

The GREEN LIGHT NEWS

Volume 7, Issue 1

February 2007

Felony OWI Law Changed Significantly

On January 3, 2007 at 9:10 a.m., House Bill 6009 was signed by the Governor and became Public Act 564 of 2006, also known as Heidi's Law. Also signed at the same time was Senate Bill 1241. That bill became Public Act 565 of 2006. These two bills have changed felony Operating While Intoxicated (OWI) offenses significantly.

P.A. 564 of 2006

P.A. 564 of 2006 amended MCL 257.625 by eliminating the 10 year limitation on a number of charges. The primary charge of OWI 3rd has always required that the two prior convictions occurred within 10 years. That language was eliminated, and in its place the words "regardless of the number of years that have elapsed since any prior conviction." (MCL 257.625(9)(c)). The result is that if a person **at any time in**

their life has two prior convictions under 257.625 then that person can be charged with an OWI 3rd Offense. What a prior conviction is, is defined in MCL 257.625(25).¹ In addition, Impaired Driving 3rd offense, which is also a 5 year felony, had the 10 year limitation removed and the same language put in its place. So if a person has two prior convictions during their lifetime, and get arrested for impaired driving, they can be charged with the felony offense.



This law also changed the 10 year limitation for Child Endangerment (MCL 257.625(7)). For a charge of Child Endangerment, when a person under 16 is present in the car and the driver has violated one of the sections of 257.625, if there is a prior within 7 years or 2 priors have occurred during the person's lifetime, then that person can be charged with Felony Child Endangerment. Remember that the penalty is the same for 2nd and 3rd offenses under the Child Endangerment section.

The new law also did away with the 3 in 10 year requirement for Zero Tolerance with a Minor in the Vehicle (MCL 257.625(7)(b)(ii)), and Operating with The Presence of Schedule One Controlled Substances or Cocaine

(Continued on page 4)

Setting the Record Straight

Myths and Misconceptions from "The SCRAM Tether as Seen Through the Eyes of Davis-Frye and Daubert"

(Published in the June 2006 Issue of the Michigan Bar Journal)
by Jeff Hawthorne

In 2003, courts throughout the state of Michigan began using a new alcohol monitoring tool designed for long-term monitoring of alcohol-involved offenders. This technology, called SCRAM (for Secure Continuous Remote Alcohol Monitor), has since been used on thousands of Michigan offenders as a component of probation or parole supervision. As of November 2006, the technology is available in 40 states and has monitored over 30,000 DUI,

domestic violence, and other alcohol-triggered offenders.

In the June 2006 issue of the Michigan Bar Journal, Michigan District Court Judge Dennis Powers authored an article discussing the validity and admissibility of SCRAM based on the Daubert/Frye standards. Judge Powers based his article on a bond revocation

(Continued on page 3)

Inside this Issue

For Your Information	2
One Thing. Just One Thing	2
Post-Impact Trajectory Investigation	6
New Commercial Driver License Suspension Periods	7



For Your Information

The International Council on Alcohol, Drugs and Traffic Safety (ICADTS) is an independent nonprofit body whose only goal is to reduce mortality and

morbidity brought about by misuse of alcohol and drugs by operators of vehicles in all modes of transportation.

To accomplish this goal, the Council sponsors international and regional conferences to collect, disseminate and share essential information among professionals in the fields of law, medicine, public health, economics, law enforcement, public information and education, human factors and public policy.

In 1950, the International Committee on Alcohol and Traffic, forerunner of ICADTS, was established at the first international conference in Stockholm

where 146 participants from 19 countries met for four days to discuss the role of alcohol in traffic safety. That was the beginning. Since then, additional conferences have been held, generally at three-year intervals.

Proceedings of all of the major conferences, satellite conferences, regional meetings and jointly-sponsored workshops have been published. This amounts to thousands of pages of material which provide a history of the development of research over the last five decades in alcohol, drugs, and traffic safety.

For more information go to: www.icadts.org

One Thing. Just One Thing.

Focusing Attention During Direct Examination

by Elliott Wilcox



Did you ever see the movie *City Slickers*? There's a scene worth watching in that movie that will improve the way you prepare your OWI cases and present your direct examinations. In the scene, Curly (Jack Palance), a gruff and grizzled cowboy, reveals the secret of life to Mitchie (Billy Crystal):

Curly: Do you know what the secret of life is?

Mitchie: No, what?

Curly [holding up a single finger]: This.

Mitchie: Your finger?

Curly: One thing. Just one thing. You stick to that and everything else don't mean sh**.

Mitchie: That's great, but what's the one thing?

Curly: That's what you gotta figure out. Most of your OWI cases can be boiled down to **one thing**, too. Do you know what your **one thing** is? Is it actual physical

control of the automobile? The defendant's identity? Whether the defendant was under the influence of alcohol?

Probably not. And it's not the DataMaster, either.

No, for the majority of your cases, your **one thing** will be whether or not the defendant's normal faculties were **under the influence of alcohol**. If you can prove that, everything else don't mean... well, you know.

In this article, you'll discover a technique to highlight your **one thing** for the jury during the direct examination of your arresting officer. Preparation and planning will be essential to your direct examination, so start by asking your police officer to arrive well in advance of the time he's expected to testify. Here are the specific directions you'll want to give him:

"Officer, before you testify, I'll need you to do me favor. I want you to focus your attention on the defendant. Watch him walking, talking, standing, etc. Pay

particular attention to any differences you notice between the way he appears today and the way he appeared the night you arrested him. Are there any physical differences? Do his eyes look different? His face? Differences in his balance? Any differences in his speech? Is his reaction speed different? Keep your eyes, ears, and nose open for any differences between how he appears today compared to how he appeared the night you arrested him for OWI."

The reason you're giving him these instructions is because you're going to conclude your direct examination by contrasting the differences between how the defendant appears today (his normal faculties) with how he appeared the night he was arrested (the indicators of impairment).

Here is an example of how to conclude your direct examination by highlighting your **one thing** for the jurors:

(Continued on page 7)

SCRAM Myths and Misconceptions (Continued from page 1)

hearing where the defendant was on a SCRAM device. This article outlines the issues presented in the article and provides primary resource references that can be used to refute the information contained in that article.

Misconception: Foods such as chocolate donuts and breads can produce “endogenous alcohol,” resulting in a false positive BAC.

Indeed, consumed in sufficient quantities, foods such as those listed above would indeed create a positive blood alcohol concentration. And indeed, that positive BAC would be detectable via breath, blood, urine, and perspiration.

However, the quantities that would have to be consumed are so extreme that it is a physical impossibility.

According to data published in “Ethanol Content of Various Foods and Soft Drinks and the Potential for Interference with a Blood Alcohol Test,” published in the Journal of Analytical

A person would have to consume 207 raised donuts to reach the equivalent blood alcohol content of .065.

Toxicology by Barry Logan,¹ a person would need to consume 3 pounds of rosemary onion bread to equal one beer (12 ounces, 4% alcohol). Using the data presented in Logan’s article, you can further calculate that in order to reach a



.065 BAC, such as the defendant did in the case that appeared before Judge Powers, a person would have to consume 41.52 pounds of chocolate donuts in one hour to equal the alcohol consumed in that drinking event. At that rate, a person would have to consume 207 raised donuts (at a weight of 3.2 ounces per donut) or 274 chocolate cake donuts (at 2.4 ounces per

donut) to reach the equivalent blood alcohol content. According to the authors of this article, “The likelihood of anyone testing positive for alcohol from cooked bread consumption, let alone becoming

intoxicated, is therefore remote.” Some additional comparisons are in Figure 1.

Dr. Michael Hlastala was allowed to testify for the defense as an expert on transdermal testing and the SCRAM

device in particular, and his testimony included a confirmation that consuming some foods would create a positive reading on the SCRAM System. Nonetheless, the study cited by Dr. Hlastala, referenced above, clearly states that’s not possible. Dr. Hlastala’s testimony was inaccurate. It’s important to note that, in a case three months later in the same Michigan county (People of the Township of Brandon v. Robert Kenneth Kuffa), the Court ruled that Dr. Hlastala could be used as an expert witness relative to the physiology of alcohol and the body, but that he was not qualified to testify as an expert witness on SCRAM.

Misconception: There is a lack of research about the science of Transdermal Alcohol Testing.

In fact, since 1936, there have been no fewer than 22 peer-reviewed, published studies that review and validate the science of transdermal alcohol measurement. (Editor’s note: The complete listing of peer reviewed studies can be obtained from me, David Wallace.)

Misconception: There has been no independent research of the SCRAM System.

In 2003, the University of Colorado Health Sciences Center began a comprehensive study of the SCRAM System, with the intent of submitting the

(Continued on page 5)

Type of Food and Amount in Pounds of food that would need to be consumed in 1 hour to yield the Theoretical BAC						
Theoretical BAC Produced	Theoretical BAC	Downey’s Original Jim Beam Kentucky Bourbon Cake	Great Harvest Apple Walnut Roll	Sun Maid Raisin Bread	Thomas’ Sourdough English Muffin	Home Pride Wheat Bread
	0.002%	1.81 lbs	3.14 lbs	10.87 lbs	6.74 lbs	6.38 lbs
	0.023%	3.62 lbs	6.28 lbs	21.74 lbs	13.48 lbs	12.76 lbs
	0.044%	5.43 lbs	9.42 lbs	32.61 lbs	20.22 lbs	19.14 lbs
	0.065%	7.24 lbs	12.56 lbs	43.48 lbs	26.96 lbs	25.52 lbs

FIGURE 1

Felony OWI Law (Continued from page 1)

(MCL 257.625(9)(c) charges. In other words, in any of the sub-sections of MCL 257.625, if there was a requirement that the two prior convictions happen within 10 years of the current offense, that requirement is no longer present. However, the requirement of one prior conviction within 7 years of the current offense has not been changed at all.

Recognizing that proving some of the older charges may be more challenging at this time, the ways to prove a prior conviction were expanded. In addition to an abstract of the conviction or a copy of the defendant's driving record, the law added as other ways to prove a prior conviction – a copy of the court register of actions, a copy of the judgment of conviction, or even information contained in the presentence report (MCL 257.625(17)).

P.A. 565 of 2006

P.A. 565 of 2006 changed the time limitations for keeping convictions under 257.625 on a person's driving record. Before this law, a conviction for 625 would be taken off the driving record after 10 years. The new law however, changed that, stating that if a person is "convicted of violating section 625, the record of that conviction **shall be maintained for the life of the person.**" This will obviously assist prosecutors and law enforcement in knowing when a prior conviction is present. However it must be noted that this law, P.A. 565 of 2006, does not go into effect until October 31, 2010. But after that point, OWI, Impaired Driving, or OWI Causing Death Convictions will not be purged from the person's driving record.

Possible Issues

While these laws are a giant step forward in ensuring that a person is held accountable for habitually violating the OWI laws, there are a few issues that may come up from time to time.

First, when the Repeat Offender bill for intoxicated driving was passed in 1998, it required a judge to immobilize a

defendant's car in a variety of circumstances. With a first offense OWI, the court may immobilize the car up to 180 days, but there is no requirement. For a second offense, the car shall be immobilized for at least 90 days and not more than 180, and for a third offense OWI, the car shall be immobilized for at least one year and not more than three years. What is important is language used for that particular section. MCL 257.904d(1)(d)

The result is that if a person at any time in their life has two prior convictions under 257.625 then that person can be charged with an OWI 3rd Offense.

says: "For a conviction under section 625(1), (3), (4), (5), (7), or (8) **within 10 years after 2 or more prior convictions**, the court shall order vehicle immobilization for not less than 1 year or more than 3 years" (emphasis added). That language has not been changed with the enactment of Heidi's Law. So if the two prior convictions are outside the 10 year time limit, even though a person can be convicted of OWI 3rd, the court only has the authority to immobilize the defendant's car up to 180 days.

Second, under the Repeat Offender Law that was passed several years back, officers are to confiscate a car's license plate in certain situations. One of those situations is when the two prior offenses OWI are within 10 years of the current OWI offense. Heidi's Law did not change that requirement. 257.904c sets the requirements for plate confiscation - and it says that plates should be confiscated whenever

"immobilization is required" pursuant to 257.904d. However, immobilization is mandatory for OWI 3rd

only when the two prior offenses are within 10 years. So again, the person might be arrested for OWI 3rd for having two other priors in their lifetime, but the plate may not be confiscated if the two priors are outside the ten years. In other words, the requirements for plate confiscation have not changed at all. As a side note, if one of the priors is within seven years of the current offense, then plate confiscation is still appropriate. For an officer to be sure, they should run a "35" when they run a driver's driving record. That will tell them if the plate should be confiscated.

The third issue has to do with a person's license. MCL 257.303 sets out some of the requirements for issuing drivers licenses by the Secretary of State's Office. In part, it states that a person's license is revoked with three OWI convictions on their driving record (MCL 257.303(2)(g)). However, it is specifically worded that a person's license is revoked for "any combination of **3 convictions within 10 years** for any of the following . . . a violation or attempted violation of section 625" (emphasis added). This is another section that was not changed by Heidi's Law. We need to be aware that a person may be convicted of OWI 3rd, and not have their driver's license revoked. It depends on when the prior convictions happened. If one is outside the 10 year requirement and the second is outside of the 7 year requirement, an OWI 3rd conviction will be treated by the Secretary of State as a first offense.

¹ Only one conviction for 256.625(6), also called the zero tolerance charge, may be used as a prior conviction.



SCRAM Myths and Misconceptions *(Continued from page 3)*

article for peer-review publication. The final article was submitted to *Alcoholism: Clinical and Experimental Research* for peer review in May of 2005, and the article was accepted for publication in September of 2005. The article, "Validity of Transdermal Alcohol Monitoring: Fixed and Self-Regulated Dosing," was published in the January 2006 issue of the journal.

In addition, the National Highway Traffic Safety Administration commissioned a study of the SCRAM System in 2004. The study, which was conducted by the Pacific Institute for Research and Evaluation, was conducted throughout 2004 and 2005. The results of that study are slated for publication in early 2007.

Misconception: The validity study of SCRAM, conducted by the University of Colorado Health Sciences Center, is not a valid study due to sample size, as well as the fact that the manufacturer contributed to the cost of the study.

The very nature of the peer-review process ensures that things such as the methodology and the interpretation of the study results are done accurately and without bias. First, a university-based board must review and approve a study that will eventually include the name of the school on the results. Second, the peer-review conducted by the publication provides yet another level of review, to ensure the credibility of the study methodology, and ultimately the publication's content. That's why peer-review is the standard for both the scientific community and the legal community.



While AMS contributed to a very small portion of the overall costs of the study, grants from the National Institute of Health, the National Institute of Drug

Abuse, and the National Institute of Mental Health supported the vast majority of the costs of the study. Ultimately, it is commonly accepted practice for a company to fund an independent study of a product, as evidenced by the billion dollar drug trial industry, which is funded by pharmaceutical manufacturers.

Misconception: In the case that appeared before Judge Powers, *The State of Michigan v. Lisa Christine Glaza, AMS, the manufacturer of SCRAM, confirmed a drinking event while the defendant was hospitalized, causing the court to question the validity of the testing.*

Since 1936, there have been no fewer than 22 peer-reviewed, published studies that review and validate the science of transdermal alcohol measurement.

During the course of this multi-day bond revocation hearing, which focused on two drinking and obstruction episodes during the preceding months, the defendant was hospitalized for two days for stress. Upon returning to the court to complete the hearing after a two-day recess, the defense counsel presented raw data to the court, from a download the previous night, showing "positive" readings that took place while the defendant was hospitalized. This data had not been reviewed or evaluated by AMS, and the prosecution was not allowed the opportunity to have AMS evaluate the readings or testify regarding those readings. Subsequent to the hearing, AMS confirmed the results as an environmental interfeerant,

not a consumption event. Nonetheless, the "hospital event" was cited by the court in the final ruling.



Conclusion

While the issues raised by Judge Powers in both the Glaza case and his Michigan Bar Journal article are essential in determining the reliability of a technology used to monitor offenders, the data he used to evaluate those issues was highly inaccurate. Since the Glaza hearing in December of 2003, SCRAM has consistently been found reliable as a way to measure for alcohol consumption in courts throughout the state of Michigan, and the technology has been upheld in formal Frye and Daubert hearings in several other states. Today, Judge Powers joins nearly 150 other Michigan courts in utilizing SCRAM technology to monitor alcohol-involved offenders.

Jeff Hawthorne is an electrical engineer and systems development manager with more than 20 years of experience in the alcohol testing field, including extensive experience utilizing fuel cell technology. Currently the chief technology officer for Alcohol Monitoring Systems, Hawthorne is a graduate of the Robert F. Borkenstein Course on Alcohol and Highway Safety: Testing, Research and Litigation from Indiana University. He is a published author and a frequent guest speaker on alcohol testing and transdermal alcohol monitoring. He has testified as an expert witness on transdermal alcohol testing and the SCRAM System in over 35 different hearings in 15 states.

¹ "Ethanol Content of Various Foods and Soft Drinks and their Potential for Interference with a Breath-Alcohol Test," in the *Journal of Analytical Toxicology*, Vol 22, May/June 1998. By Barry K. Logan and Sandra Distefano.

Post-Impact Trajectory Investigation

By John Kwasnoski



Two cars approach an intersection, neither vehicle brakes prior to collision, and the post-impact motions of the vehicles include rotation and vehicle rollout to the final rest positions. This is a common scenario, and the reconstruction of this crash might be done by a linear momentum analysis in which critical assumptions are made without understanding the significance of those assumptions. The collision may be treated as though the vehicles were idealized point masses, disregarding their centers of mass, the effect of rotation on effective drag factor, and especially the path of the vehicle from impact to final rest. In the *Accident Reconstruction Journal* "Letters to the Editor" column for Nov/Dec 1993, a writer points out some of the assumptions made in momentum calculations:

1. CM at impact to CM at final rest position (FRP) is treated as a full braking skid, even though tire mark evidence of full braking is not observed. Effects of rotation on drag factor are not considered, and full braking drag factor is used. This was addressed by Pultar¹ in a mathematical model based on the friction circle concept.
2. Separation angles used in the calculations are determined by POI to final rest direction, without regard for the actual post-impact path of the vehicles or vehicle rollout.
3. Approach angles are determined by alignment of vehicle damage at full engagement.

Without correctly determining post-impact motion parameters a linear momentum calculation may become little more than an exercise in algebra and trigonometry. A limited at-scene investigation may make it impossible to complete a momentum analysis; this is better than making invalid assumptions in order to be able to complete a mathematical calculation. An example of a complex post-impact motion

with significant rollout is the Dayton, OH intersection collision (in which a van rolled over a pedestrian crossing the street) that frequented the Internet recently. Using a POI to FRP direction for the separation angle of one of the vehicles would have been completely inappropriate, as there was significant rollout to the FRP.

To demonstrate the effect of an erroneous post-impact analysis fourteen "staged" collisions reported by Smith and Noga² were analyzed. The data on the staged collisions included scale drawings of the collisions and the post-impact tire marks, measured drag factors, final rest positions of the vehicles, etc. In each analysis the separation angle was determined by using the POI to FRP straight-line direction, and the entire post-impact motion was treated as a four-wheel skid.

The result of each analysis was compared to the known impact speeds, and a percentage difference was calculated. Two calculations resulted in negative impact speeds, which had no meaning. In two cases the impact speeds were underestimated. In the other cases overestimates of impact speeds ranged from 25% to 401%. Cutouts of the vehicle profiles were given to several reconstructionists, and they were asked to align the damages to determine approach angles. In another test the same reconstructionist was asked to align the vehicle damages more than once, and variations were noted. Aligning damage profiles generally produced an uncertainty within a range of +/-7 degrees. The variation of 7 degrees in the approach angle produced significant errors in calculated impact speeds in some cases, especially those in which vehicle weights differed significantly. The analysis of the Smith and Noga staged crashes offers a rare opportunity to work with well-

measured and documented crashes, and affords a test of the certainty of linear momentum calculations when bad assumptions are made in lieu of evidence.

The analyses showed that the at-scene investigation of the post-impact trajectories, relates directly to the accuracy of the momentum analysis. When using the linear momentum method, ask the following questions:

1. What evidence is there of braking action by each of the vehicles' tires?
2. Does the post-impact trajectory include significant rotation and/or rollout?
3. What evidence supports the determination of approach and separation angles?
4. Has a sensitivity analysis been completed?

Editor's Note: John B. Kwasnoski is Professor Emeritus of Forensic Physics at Western New England College, Springfield, MA after 31 years on the faculty. He is a certified police trainer in more than 20 states and is the crash reconstructionist on the "Lethal Weapon - DWI Homicide" team formed by the National Traffic Law Center to teach prosecutors how to utilize expert witness testimony and cross examine adverse expert witnesses. He is the author of the book, "Investigation and Prosecution of DWI and Vehicular Homicide" and his recently published book "From Crash to Courtroom: Collision Reconstruction for Lawyers and Law Enforcement." Prof. Kwasnoski has reconstructed over 650 crashes.

¹ W. Pultar, "A Model to Determine Acceleration of Rotating Vehicles", ARJ, Nov/Dec 1990

² R.A. Smith and J.T. Noga, "Examples of Staged Collisions in Accident Reconstruction," Highway Collision Reconstruction, ASME, November 1980.

New Commercial Driver License Suspension Periods

Prosecutors may be noticing an increase in not guilty pleas to citations issued to truck drivers who hold Commercial Driver Licenses (CDLs) including citations issued when driving non-commercial vehicles. This is due to changes in the thresholds for suspensions mandated by the U.S. Department of Transportation (USDOT) and the U.S. Department of Homeland Security.

Section 257.319b of Act 300 PA 1949 was updated in October 2005 to reflect these new requirements. There are four separate categories:



- Suspensions for Major Offenses (OWI, felonies), which, upon conviction, result in the loss of CDL for anywhere from a year to life;
- Suspensions for Serious Traffic Offenses (excessive speed, improper lane changes, etc.), which, upon conviction, result in the loss of CDL for anywhere from 60 days to 120 days;
- Suspensions for Railroad Crossing violations, which, upon conviction, result in the loss of CDL for anywhere from 60 days to a year; and

(Continued on page 8)

One Thing *(Continued from page 2)*

Q. Officer McNulty, have you had the opportunity to observe the defendant today at the courthouse?

A. Yes, I have.

Q. Is there any difference between how he looks today, compared to the night you arrested him?

A. Yes, there is.

Q. Let's talk about his physical appearance. Start with his eyes.

A. Today, his eyes are clear. That night, his eyes were bloodshot and glassy.

Q. And his face?

A. Today, I'd say his face looks "normal." That night, his face was red and flushed. It looked as if he was sweaty, even though it was cool out.

Q. Any difference in the way he sounds?

A. Today, he's been articulate and crisp in his speech, but that night, he was slurring his speech and stumbling over words.

Q. What about his balance?

A. Today, he hasn't had any trouble walking or standing up, and has been

steady on his feet. That evening, he couldn't even stand up straight – he swayed side to side, and lost his balance.

Q. Do you notice any other differences between how he appears today, contrasted with the way he looked the night you arrested him for Driving Under the Influence?

A. No, I think I've mentioned everything I saw. [Asking this question gives the witness an opportunity to mention any other indicators of impairment that you may have missed.]

For the majority of your OWI cases, your one key thing will be whether or not the defendant's normal faculties were impaired.

Q. Overall, what's the difference between the defendant's appearance today and how he appeared the night you arrested him?

A. Today, he's sober. That night, he was drunk.



One thing. Just **one thing**... *intoxication*. It takes planning and preparation to develop these types of direct examinations, but the payoff makes it all worthwhile. When your jurors retire to the deliberation room with that **one thing** illustrated clearly in their minds, their decision will be an easy one.

Editor's Note: Elliott Wilcox publishes **Trial Tips Newsletter**, a free weekly e-zine for prosecutors that reveals simple, effective, and persuasive techniques to help you win more trials, guaranteed. Sign up today for your free trial advocacy tips at www.ProsecutorTips.com.

Prosecuting Attorneys Association of Michigan

116 West Ottawa
Suite 200
Lansing, Michigan 48913

Phone: (517) 334-6060
Fax: (517) 334-7052
Email: wallaced@michigan.gov



We're on the Web!
www.paamtrafficsafety.com



This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.

License Suspension Periods *(Continued from page 7)*

- Suspensions for violating Out-of-Service (OOS) Orders, which result in the loss of CDL for anywhere from 90 days to 5 years.

These suspensions are applied automatically by the Secretary of State upon notification of a conviction by the court. Convictions on out-of-state CDL holders are required, by state and federal law, to be forwarded to the appropriate state licensing agency.

Details about the various categories are listed on a chart from the federal regulations. The term "disqualification" is synonymous with a suspension or revocation. *(Editor's Note: For a copy of the chart, contact me, David Wallace)*

One conviction of particular interest is found under Suspensions for Major Offenses, which states that if a CDL holder is convicted of using a vehicle in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance, the CDL is suspended for life.



An Out-of-Service Order, may be issued to a particular driver/vehicle during a roadside inspection, or may be issued to an entire trucking company by USDOT, the government of Canada or Mexico, or by a state agency (in Michigan, the Michigan State Police Motor Carrier Division).

These suspension provisions are in addition to the fine for the violation and any points that may be assessed. Prosecutors should be alert to truck drivers attempting to plead down these violations to avoid the suspensions.

Crash statistics show that driver behaviors are the most common factors in truck related crashes, by both car and truck drivers.



Case Law Update

Unpublished Cases

Since the circuit court was bound by the court's prior decision the traffic stop of the defendant in this OUIL case was proper, the circuit court's order on remand from the court was improper. The prosecution appealed the circuit court's order reversing the district court's order denying defendant's motion to suppress evidence obtained from a breathalyzer test. In reversing the circuit court's original order, the court held the stop of defendant's vehicle was lawful and remanded the case to the circuit court to resolve whether the officers complied with the observation rule. Specifically, the court noted "[t]he circuit court overstepped its review function and improperly substituted its judgment for that of the district court based solely on its review of the videotape." Despite this order, the circuit court again ruled the stop of the defendant's vehicle was unlawful. Given the rule an appellate court's decision on a particular issue is binding on inferior courts, the circuit court was bound by the law of the case doctrine to follow the court's order finding the stop of defendant's vehicle lawful. Despite the circuit court's assertions to the contrary, the videotape clearly showed defendant swerving onto both the white dividing lines toward the right of her vehicle as well as the yellow line toward the left of the vehicle. An officer testified he saw defendant swerving out of her lane several times. Given that "erratic driving can give rise to a reasonable



suspicion of unlawful intoxication so as to justify an investigatory stop," defendant's erratic driving clearly created the reasonable suspicion she was intoxicated. Further, the court agreed with the prosecution the results of the breathalyzer test were reliable and should not have been suppressed where the 15-minute observation rule was technically violated, but suppression of the test results was not the appropriate remedy. The case was reversed and remanded. *People v Kneisler*, case no. 262384, released January 9, 2007.

The trial court properly admitted as evidence other acts testimony by the sheriff's deputy who stopped defendant's truck and arrested him for a probation violation (but not OUIL) because he suspected he had been drinking since the evidence was relevant to explain defendant's parole status and to explain the deputy's failure to give defendant field sobriety tests. Moreover, the trial court properly instructed the jury both during opening statements and after the close of evidence that it could only consider evidence of defendant's parole status or the other bad acts "to understand why the officer handled the matter as he did." The trial court also instructed the jury it could not consider this evidence as indicative of defendant's criminal propensity. The prosecutor also questioned defendant's mother regarding his history of driving while intoxicated. The court concluded her testimony supported defendant's theory

there was reasonable doubt regarding whether he was intoxicated at the time of his arrest. Thus, the admission of her testimony was not outcome determinative and did not violate defendant's substantial rights. The court affirmed defendant's conviction of OWVI. *People v Wakeley*, case no. 262977, released December 21, 2006.

The circuit court erred when it reached an issue not properly before it, and when it reversed defendant's conviction based on its erroneous conclusion his blood alcohol level of .07 could not be admitted into evidence and considered by the jury during deliberations without expert testimony. The circuit court reversed defendant's conviction because it concluded the district court committed reversible error when it allowed defendant's blood alcohol level of .07 to be admitted into evidence and considered by the jury during deliberations without expert testimony to explain what the evidence meant. The question of whether expert testimony was required in order to admit defendant's alcohol level into evidence was not before the circuit court. Defendant framed his appeal to the circuit court as involving a claim of instructional error, not an evidentiary issue. Moreover, nothing in the drunk-driving statutes would expressly require the prosecution to produce expert testimony before a defendant's alcohol level can be admitted into evidence. MCL 257.625a(6)(d) clearly states breath tests are admissible. The court further held the district court's

(Continued on page 2)

(Continued from page 1)

instructions to the jury regarding defendant's bodily alcohol level were adequate. The trial court read the standard OWVI and OWI instructions to the jury. Those instructions state a defendant's alcohol level is only one factor to consider, along with the other evidence presented at trial, to determine if the defendant is guilty of either OWVI or OWI. While the district court refused to read defendant's requested instruction, which included the presumptions from the old statute, its refusal was not erroneous because the Legislature removed those presumptions with its 2003 amendment to the drunk-driving statutes. The case was reversed and remanded to the district court. *City of Howell v Amell*, case no. 261228, released December 19, 2006.

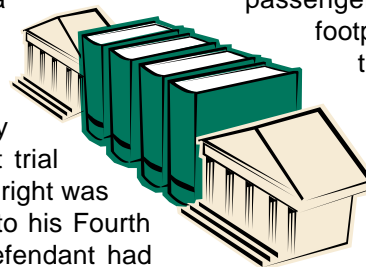
The trial court did not abuse its discretion by granting the prosecution's motion to admit evidence of the defendant's two prior OUIL offenses from 1994 and 1997. Several witnesses testified the vehicle defendant was operating struck the rear of a vehicle as the driver was waiting to turn left into a gas station. Defendant did not stop at the scene of the accident. Defendant's blood alcohol level was determined to be .20 when he arrived at the hospital. The evidence was not offered to establish defendant's character to show his propensity to commit the offense. Rather, it was offered for the permissible purpose of showing defendant possessed the requisite degree of malice for second-degree murder. The evidence was also logically relevant to the disputed element of malice because it established defendant's knowledge of the effects of intoxication on his driving ability. This evidence helped the prosecution establish defendant drove his vehicle while intoxicated on November 26, 2004, in willful and wanton disregard of the safety of others on the roadway. Defendant knew on previous occasions, his intoxication caused him to drive erratically, including weaving and crossing the center road line into oncoming traffic. Finally, there

was no indication on the record the jury gave the evidence preemptive weight, or the evidence had any undue tendency to move the jury to decide the case on an improper or emotional basis. Defendant's convictions of one count of second-degree murder, OUIL causing death, operating a motor vehicle with license suspended causing death, and failing to stop at the scene of a personal injury accident were affirmed. *People v Arendsen*, case no. 264032, released December 12, 2006.

Since the trial court's rulings on defendant's motions to dismiss the charge and to suppress the evidence and blood test results forced him to choose between pursuing his Fourth Amendment claims or asserting his Fifth Amendment privilege against self-incrimination, the trial court erred in denying his request to testify at the evidentiary hearing on his motions for the limited purpose of making a record of his allegations. Defendant should have been permitted to testify with the assurance his testimony could not be used against him at trial on the issue of guilt if he did not testify at trial. But, defendant should have been advised if he testified at trial, the evidentiary hearing testimony could be used against him for impeachment purposes. The issue then was whether relief was warranted. The court concluded relief was not warranted because the error was harmless, whether considered as an evidentiary error or a constitutional error. Defendant did not testify at the evidentiary hearing. Thus, no such testimony was used against him at trial and his Fifth Amendment right was not actually violated. As to his Fourth Amendment claims, if defendant had testified at the evidentiary hearing his testimony would have been consistent with the claims asserted in his motion, as well as his trial testimony, which included (1) he agreed to the breath test because he "was under a lot of pressure to do so," and (2) his repeated requests for a blood test were wrongfully ignored

or denied. Neither of these claims had merit. Although defendant should have been permitted to testify at the evidentiary hearing regarding his purported Fourth Amendment claims, the error did not warrant relief because even under the strictest standard of review, it was harmless. The case was affirmed. *People v Kanka*, case no. 260966, released December 5, 2006.

In light of the circumstantial evidence and reasonable inferences drawn from it, including evidence defendant was loaned the car found in the ditch on the night of the incident, he had an injury consistent with injuries sustained in crashes by drivers wearing seatbelts, and a breathalyzer test indicated he had a BAC of .19, the court held sufficient evidence supported his OUIL, third offense conviction. A witness testified she gave defendant permission to use her car on the date in question and gave her car keys to his female companion. The witness's car was later found in a ditch, and defendant was the only person the police found in the area, wandering 200 yards away. Police subsequently discovered defendant had a red mark extending from his left shoulder to the lower right area of his chest. Defendant told police the owner of the car had been driving and she had fled into the woods. However, the automatic seatbelt on the passenger's side of the car was in its upright position, indicating no one had been in the passenger seat. Only one set of footprints was found around the car, next to the driver's door. Before the car was found, the investigating officer had received a "BOL" for a vehicle involved in a hit and run – an older black car in which only one person had been seen. The court concluded in light of the facts presented, it was reasonable to infer defendant voluntarily operated the car after he had consumed alcohol with knowledge he was intoxicated. The



(Continued on page 3)

(Continued from page 2)

case was affirmed. *People v Morris*, case no. 263186, released November 30, 2006.

The trial court properly refused to give the defendant's proposed instruction on the sudden emergency doctrine. Defendant contended because there was evidence the victim suddenly applied her brakes and defendant did not cause the accident, she was entitled to her proposed instruction on the sudden emergency doctrine. The court agreed with the trial court this instruction should not have been given because it did not correctly reflect the applicable law. In proposing an instruction on this doctrine, defendant asserted it applies equally to civil and criminal cases. In the context of OUIL causing death, however, the Supreme Court recently interpreted the causation element of MCL 257.625(4) to clearly mean "[w]hile an act of God or the gross negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, ordinary negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is foreseeable." Moreover, the trial court instructed the jury, "If you find that [the victim] was negligent, you may only consider that negligence in deciding whether the Defendant's conduct was a substantial cause of the accident." In accord with this instruction, defense counsel was still able to, and did, present his theory, based on the evidence, when the victim suddenly hit her brakes, defendant regardless of her intoxication, could not have stopped and therefore, could not have been the substantial cause of the victim's death. Thus, the instructions given did not deprive defendant of her defense theory. The case was affirmed. *People v Brooks*, case no. 262995, released November 28, 2006.

There was sufficient evidence to support the defendant's fleeing and eluding conviction. The officer testified he was on duty, in full uniform, and driving a marked police

car, except it was a "slick top," meaning its emergency lights were on the front grill rather than atop the car. He spotted defendant's vehicle traveling "extremely fast" in a location where the posted speed limit was 35 mph. The officer sped up to position himself behind defendant's car, following the still-speeding vehicle into an even slower speed zone. When about 50 feet from defendant, the officer activated his blue and red emergency lights, but defendant's vehicle then accelerated, running 2 stop signs without making any attempt to slow for them. The officer caught up with defendant, who continued for a short time at a low rate of speed, failing to observe a third stop sign, then pulled over. According to the officer, defendant did not obey commands to exit the vehicle, and had to be forcibly removed. Defendant argued to flee is to run away, as if from a pursuer, and to elude is to avoid capture or detection, and both terms suggest affirmative action, not a mere failure to submit. However, the distinction between active evasion and passive noncompliance substantially disappears when the actor is situated in a moving vehicle. The evidence suggested not just that defendant continued driving in disregard of the police car, but sped up and failed to observe stop signs, and when he finally stopped, he left his vehicle only when forced to do so. Further, the officer testified defendant admitted noticing his lights, and stated he failed to stop because he was having an anxiety attack. The case was affirmed. *People v Martins*, case no. 263893, released November 28, 2006.

Since the defendant was the only one found at the scene and he initially stated he was the only one involved in the accident, a reasonable trier of fact could conclude beyond a reasonable doubt he was driving the vehicle while intoxicated. Defendant argued the evidence at trial failed to prove beyond a reasonable doubt he was actually operating the vehicle while intoxicated. The evidence established a car belonging to defendant's ex-wife was found rolled in a ditch and he was found lying in the



woods near the car in an intoxicated state. The arresting officer found no one else around the car. The defendant first stated, according to the officer, he was the only one there. It was not until they arrived at the hospital he blurted out, "I sure hope you guys find Dave." When asked about Dave, defendant could only describe him as being six feet tall with black hair. Defendant could not give a last name or location where Dave could be found. He claimed at trial he had met Dave earlier at a bar and he had let him drive his ex-wife's car to Detroit while defendant rode in the passenger seat. Since it is the jury's province to determine witness credibility, the jury was free to reject defendant's testimony claiming "Dave" was driving his car. Given the fact circumstantial evidence is sufficient to establish the elements of a crime, the circumstantial evidence here, when viewed in a light favorable to the prosecution, supported defendant's conviction. The case was affirmed. *People v Tetreau*, case no. 264365, released November 28, 2006.

Since the trial court did not have jurisdiction to review the respondent-Department of State's determination, the court vacated the trial court's order holding the five-year revocation period of petitioner's driver's license would expire on August 30, 2005. Petitioner was convicted of four alcohol-related driving offenses within a three-year period between 1997 and 2000. After the third conviction in June 2000, respondent revoked his license for one year from August 13, 2000. On August 30, 2000, petitioner was convicted in district court of OUIL, second offense, his fourth alcohol-related driving conviction. This conviction required a five-year revocation because it occurred while his

(Continued on page 4)

(Continued from page 3)

license had already been revoked or suspended. The district court did not send an abstract of the conviction to respondent until June 2002. Respondent then revoked petitioner's license for a 5-year period from July 14, 2002 to July 13, 2007. In August 2003, respondent denied petitioner's request to "backdate" the start date of the 5-year revocation period to August 30, 2000. At petitioner's request, the trial court backdated the start date of the revocation and held the revocation "shall end" on August 30, 2005, five years after the date of conviction. Respondent argued the petitioner's petition was untimely and the trial court did not have jurisdiction to consider it. Given the plain language of the vehicle code, the court agreed with respondent the time limits in subsection 323(1) are jurisdictional. *Jakobek v Department of State*, case no 261773, released November 21, 2006.

Under the circumstances of the case, the prosecutor presented sufficient evidence the cruiser was "identified as an official police...vehicle" when defendant received and disregarded the officer's various signals to pull over, to inform him the vehicle he eluded was a police vehicle to convict him of fleeing and eluding police. The evidence indicated the defendant saw the police cruiser and its uniformed police officer approach from the opposite, oncoming lane and pass his parked, unlicensed car. The officer turned his head to check the license plate because the car matched the description of a recently stolen vehicle, and decided to investigate further when he saw the occupied car lacked a license plate. The officer began to make a u-turn, but defendant, who knew he was driving on a suspended license and the vehicle lacked a plate, had already sped away and turned right at the next corner. The officer abandoned the u-turn, took the next left turn, and then accelerated along a parallel path, eventually catching up with defendant's car. Although the officer's

dark blue Crown Victoria did not have any decals or police insignias, the officer activated his siren and police lights, which consisted of dashboard lights, grill lights, and external mirror lights that flashed red and blue. The officer also activated his pulsating headlights. Defendant testified he did not initially recognize he was being pursued by a police car and attributed his high speed and elusive driving to his suspicion of the vehicle, annoyance, and heavy crack cocaine intoxication. He admitted he eventually realized the car chasing him was a police car, but continued to flee. The jury heard evidence the police car was sufficiently decorated and outfitted so as to identify it as an official police vehicle, defendant identified it as an official police vehicle, and admitted he prolonged the pursuit after realizing this. The case was affirmed. *People v Ivy*, case no. 262369, released November 21, 2006.

There was sufficient evidence to support the defendant's conviction of felonious driving. Defendant argued the prosecution failed to present evidence he was driving his motorcycle in a grossly negligent manner. A jury could reasonably infer defendant had "[k]nowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another" because "a jury could properly infer that defendant knew that the act of driving requires the exercise" of such care. Likewise, the jury could reasonably infer defendant had the ability to avoid hitting the victim with his motorcycle by exercising "ordinary care and diligence," but failed to do so. For example, there was no evidence defendant could not have stopped at the red light, could not have slowed down through the intersection, and could not have steered his motorcycle away from the victim. Finally, a jury could reasonably infer it must have been apparent to the ordinary mind the result of defendant failing to exercise ordinary care and diligence in this situation was

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.



This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.

"likely to prove disastrous to another." *McCoy* concluded this element was satisfied when the defendant drove his van at 55 mph in a 35 mph zone (a speed described as "significantly faster than the average speed" of 40 to 45 mph on the road) through heavy traffic and struck two women who had been standing in the same place for several seconds. The court stated "[t]he fact that defendant did not slow down or swerve in an attempt to avoid striking [the women] . . . suggests that he was traveling at a reckless speed." Similarly here, a jury could reasonably find defendant drove recklessly because he was traveling at up to 10 mph over the speed limit through an intersection busy with vehicular and pedestrian traffic, and he failed to either slow down or swerve in an attempt to avoid striking the victim. The case was affirmed. *People v Bay*, case no. 266739, released November 16, 2006.