update gives an overview of The Youth Tobacco Act which was amended by Public Act 167 of 2022, effective, July 21, 2022.

Public Act 167 prohibits the purchase or possession of tobacco products, vapor products, or alternative nicotine products by persons less than 21 years of age.

[Here is a link](#) to Legal Update No. 152. Questions or comments concerning the

### The Yellow Light Legal Update

Legal Update are welcome and may be directed to [MSPLegal@michigan.gov](mailto:MSPLegal@michigan.gov). All editions of the Legal Update can be found on the internet at [www.michigan.gov/msp-legal](http://www.michigan.gov/msp-legal).

#### Public Act 147

Public Act 147 of 2022, effective July 19, 2022, amends the the Michigan Penal Code (MCL 750.410c) to make it a criminal offense to distribute, deliver, sell, or possess with intent to distribute, deliver, or sell a drug masking product.

A violation would be a misdemeanor punishable by imprisonment for up to one year or a fine of up to \$1,000, or both.

"Drug-masking product" includes synthetic urine, human urine, a substance designed to be added to human urine, or a substance designed to be added to or used on human hair or oral fluid, for the purpose of defrauding an alcohol or a drug screening test.

"Synthetic urine" means a substance that is designed to simulate the composition, chemical properties, physical appearance, or physical properties of human urine.

#### 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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