

The GREEN LIGHT NEWS

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Ten Things Prosecutors Can Do For Stronger OWI Cases

1. *Visit the scene.* You are the only one who hasn't been there. Do you really want the defendant to know more about the scene than you do?

2. *Get booking photos.* Often they are in stark contrast to the defendant's sober appearance in court. Also, compare the defendant's drunken scrawl on the booking log with his straight, sober signature on his driver's license.

3. *Take the same field sobriety training as officers.* To explain standardized field sobriety tests (SFST) to a jury, you had better know them inside and out. For the latest on SFST, see the CD-ROM from the National Highway Traffic Safety Administration (NHTSA), complete with instructions, validation studies and digital video suitable for demonstrative purposes in court. To order a copy, visit www.nhtsa.dot.gov.

4. *Spend time with your toxicologist.* More prosecutors need to understand retrograde extrapolation of blood alcohol tests. Can you explain the difference between a medical blood sample versus a forensic sample? Learn the reach and limits of toxicology and what you can reasonably expect from a toxicologist. Check out Alcohol Toxicology for Prosecutors from APRI's Special Topic Series at www.ndaa.org/pdf/toxicology_final.pdf.

5. *Take a breathalyzer test.* Take a field trip to your local jail's booking facility and spend 20 seconds blowing into the machine. What you learn will help you dispatch a number of defenses in lightning speed.

6. *Know your procedures regarding medical records.* Some states allow medical records to be obtained through subpoena or warrant. Also, many hospitals are slow to release records while they struggle to interpret the new Health Insurance Portability & Accountability Act (HIPAA).

A strong national, state and local community of prosecutors and other professionals is waiting to help you in any possible way.

Avoid the medical records issue altogether by assisting officers in securing a search warrant to obtain a blood draw from a defendant or to obtain the medical sample from the hospital. The medical sample is subject to seizure; after all, it is material evidence of a crime.

7. *Develop strong visuals.* Seeing is believing. If you don't use visual aids, juries will only retain 20% of what you say. PowerPoint templates for impaired driving trials are available from PAAM's traffic safety program.

8. *Build a strong relationship with law enforcement agencies.* Do ride-alongs. Understand how your cases originate on the road and move into court. Offer to conduct roll-call trainings. Invite officers to observe a DUI trial from jury selection to verdict. As in most things, a team approach makes everyone's job easier.

9. *Remember, you are not alone.* While a cadre of defense attorneys may await your

next visit to court, you are not outnumbered. A strong national, state and local community of prosecutors and other professionals is waiting to help you in any possible way. For more information on any of these topics go to <http://www.ndaa.org/publications.html>.

10. *Always be prepared to take your case to trial!*

For more information on any of these topics go to www.ndaa.org/apri/programs/traffic/ntlc_home.html.

Editor's Note: With slight modifications, originally appeared in *Between the Lines*, Vol. 12, No. 3. The American Prosecutors Research Institute merged into and is survived by the National District Attorneys Association. Reprinted with permission of the National District Attorneys Association, National Traffic Law Center. For further information, please visit www.ndaa.org.

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Garmin¹ GPS Units and Crash Investigation

By: Spl.Sgt John M. Bruno

This article provides a brief description of the potential investigative use of Garmin GPS Units that have been in use in vehicles that were involved in a crash.

This information pertains to nearly all Garmin GPS units, whether hand held, temporarily mounted or permanently mounted. The author is personally familiar with the Garmin GPSMAP 76S, the Garmin Montana hand held unit, and the Garmin NUVI 750 mobile unit; also the Garmin GPSMAP 3210 and GPSMAP 4010 fix mounted marine units. When activated, these units and most other Garmin units (known exception is the NUVI 750 mobile unit; also the Garmin GPSMAP 3210 and GPSMAP 4010 fix mounted marine units. When activated, these units and most other Garmin units (known exception is the NUVI 200) will record an active log and keep a bread crumb trail of the unit's path of travel. The unit only has to be activated and does not have to be routing from one point to another. Once the unit is turned off it will store the active log. When the unit is activated again it will begin another active log and begin recording again. Specific examples of the information contained in these active logs will be detailed later in the article.

A Garmin GPS unit that may have been activated in a vehicle when a crash occurred

may contain information that can be imaged for potential use in court. To image the information you will need a computer that has Garmin's Base Camp freeware software and preferably some type of mapping program (such as City Navigator) besides the base map. You can also use Garmin's Map Source software that is provided with any of their mapping software products. Most mobile or handheld units use a USB or mini-USB cable to connect to a computer. Some older units use serial cable. Fix mounted units use a SD card to transfer information to a computer. Once the unit is connected to the computer, the software will recognize the unit. The user then selects in the software "receive from device" then selects tracks to download. The Active Logs will then load into the software. All Active Logs will then appear as gray lines on the map. A highlighted or selected Active Log will contain direction arrows indicating that it is the selected log.

The Active Log information contains: the number of points contained in the log, start time and date, elapsed time, length, area and average speed for the log. By default the color of the log is grey and can be changed for display purposes. Generally for our purposes, the crash will have occurred during the last Active

Log. Double clicking the Active Log you are interested in will open another window. That window will reveal specific information about the Track Properties.

The Track Properties information contains: date and time, elevation, leg length, leg time, leg speed, leg course, and lat/long position. The opened Active Log will also highlight on the map. You can then select individual segments of the bread crumb trail. The segment will also highlight on the map and you will be able to see that during that segment the vehicle traveled, for example, 0.2 miles in 14 seconds and had an average speed of 58 MPH. The GPS units have a possible resolution of 1 second.

The following example is from an actual crash that occurred. The location and date and time have been changed. This incident resulted in a fatal traffic crash and the Garmin GPS unit was imaged and contained the following information to outline the suspect's activities leading up to the crash. It was determined through followup investigation that the suspect was in fact the driver of the vehicle during the entire time line of events. The following time line was created based on the Active Log imaged from the Garmin GPS unit in the suspect's vehicle.

(Continued on page 6)

Time Line of Garmin Unit

Index	Time	Leg Time	Position	Location
980	2/7/2009 2:24pm-2/8/09 9:07am	18:42:06	N33 14.514 N77 20.888	Motel-A
1204	2/8/2009 9:35am-11:00am	1:25:00	N33 21.426 N77 3.935	ParkingGarage
1434	2/8/2009 11:40am-12:02pm	0:21:39	N33 22.362 N77 21.783	WorkLocation-A
1824	2/8/2009 12:47pm-2:16pm	1:29:00	N33 14.514 N77 20.874	Motel-A
1987	2/8/2009 2:34pm-3:00pm	0:26:14	N33 22.36 N77 21.783	WorkLocation-B
2206	2/8/2009 3:29pm-3:53pm	0:23:55	N33 16.84 N77 12.488	ShoppingMall-A
2229	2/8/2009 4:05pm-4:32pm	0:26:59	N33 17.09 N77 12.35	ShoppingMall-B
2388	2/8/2009 4:49pm-6:47pm	1:57:59	N33 11.952 N77 15.318	ShoppingMall-C
2470	2/8/2009 6:52pm-7:19pm	0:27:04	N33 11.951 N77 14.578	Restaurant-A
2638	2/8/2009 7:39pm-9:50pm	2:11:22	N33 14.515 N77 20.941	Motel-A
2741	2/8/2009 10:03pm-2/9/2009 12:52am	2:49:01	N33 17.68 N77 23.285	Bar and Grill A
3019	2/9/2009 1:17:57am		N33 14.268 N77 26.334	Crash Site

Index	Time	Leg Time	Speed
3006	2/9/2009 1:16	0:00:07	71 mph
3007	2/9/2009 1:16	0:00:07	77 mph
3008	2/9/2009 1:16	0:00:07	80 mph
3009	2/9/2009 1:16	0:00:13	81 mph
3010	2/9/2009 1:17	0:00:08	84 mph
3011	2/9/2009 1:17	0:00:08	83 mph
3012	2/9/2009 1:17	0:00:06	82 mph
3013	2/9/2009 1:17	0:00:07	73 mph
3014	2/9/2009 1:17	0:00:08	68 mph
3015	2/9/2009 1:17	0:00:01	7 mph
3016	2/9/2009 1:17	0:00:01	0.5 mph
3017	2/9/2009 1:17	0:00:01	0 mph
3018	2/9/2009 1:17	0:00:10	0 mph
3019	2/9/2009 1:17		

¹ Garmin refers to Garmin, Ltd. and its subsidiaries. GPSMAP®, NUVI® (nuvi®), MapSource®, and CityNavigator® are registered trademarks of Garmin, Ltd

Why Breath and Blood Tests in Intoxicated Driving Cases Do Meet Scientific and Legal Safeguards for Admissibility in Michigan

By: Kenneth Stecker

The article by Patrick Barone and Ted Vosk in the July 2015 *Michigan Bar Journal*, “Breath and Blood Tests in Intoxicated Driving Cases,”¹ opined that breath and blood tests in such cases in Michigan fail to meet basic scientific and legal safeguards for admissibility. I would like to offer an opposing viewpoint.

The authors claimed, “Judges around the country, including in Michigan, have begun suppressing breath and blood tests for failure to report uncertainty.”² The fact is that only a handful of cases have addressed this issue, and only one of these cases has been decided in favor of the defense: *People v Carson*,³ decided by Judge Thomas Boyd on January 8, 2014, in the 55th District Court for Ingham County.

In *Carson*, the defendant had been charged with operating a motor vehicle while intoxicated. A search warrant was obtained for blood, which was subsequently forwarded to the Michigan



State Police Crime Laboratory for testing. Duplicate analyses yielded results of 0.101 and 0.103 grams of ethanol per 100 milliliters of blood. The defendant successfully challenged the testing procedures and the reliability of the results; the court ruled the two test results were inadmissible pursuant to Michigan Rules of Evidence 702.

The case of *People v Jabrocki*⁴ was also cited by the authors, including a lengthy quote from the trial judge’s *original* bind over opinion issued May 6, 2011. Initially,

In essence, the court was satisfied that the lab had constructed an uncertainty budget for use in blood alcohol analysis.⁷

the court found that the blood test results of 0.30 g ethanol per 100ml of blood were not reliable because of a lack of uncertainty measurement, and refused to bind over the charge of an operating while intoxicated—third offense.⁵ What the article failed to mention, however, is that the case did not stop there. In a second opinion on the same issue, the court reversed itself and found there *was* probable cause to believe that the crime of operating while intoxicated—third offense was committed by the defendant operating with a blood alcohol content in excess of 0.08 g per 100 ml of blood; specifically 0.301 g per 100 ml of blood.⁶ In essence, the court was satisfied that the lab had constructed an uncertainty

budget for use in blood alcohol analysis.⁷ The defendant then pled guilty as charged on November 8, 2011, and was sentenced on December 15, 2011.

Additionally, only one other case in Michigan has ruled on the measurement uncertainty issue.⁸ The court in that case decided in favor of the people. In *People v Hill*,⁹ addressing this issue, the court held:

I find that MSP used reliable principles and methods, which satisfies MRE 702(2). To the extent that Defendant contests the validity of the above data, at trial Defendant may do so through cross-examination or competing expert testimony.¹⁰

On page 32 of the Barone/Vosk article, the authors note a district court case from the state of Washington in favor of the defendant. However, that decision was reversed by the circuit court in that county and later affirmed by the Washington Court of Appeals in a published opinion.¹¹ The Washington Court of Appeals noted, “The burden is on defendants, not the State, to present uncertainty challenging BrAC test results,” a judicial opinion not shared by the authors.¹²

Finally, the article notes that the Michigan State Police have constructed uncertainty budgets for breath and blood, but nowhere states how they are deficient.

(Continued on page 7)

1. Barone & Vosk, *Breath and Blood Tests in Intoxicated Driving Cases: Why they Currently Fail to Meet Basic Scientific and Legal Safeguards for Admissibility*, 94 Mich B J 30 (July 2015).

2. *Id.* at 31.

3. *People v Carson*, unpublished opinion of the 55th District Court, decided January 8, 2014 (No. 12-01408).

4. *People v Jabrocki*, unpublished opinion of the 79th District Court, decided May 6, 2011 (No. 08-5461-FD).

5. *Id.* at 12.

6. *People v Jabrocki*, unpublished opinion of the 79th District Court, decided September 30, 2011 (No. 08-5461-FD).

7. *Id.* at 5.

8. See *People v Hill*, unpublished opinion of the 5th District Court, decided December 21, 2012 (No. 2011-005304-SD-B).

9. *Hill*, unpub op.

10. *Id.* at 9.

11. *Washington v King Co Dist Court West Div*, 175 Wash App 630; 307 P3d 765 (2013).

12. *Id.* at 641.

State Police Motor Carrier Officers Adopt Aggressive Traffic Safety Goal

By: Colonel Kriste Kibbey Etue

The MSP Commercial Vehicle Enforcement Division is pleased to be part of the nationwide *Toward Zero Deaths* traffic safety initiative aimed at significantly reducing traffic fatalities—toward the ultimate goal of zero traffic deaths.

In 2014 alone, 106 people were killed in commercial motor vehicle-involved crashes in Michigan. These statistics include a 14-year-old boy from Detroit, a husband and wife from Atlanta (Mich.), a 55-year-old man from Muskegon, and an 11-year-old girl from Daggett.

To improve traffic safety related to commercial motor vehicles, the MSP is increasing not only its enforcement efforts but also its education efforts.

MSP motor carrier officers will increase enforcement in areas and during times with the highest rate of crashes, as identified by crash data. Officers will focus on moving violations by commercial motor vehicles, including speeding, driving while fatigued, and careless driving that result from driver distraction.

Banners with the *Toward Zero Deaths* logo will also be displayed at weigh stations and enforcement locations across Michigan to raise awareness. The *Toward Zero Deaths* initiative is the United States' highway safety vision that unites stakeholders from engineering, enforcement, education, and emergency medical services with

the common goal of reducing traffic fatalities to zero.

The MSP is proud to be part of this traffic safety effort to reduce, and ultimately eliminate, deaths on our roadways because the hardship and suffering of even one family due to a preventable traffic crash is too many.

Editor's Note: Colonel Kriste Kibbey Etue is the Director of the Michigan State Police. She is the 18th Director of the department and she is the department's first female Director. As Director, Colonel Etue also serves as State Director of Emergency Management and as Michigan's Homeland Security Director.

Eaton County Assistant Prosecuting Attorney Chris Anderson Honored for Role in Senseless Case

Eaton County Prosecuting Attorney Christopher Anderson was the recipient of the 2015 David M. Schieber MADD/OHSP Lifesaver Award late last month.

Anderson received the award because of his role for the prosecution of the case of *People v. Starr Kiogima* in December 2014. After four days of testimony and less than an hour of jury deliberations, an Eaton County Jury convicted the defendant of 2nd Degree Murder and Operating While Intoxicated Causing Death. The judge sentenced her to 25-50 years in prison.

The facts are that the defendant, who had a blood alcohol in the range of .15% to .24% and narcotic medication in her blood was speeding as she entered a highway, hit a vehicle, and the defendant's 4 year old daughter was killed as her vehicle tumbled down the road.

Additionally in February 2015, Anderson prevailed in a pre-trial motion to qualify a sheriff's deputy as an expert witness in the



From l to r: Eaton County Chief Assistant Prosecuting Attorney Neil O'Brien, Eaton County Assistant Prosecuting Attorney Chris Anderson, and Michigan Traffic Safety Resource Prosecutor Kenneth Stecker.

area of drug recognition evaluation in the case of *People v. Cynthia Toepler*. This is the first time in Michigan that such a motion had been granted. The defendant was charged with an Operating While Intoxicated - Third Offense. The Drug Recognition Expert's (DRE) opinion would be critical in this case.

The award is given annually to a Michigan prosecutor whose extraordinary work dealt with a high profile or complicated drunk driving case.

The award is named after the late Kent County Assistant Prosecuting Attorney David M. Schieber.

The Importance Of Standardized Field Sobriety Tests In Marijuana Driving Cases

By: Kenneth Stecker and Kinga Gorzelewski

By now, everyone is aware of the Michigan Supreme Court ruling of *People v. Koon*, No. 145259, decided May 21, 2013.

The *Koon* Court ruled that “The immunity from prosecution provided under the Michigan Medical Marijuana Act (MMMA) to a registered patient who drives with indications of marijuana in his or her system but is not otherwise under the influence of marijuana inescapably conflicts with MCL 257.625(8), which prohibits a person from driving with any amount of marijuana in her or his system. Under the MMMA, all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marijuana. Consequently, MCL 257.625(8) does not apply to the medical use of marijuana.”

In essence, in order to be charged with a crime, the driver who is a qualifying patient under the MMMA, has to be operating “under the influence” with tetrahydrocannabinol, also known as THC, in his or her system. As to a driver who is not a qualifying patient under the MMMA, the law prohibits a person from driving with any amount of marijuana in her or his system.

In light of the *Koon* decision, it is important that police officers and prosecutors refresh themselves on what a police officer usually will see in some combination with someone under the influence of only marijuana: **Horizontal Gaze Nystagmus (HGN):** None **Vertical Gaze Nystagmus (VGN):** None **Lack of Convergence (LOC):** Present (but not always) **Pupils:** Almost always dilated (possibly normal)

GENERAL INDICATORS

1. Bloodshot, watery eyes
2. Relaxed inhibitions
3. Body tremors
4. Eyelid tremors
5. Impaired perception time/distance
6. Increased appetite
7. Possible paranoia
8. Possible panic attacks
9. Divided attention impairment
10. Odor of marijuana (not always)
11. Debris in mouth, on tongue

Standardized Field Sobriety Tests (SFST): Indicators of impairment will usually be evident on the Walk and Turn (WAT) and/or One Leg Stand (OLS).

HGN: Will not usually cause any HGN, but person might have difficulty holding their head still due to divided attention issues. VGN will not be present.

Walk and Turn: There are eight clues on this test that were studied and validated for .08 bodily alcohol level. However, they are extremely useful for disclosing drug impairment as well. The eight clues are easy to remember in this way:

Under the MMMA, all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marijuana.

“BS SO WHAT.” In order, subjects sometimes lose their **B**alance during instructions. Sometimes they **S**tart walking too soon. Sometimes they **S**top while walking. Sometimes they step **O**ffline. Sometimes they take the **W**rong number of steps. Sometimes they miss touching **H**eel-to- toe by more than a half-inch. Sometimes they raise their **A**rms more than six inches from their sides for balance. And some- times they **T**urn improperly. Additionally, general, non-studied indicators of impairment frequently manifest themselves as well, including, but not limited to: failing to count each step out loud, failing to watch feet while walking, body tremors.

One Leg Stand: There are four studied, validated clues for alcohol for this test. An easy way to remember them is **“DASH.”** Subjects sometimes put their foot **D**own while balancing. Some raise their **A**rms over six inches from their body for balance. Some **S**way while balancing. Sometimes, they **H**op. General indicators of impairment frequently occur as well with the OLS, including, but not limited: not looking at the raised foot while balancing, jumbled count/no count, and body tremors, unusually fast or slow count.



As with the WAT, make sure to remind your officers to legalistically enforce the instructions. This is how the National Highway Traffic Safety Administration (NHTSA) studied and validated them. Departure from these rules causes a loss of standardization and the tests may lose most, if not all their weight in court.

Departure from the rules usually makes these tests too easy for the subject and they will not show the impairment that was there all along. We already know this from testing habitual drunks and other types of tolerant substance users. Marijuana is no exception. Please take the time to review your SFST's and be as sharp as you can on them. By committing these tests to memory, they will be there when needed.

As officers may want to use the Modified Romberg and the Lack of Convergence tests as well, incorporate them in with the SFSTs on all Operating While Intoxicated investigations. They show impairment the other tests don't and are super for showing marijuana impairment.

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

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.

For Your Information

MSP Release 2014 Drunk Driving Audit

The Michigan State Police (MSP) has released the 2014 Drunk Driving Audit. It includes statistics about alcohol- and/or drug-involved traffic fatalities, injuries, and arrests in 2014.

The annual report showed a decline in alcohol- and drug-related crashes and fatalities. Alcohol involvement in traffic

fatalities decreased 17 percent, from 284 deaths in 2013 to 236 in 2014, while drug involvement dropped 9 percent from 165 in 2013 to 150 in 2014.

The audit, issued by the MSP Criminal Justice Information Center, is a collaborative effort between MSP and the Michigan Department of State.

The 2014 audit includes county specific information and is available at Michigan.gov/drunkdirivingaudit.



New Look for the Paper UD-10 Traffic Crash Report

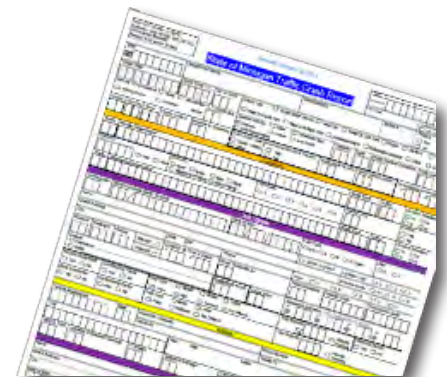
Beginning January 1, 2016, Michigan will be implementing a revised UD-10 Traffic Crash Report. After that date, the current paper UD-10 will no longer be accepted and all crashes must be submitted on the new form. While nearly 97 percent of all traffic crash data is submitted electronically, paper UD-10s will be made available for those agencies that still submit paper forms.

For those agencies that submit UD-10s electronically, each vendor will be revising their respective electronic crash applications to coincide with the rollout on January 1, 2016.

Currently, the paper UD-10s are printed, ordered, and distributed by Scantron. For the 2016 paper UD-10, the state of Michigan will be printing and distributing

them. The Traffic Crash Reporting Unit (TCRU) will determine the average number of crashes submitted on paper for each police department and will distribute the appropriate number of 2016 forms to those departments at no charge. With that being said, do not order any more UD-10 pads through Scantron. If additional paper forms are needed to get through the end of the year, please contact the TCRU at (517) 241-1699.

Over the next few months, the TCRU will be sending out details about the 2016 revision, as well as information pertaining to the ordering and distribution of the new paper forms. Most of that information will be communicated through GovDelivery emails, so please make sure you are signed up to receive these emails. You can



be added to GovDelivery by sending your email address to CrashTCRS@michigan.gov.

UD-10 questions and training opportunity inquiries may be directed to Sgt. Scott Carlson at Carlsons1@michigan.gov or call (517) 241-1312.

Garmin GPS Units and Crash Investigation (continued from page 2)

This crash occurred on a freeway where the suspect was traveling eastbound in the westbound lane of the freeway which resulted in a head-on crash. The crash killed the westbound vehicle driver. The suspect was not killed and was later charged criminally. A search warrant was obtained to image the data from the Garmin GPS Unit in the vehicle. At the time it was unknown if the unit was active when the crash occurred as it was found in the power off state. Most units if plugged into a cigarette lighter of a vehicle will turn off 30 seconds after the vehicle is turned off and will then turn back on when the vehicle is started again.

Looking at the active log we can see that the crash occurred at 1:17am on

2/9/09 and that the suspect vehicle was traveling as much as 84 MPH just prior to the crash. Looking back at the suspect's movements throughout the day we can see that the suspect was at a bar and grill for approximately 2 hours and 49 minutes prior to the crash and there were 25 minutes between the time the suspect left the bar and when the crash occurred.

You also have the availability to plot a large scale map for presentation in court showing the bread crumb trail of the suspect's path of travel for the day. As you can see this information provides valuable information not only about the crash itself, but information

about the suspect's activities and locations prior to the crash.

I am not familiar with GPS units other than Garmin to know if they have the capability to save and image track information. Further research and tests would need to be done with units other than Garmin.

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Breath and Blood Tests in Intoxicated Driving Cases (continued from page 3)

The article contends that the MSP needs to “reveal the sources of uncertainty,” but fails to mention that the police laboratory and breath alcohol program both have unequivocally already done so.

In *Jabrocki*, the sources of uncertainty were extensively discussed and are part of the case record.¹³ The laboratory uncertainty measurements for blood alcohol appear on the lab report itself, and those for drug levels are provided routinely. The methods by which those data are derived are available through the Freedom of Information Act and have been provided many times on request as well as testified to in numerous court proceedings.

An uncertainty budget for the Data master DMT was submitted during a *Daubert* hearing in which the Kent County Prosecutor’s Office successfully demonstrated that the instrument was scientifically reliable.¹⁴ A report containing

all the details of measurements and derived calculations was submitted as evidence in that hearing and provided to the defense. The report remains available through FOIA and has been repeatedly provided on request.

Again, the article does not specifically identify why Michigan’s blood and breath measurements fail to live up to scientific standards. It fails to mention that the MSP Toxicology Laboratory is accredited by the American Society of Crime Lab Directors Laboratory Accreditation Board and as such is compliant with ISO 17025, which is acknowledged on page 31 as the international standard for competence for performing scientifically valid measurements. Thus, if the laboratory is certified as compliant with ISO 17025 and ISO 17025 is the international standard for scientific measurements, there is no justification in the article for saying it does not meet those standards.

In conclusion, case practice around our state shows that the majority of courts accept breath and blood test results as reliable evidence in operating while intoxicated cases, and for prosecutors, these results continue to be a crucial tool in fighting drunk and drugged drivers.

Editor’s Note: Kenneth Stecker is a Michigan Traffic Safety Resource Prosecutor.

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.

13. See *Jabrocki*, unpub September 30, 2011, op at 2–4.

14. *People v Stanhardt*, unpublished opinion of the 63rd District Court, decided January 14, 2014 (No. D-130733-FD).

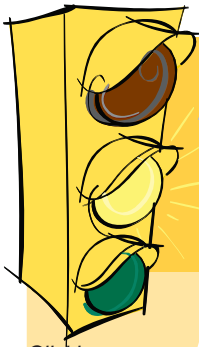
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The YELLOW LIGHT LEGAL UPDATE

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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

Defendant grabbed the wheel from his girlfriend, who was driving, causing the car to go off the road and strike a tree in Leelanau County. Defendant's girlfriend suffered a broken collar bone and a concussion as a result of the crash. Defendant had a blood alcohol level of 0.17.

Defendant was charged with operating while intoxicated (OWI) and operating while intoxicated causing serious impairment of the body function of another person (OWI-injury). A jury convicted defendant as charged.

The Michigan Supreme Court held that defendant's convictions of both OWI and OWI-injury for the same intoxicated driving incident violated the multiple punishments prong of the double jeopardy clauses.

Defendant appealed to the Court of Appeals, arguing that the trial court violated the multiple punishments of the double jeopardy clauses by convicting him of both OWI and OWI-injury. The Court of Appeals agreed, vacated defendant's OWI conviction. The Prosecutor moved for reconsideration, arguing that the Court of Appeals' analysis was contrary to *People v Ream*, 481 Mich 223 (2008). The Court of Appeals denied the motion.

The Prosecutor sought leave to appeal in the Michigan Supreme Court. The Court granted leave.

The issue before the Court was whether the defendant's convictions of OWI

and OWI-injury arising from a single intoxicated driving incident violated the double jeopardy clauses of the United States and Michigan Constitutions.

The Michigan Supreme Court held that defendant's convictions of both OWI and OWI-injury for the same intoxicated driving incident violated the multiple punishments prong of the double jeopardy clauses. The Court reasoned "Based on the plain language of MCL 257.625, the Legislature expressed a clear intent not to allow conviction and punishment for multiple offenses arising from the same conduct, except where explicitly authorized by the statute."

The Court noted "The specific authorization for multiple punishments contained in MCL 257.625(7)(d) leads us to conclude that the Legislature did not intend to permit multiple punishments for OWI and OWI-injury offenses arising from the same incident. While subsection (7) expressly authorizes multiple punishments for certain operating while intoxicated offenses, this authorization is limited to the circumstances described in MCL 257.625(7)(d). And interpreting this subsection in the context of the statute as a whole leads us to conclude that the Legislature intended to exclude all other multiple punishments under MCL 257.625."

The Court however noted for example "Under MCL 257.625(7)(d), the Legislature specifically authorized multiple convictions and punishments for a person who commits OWI-minor and by that same conduct also commits OWI-injury or causes "the death of another person" under MCL 257.625(4) (OWI-death)."

Affirmed on alternate grounds and remanded to the trial court for re-sentencing.

[People v. Miller](#), case no. 149502, decided July 20, 2015.

Michigan Court of Appeals

The defendant argued that the trial court erred in excluding evidence that the victim driver had alcohol and controlled substances in his system. The defense's basis for admission of this evidence was that it would establish that the victim himself was negligent and that defendant did not have the requisite level of intent for a second-degree murder charge.



The Court of Appeals rejected both arguments. First, the Court held that there was no evidence that the victim did anything to contribute to the crash such that he was negligent or grossly negligent and thus an intervening cause of the crash. Evidence at trial established that the victim's truck was properly driving in its own lane when defendant's truck crossed the center line and struck victim's truck head on. The Court contrasted these facts from those in *People v. Feezel*, 486 Mich 184 (2010), where the heavily intoxicated victim was walking in the middle of an unlit road with his back to oncoming traffic on a dark rainy night.

Second, the Court of Appeals also held that evidence that the victim had alcohol and controlled substances in his system is irrelevant to the issue of defendant's intent in a second-degree murder case. The Court held that the facts in this case were sufficient to show that defendant committed an act that was in obvious disregard of life-endangering consequences and that

victim's state of intoxication was irrelevant to her knowledge of her own susceptibility of hazardous driving.

The defendant also argued on appeal that the trial court erred in admitting evidence of seven prior incidents where she had driven erratically, was passed out in her vehicle, or struck another vehicle while impaired or under the influence of prescription drugs. These incidents were admitted as prior acts under MRE 404(b)(1). The Court noted "The prior acts evidence here involved incidents in which defendant either drove unsafely, was passed out in her vehicle, or was involved in an accident while impaired or under the influence of prescription substances, or was in possession of pills, such as Vicodin and Soma.



This evidence was properly admitted to show defendant's knowledge and absence of mistake, and was relevant to the malice element for second-degree murder because it was probative of defendant's knowledge of her inability to drive safely after consuming prescription substances. And, because the prior incidents were minor in comparison to charged offense involving a head-on collision that caused the deaths of two individuals, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Lastly, the trial court gave an appropriate cautionary instruction to reduce any potential for prejudice."

The Court of Appeals rejected this argument and held that the prior acts were properly admitted to show defendant's knowledge and absence of mistake. The Court also held that the prior acts were relevant to the malice element for second-degree murder because it was probative of defendant's knowledge of her inability to drive safely after consuming prescription drugs.

Affirmed.

People v. Bergman, case no. 320975, decided September 29, 2015.

Unpublished Cases

(An unpublished opinion is not binding as precedent but may have persuasive value in court.)

Defendant was charged with two counts of operating a motor vehicle while impaired (OWI) causing death, MCL 257.625(4), and two counts of reckless driving causing death, MCL 257.626(4), following a crash in which Andrea Herrera and Eric Fischer died. After a jury trial, defendant was convicted of OWI causing death and reckless driving causing death in the death of Herrera. Defendant was acquitted of OWI causing death in the death of Fischer, but was convicted of a moving violation causing death, MCL 257.602d(1), which was submitted to the jury as a lesser offense of reckless driving causing death.

Defendant's convictions arose out of a collision between the vehicle he was driving, and the vehicle driven by Fischer, in which Herrera was a passenger. Witnesses to the crash testified that defendant's vehicle ran a red light at an intersection and collided with Fischer's vehicle as it was proceeding through the intersection. Fischer's vehicle was pushed into a semi-truck that was also in the intersection. Herrera was dead on arrival at the hospital, while Fischer died in the operating room.

Kent County Deputy Christopher Goehring testified that he spoke with defendant while defendant was in the back of an ambulance. He could smell a moderate amount of alcohol coming from defendant. Defendant told the deputy that he could not remember the whole night. He remembered where he was coming from, but nothing else. Defendant also said that he had had two beers. Other than the smell of alcohol and defendant's admission that he had been drinking, the deputy did not note any signs that defendant was intoxicated. The ambulance took defendant to the

hospital. The deputy also went to the hospital.

An emergency room physician at the hospital treated the defendant. For medical purposes, she requested a chemical analysis of defendant's blood. Defendant's blood alcohol result was .125 percent. The hospital uses a serum test.

According to Glinn, because "alcohol partitions into the water," the serum alcohol level is higher than the whole blood alcohol level.

At the hospital, Goehring filled out an affidavit for a search warrant for defendant's blood. The warrant was signed by a magistrate. The samples were sent to the Michigan State Police (MSP) crime laboratory. Experts from the MSP crime laboratory testified that the two samples of defendant's blood showed a blood alcohol level .086 and .088 percent by whole blood test. Further, controlled substances were found in defendant's blood, including amphetamines, morphine, and promethazine and promethazine metabolite.

Michele Glinn testified as an expert in forensic toxicology, the analysis of blood, and procedures for a crime laboratory. Glinn testified that "whole blood" is blood that comes from a person's arm. It contains red and white blood cells, as well as other proteins and clotting factors. Hospitals often separate out the red blood cells and proteins, ending up with the water fraction of the blood. Depending on the amount of filtering, this part of the blood is plasma or serum.

According to Glinn, because "alcohol partitions into the water," the serum alcohol level is higher than the whole blood alcohol level. By reducing a serum alcohol level by 16 or 18 percent, one can obtain the whole blood alcohol level. According to Glinn, a decrease in defendant's blood alcohol level from .105 to .087 percent is consistent with the general metabolic range. Glinn further testified that the amphetamine level of defendant's blood was consistent with one dose of the prescription medication Adderall.

Defendant first argued that the trial court erred when it failed to suppress evidence of the blood draw ordered by the physician in the emergency room. The Court of Appeals disagreed.

The Court noted that the following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than a preliminary chemical breath analysis:

(e) If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure.

The Court held "There is no dispute that evidence of the hospital blood draw met the requirements of MCL 257.625a(6)(e)."

Defendant next argued that the trial court erred in failing to suppress evidence of the blood draw taken pursuant to the search warrant. The Court of Appeals disagreed.

The Court noted that the "Affidavit submitted by Goehring contained the following facts: defendant was the driver of a silver Charger that was involved in an accident; the accident was the result of defendant running a red light; a moderate odor of alcohol emanated from defendant; and defendant said that he had consumed two beers before driving. These facts, when viewed in a commonsense and realistic manner, allow a reasonable person to believe that evidence of a crime was in defendant's blood. *Waclawski*, 286 Mich App at 698. Moreover, these facts allowed the

magistrate to make an independent probable cause determination. *People v Sloan*, 450 Mich 160, 169; 538 NW2d 380 (1995), overruled in part *People v Hawkins*, 468 Mich 488 (2003)."

The Court of Appeals rejected the defendant's argument that the statements he made to deputy in the back of the ambulance could not be used to make a probable cause determination because defendant had not yet been given his Miranda rights.

The Court noted that "At the hearing on defendant's motion to suppress the statements he made in the ambulance, Goehring testified that his purpose in speaking to defendant in the ambulance was to conduct a preliminary investigation into how the accident had happened. Goehring did not take defendant into custody or engage in any conduct that deprived defendant of his freedom of action in any significant way. Accordingly, Goehring was not required to inform defendant of his Miranda rights."

Lastly, the defendant argued that the trial court erred when it instructed the jury on the lesser offense of moving violation causing death.



The Court of Appeals remanded this issue "For the trial court to determine whether defendant requested the instruction on moving violation causing death. If he did, the issue is waived and the conviction stands. If he did not, it was plain error, in light of MCL 257.626(5) and *Jones*, 497 Mich at 157- 158, for the trial court to give such an instruction, and defendant's conviction for moving violation causing death must be vacated.

Affirmed in part, and remanded in part.

People v. Ford, case no. 322456, decided September 10, 2015.

The defendant contended that the trial court erred in refusing to instruct the jury on the affirmative defense of duress. The Court of Appeals disagreed.

The Court stated the following: "To be entitled to an instruction on an affirmative defense, such as duress, a defendant asserting the defense must produce some evidence from which the jury can conclude that the essential elements of the defense

To demonstrate duress, evidence of a threat of future conduct is insufficient; rather, the threatened conduct must be imminent and impending.

are present. *People v Henderson*, 306 Mich App 1, 4; 854 NW2d 234 (2014). The elements of duress are as follows:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm. *Henderson*, 306 Mich App at 4-5.

To demonstrate duress, evidence of a threat of future conduct is insufficient; rather, the threatened conduct must be imminent and impending. *Id.* at 5. A defendant forfeits the defense of duress if he or she does not take advantage of a reasonable opportunity to escape, or if the actor fails to terminate his conduct when the claimed duress loses its coercive force." *People v Lemons*, 454 Mich 234, 247 n 18; 562 NW2d 447 (1997).

The Court held that in this case there was no evidence demonstrating a threat sufficient to create a fear of death or serious bodily harm in the mind

of a reasonable person, and there no evidence that defendant feared death or serious bodily harm.

The Court affirmed the defendant's convictions of reckless driving, MCL 257.626(3), felonious assault, MCL 750.82, failure to stay at the scene of an accident that results in serious impairment of a body function or death, MCL 257.617(2), and failure to stay at the scene of an accident that results in injury to any individual, MCL 257.617a(2).

People v. Hassan, case no. 320048, decided September 10, 2015.

After a night of drinking at a bar, the defendant went to his car, turned it on, and passed out in the driver's seat. The police discovered him shortly thereafter, woke him up, and performed sobriety tests, which he failed. He was arrested for OWI.

Because he had refused a breathalyzer or chemical test, the police obtained a search warrant for a blood test. Based on the results, the Jackson County Prosecuting Attorney's Office charged him with violating MCL 257.625(1)©, BAC of 0.17 grams or more, and MCL 257.625(1), operating a motor vehicle while intoxicated.

The defendant argued that he was not "operating" his car, and therefore, his arrest was unlawful.

The district court agreed with the defendant and granted his motion to quash the search warrant, and suppressed the evidence of the blood test. The circuit court affirmed.

The Court of Appeals disagreed. The Court noted that even if "the search warrant and the blood draw it authorized were not based on probable cause, and thus unconstitutional the blood test was still admissible because the officer who ordered defendant to submit to a blood test acted in reasonable and good-faith reliance on a search warrant."

The Court further noted "The officer encountered defendant: (1) in the driver's seat of his car; (2) with the engine running; and (3) surrounded by a half-empty (and open) bottle of tequila and case of beer. Defendant and the interior of the car also emitted a strong odor of intoxicants, and defendant himself admitted that he had had too much to drink. Despite his assertions to the contrary, criminal defendants in Michigan have been found guilty of operating a vehicle while intoxicated in similar circumstances."

Reversed and remanded.

People v. Metzner, case no. 323971, decided August 25, 2015.

New Laws Quadricycles

Quadricycles --commonly called "pedal pubs"-- shuttle riders through downtown areas and between popular tourist attractions such as breweries, wineries, and distilleries, and some have the capacity to be outfitted with beer kegs. The Michigan Department of Transportation, however, determined that pedal pubs do not meet the criteria for licensure as limousines; thus, although they may be operated on the street, they were subject to the State's general ban on open containers in a vehicle's passenger compartment.

Public Act 126 amended the Motor Vehicle Code, effective July 15, 2015, to do the following:

- Require a commercial quadricycle owner to furnish a specified amount of liability insurance.
- Allow a commercial quadricycle passenger to possess or transport open alcohol unless prohibited by a local ordinance.
- Prohibit a person from operating a commercial quadricycle with any bodily alcohol content, and prescribe misdemeanor penalties for a violation.
- Designate other Code violations involving commercial quadricycles as civil infractions and prescribe a fine.
- Extend to a commercial quadricycle

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certain provisions that apply to the operation of a bicycle, electric personal assistive mobility device, moped, or low-speed vehicle.

- Authorize a local unit of government to regulate the operation of commercial quadricycles.

Public Act 127 amended the Motor Vehicle Code, effective July 15, 2015, to provide that the term "motor vehicle" would not include a commercial quadricycle, and to define "commercial quadricycle" as a vehicle that meets all of the following criteria:

- Has fully operative pedals for propulsion entirely by human power.
- Has at least four wheels and is operated in a manner similar to a bicycle.
- Has at least six seats for passengers.
- Is designed to be occupied by a driver and powered either by passengers providing pedal power to the vehicle's drive train or by a motor capable of propelling the vehicle in the absence of human power.
- Is used for commercial purposes.
- Is operated by the vehicle's owner or an employee of the owner.

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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