



# The Yellow Light Legal Update

## Special Cases of Interest

- When an officer makes a lawful arrest of an occupant of a vehicle outside of the motor vehicle, the officer may still search the passenger compartment pursuant to a lawful arrest. **Thornton v United States**
- Giving a false name to a police officer justifies 10 points under OV 19. **People v Barber**
- The good faith exception on search warrants applies to Michigan law. **People vs. Goldston**
- Driving away from an officer on foot can constitute fleeing and eluding. **People v Green**

## Statute And Case Law Alert !!!

### Published Cases

#### U.S. Supreme Court

**B**efore the officer could pull over the defendant, the defendant parked his car and got out. The officer arrested defendant after finding drugs in his pocket and then searched the car incident to the lawful arrest. A handgun was found under the driver's seat. The defendant moved to suppress the handgun arguing that *New York v. Belton* did not apply since he was outside the car.

*New York v. Belton*, 453 U.S. 454 (1981) held that when a police officer has made a lawful custodial arrest of the occupant of a vehicle, the officer may search the passenger compartment of the vehicle.

In this case, the Supreme Court held that *Belton* applies even when an officer does not make

contact until the person arrested has left the vehicle. In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and evidence destruction as one who is inside. *Thornton v United States*, USC No. 03-5165, released May 24, 2004.

#### Michigan Supreme Court

**T**he defendant was pulled over for erratic driving. He gave the officer his brother's name. He was arrested for drunk driving and convicted of OUIL 3<sup>rd</sup>. The judge found that giving the false name interfered with the administration of justice, and scored 10 points under Offense Variable (OV) 19. He was sentenced to 29 to 60 months in prison.

A unanimous Supreme Court upheld his conviction and prison

sentence. They made the following holdings regarding OV 19:

1. Conduct does not have to rise to the level of obstruction of justice to interfere with the administration of justice. Scoring under OV 19 is appropriate for the lesser level of conduct;
2. Conduct that occurs pre-charge can be scored under OV 19;
3. Conduct that interferes with the administration of justice is not limited to conduct that only affects the courts.

*People v Barbee*, MSC No. 123491, released June 23, 2004.

**A**dopting the good-faith exception to the exclusionary rule in Michigan, the court held the trial court erred in suppressing the evidence seized in this case pursuant to a defective warrant. The court

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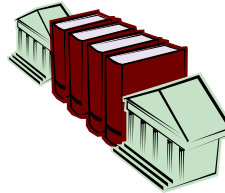
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concluded it was clear from the records of the Michigan Constitutional Convention of 1961 the people favored less stringent search and seizure protections than required under the Fourth Amendment at the time, and the text of Const. 1963, art. 1, § 11 is consistent with the conclusion the people intended to retreat from the exclusionary rule. The court remained free to repudiate or modify the exclusionary rule by virtue of the fact it is a judge-made rule, not a constitutional rule. Finding the reasoning of *People v Leon* persuasive, the court elected to embrace it and retreat from the judicially created exclusionary rule announced in *Marxhausen*. The goal of the exclusionary rule, as stated in *Leon*, is to deter police misconduct, and excluding evidence the police recover in objective, good-faith reliance on a search warrant would not further this goal. Applying the exception here, the court held the trial court erred in suppressing the marijuana, firearm, and firefighter paraphernalia seized pursuant to a search warrant, concluding the police officers' reliance on the district judge's determination of probable cause and on the technical sufficiency of the warrant was objectively reasonable. Reversed and remanded for reinstatement of the charges against defendant. *People v Goldston*, MSC case no. 23870, released July 15, 2004.



### Court of Appeals

The trial court erred in granting defendant's motion to quash on the basis the officer who ordered him to stop was not in or near his police vehicle when defendant left the area, because defendant was twice given a voice signal to stop by a uniformed officer. The officer was securing the rear exit doors of the apartment building where a search warrant for drugs was being executed when he observed defendant's vehicle pull into the driveway at the rear of the building from an adjacent alleyway. The officer approached defendant's vehicle on foot and, from a distance of 10 to 20 feet, told him to stop.



Defendant attempted to place his vehicle in gear to leave, but it kept stalling. Realizing defendant was attempting to leave, the officer ran up to the car and yelled "Stop, Police." Defendant proceeded to drive away, passing the officer's clearly marked vehicle. The court concluded under the circumstances, defendant's conduct fell within the scope of MCL 750.479a(1). His challenges to the elements of the offense and the necessary intent presented questions for the trier of fact. The case was reversed and remanded. *People v Green*, CA no. 244306, released February 26, 2004.

There was sufficient evidence to support defendant's conviction. Defendant argued he was not "operating" the

parked car when the police found him unconscious in the driver's seat, and there was reasonable doubt he drove to that location while intoxicated. The prosecutor did not claim the evidence established defendant was operating the vehicle at the point the police found him unconscious or the police found defendant attempting to operate the vehicle while intoxicated, but argued the evidence at trial presented a compelling circumstantial case defendant had driven while intoxicated to the location where the police found him. Although defense counsel argued someone else drove defendant to where the police found him, he presented no evidence at trial to support that theory. The case was affirmed. *People v Solmonson*, CA no. 245178, released for publication April 29, 2004.

(*Solmonson* was previously released as an unpublished opinion on 3/4/04.)

Based on defendant's admissions and other evidence, the arresting officer had reasonable cause to arrest him for OUIL and the prosecution was entitled to prosecute him on this charge. The officer had reasonable cause to believe the offense of OUIL had been committed and defendant committed it when he admitted to the officer he drove on public roadways to the county fairgrounds where he was arrested, to sleep off the effects of having had too much to drink. Acting on an anonymous telephone call, the officer discovered defendant asleep in his truck at the fairgrounds. The truck was wedged

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on a parking log, defendant was in the passenger seat covered with a sleeping bag, the truck's engine was not running, the transmission was in park, and the truck keys were in defendant's pocket. When the officer woke defendant, he observed he smelled strongly of intoxicants. An officer does not have to observe a defendant operating a vehicle for the defendant to be arrested and prosecuted for the 93 day misdemeanor of OUIL under MCL 764.15(1)(d). The court did not reach the "accident" exception question. The case was reversed and remanded. *People v Stephen*, CA no. 251190, released on June 1, 2004.



The defendant was given a ticket for an overweight truck under MCL 257.722. At the close of the formal hearing, the defendant moved for a dismissal because the prosecutor had failed to present any proof that the officer who stopped the truck had reason to believe the truck was overweight as required by MCL 257.724. The District Judge denied the request and found the defendant responsible. On appeal to the Circuit Court, however, the Circuit Judge agreed with the defendant and reversed the case.

On the prosecution's appeal, Judges Donofrio, Hoekstra and O'Connell reversed the Circuit Judge and reinstated the finding of responsibility. They noted that whether the officer had reason to believe the truck was overweight went only to the validity of the stop, and was not an element of the offense of operating an overweight

vehicle. *People v Gentner, Inc.*, CA No. 249559, June 10, 2004.

Agreeing with the interpretation of MCL 750.217 in *People v Jones*, 142 Mich App 819 (1985) that "disguise" refers to a defendant's physical disguise of his or her person, the court upheld the trial court's dismissal of the charge against defendant, which was based on his giving a false name to a police officer who stopped him for speeding. The facts of this case were virtually identical to *Jones*. While the rule of strict construction applied by the court in *Jones* is no longer applicable, the court agreed with the *Jones* court the plain meaning and ordinary usage of "disguise" includes the element of physical concealment. The concept of misrepresentation in the dictionary definitions of "disguise" is linked with the concept of altering one's appearance or dress, or making one's intentions or the situation appear to be what it is not by effecting some change in one's appearance or behavior. The court concluded no dictionary definition or case law indicates giving a false name to the police is, in and of itself, within the fair import or meaning of "disguise." The case was affirmed. *People v Jackson*, CA no. 245972, released July 6, 2004.

On remand from the Supreme Court, the court held the sentence imposed on defendant of one year to be served in county jail was not in violation of the statute or otherwise an abuse of discretion. Defendant

pleaded guilty to OUIL, third offense and driving while license suspended, second offense. The prosecutor requested the trial court sentence defendant to the jurisdiction of the DOC for 1 to 5 years pursuant to MCL 257.625(8)(c). Contrary to plaintiff's argument, nothing in MCL 769.34(2) or MCL 257.625(8)(c) required the trial judge to impose a minimum one year sentence to the DOC. Further, even though defendant's sentencing guidelines range was only 11 months, the imposition of the one year sentence, equal to the mandatory minimum of the DOC imprisonment specified in MCL 257.625(8)(c)(i), was "not a departure" under MCL 769.34(2)(a). The case was affirmed. *People v Hendrix*, CA no. 245354, released July 8, 2004.

**Editor's note:** *The previous case was first released May 18, 2004, but that opinion was vacated in an order dated July 8, 2004, with a revised opinion attached to the order.*

### Unpublished Cases

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



On remand in lieu of granting leave to appeal, the Supreme Court vacated in part the lower court's prior opinion and overruled *People v McIntosh*, on which the prior opinion relied. On remand the opinion provided that the charges arose from facts indicating defendant had no driver's license, and had been drinking when he was pulled over by

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a sheriff's department deputy. As the deputy approached defendant's car on foot, defendant sped away, initiating a high-speed chase. Several miles later, defendant's vehicle collided with a car crossing his path, killing the two occupants of the other car. Defendant was charged with two counts of second-degree murder and other offenses, and was convicted of two counts of the lesser included offense of involuntary manslaughter, two counts of OUIL causing death, two counts of first-degree fleeing and eluding, and operating a vehicle with a suspended license, second offense. Even though negligent homicide is a necessarily included lesser offense of murder, defendant was not entitled to a jury instruction on the charge, because the facts did not support the instruction. Thus, the trial court did not err in refusing to give the negligent homicide instruction. The court affirmed defendant's convictions and sentences for involuntary manslaughter, and denied defendant's motion to remand. *People v Weeder*, CA no. 217454, released on March 23, 2004.

The trial court failed to adequately instruct the jury on the causation element for the OUIL causing death offense and the instructional error was not harmless. Defendant argued the trial court's OUIL jury instruction allowed the jury to convict him on culpability less than required by the essential elements of the crime, in violation of the Supreme Court's holding in *Lardie*. Defendant noted

the trial court's erroneous instruction did not indicate the prosecution was required to prove causation when defendant was actually engaged in the intoxicated driving and the instruction never informed the jury defendant's intoxicated driving had to be a substantial cause of the victim's death. The court agreed, concluding the erroneous instruction misstated the essential causation element of the crime of OUIL, allowing the jury to convict defendant on a lesser showing of culpability than required. Reversed in part, affirmed in part, and remanded for new trial in part. *People v Schaefer*, CA no. 245175, released March 25, 2004.

The court rejected defendant's argument the evidence was insufficient to establish the gross negligence elements of his manslaughter and felonious driving convictions, concluding the jury could have found he was grossly negligent under the totality of the circumstances. Defendant asserted he was simply speeding, he was not under the influence of drugs or alcohol, and he did not know the deceased victim would (he alleged) ignore a stop sign and enter the road directly in front of his vehicle. While speeding itself does not ordinarily constitute gross negligence, the court held in *McCoy* it can be gross negligence under certain circumstances. A police officer testified defendant's speed was the most important factor in determining how the accident occurred. The evidence showed defendant was also driving 25 miles per hour over the speed limit in the middle of the



afternoon on a 4-lane, undivided highway. There was also evidence it is difficult to correctly judge the speed of an oncoming car. The jury could have found defendant's speeding rose to the level of gross negligence because it prevented the deceased victim from foreseeing defendant would hit him before he cleared the westbound lanes in making his left turn onto the highway. The case was affirmed. *People v Brian Smith*, CA no. 245357, released April 20, 2004.

Since it is well established the administering of a PBT does not coerce evidence of a testimonial or communicative nature, the Fifth Amendment did not prevent the state from imposing a penalty for refusal to submit to a PBT. Defendant was convicted of the civil infraction of a minor refusing to take a PBT. The court concluded his Fifth Amendment argument was premised on the erroneous presumption there is a constitutional protection under the Fifth Amendment from being compelled to submit to a PBT. The court also rejected defendant's argument he had a constitutional right to be advised of his rights before he could be penalized for failing to submit to a PBT. The statute at issue does not require a defendant be informed of his chemical breath rights. Finally, the court held there is no right to consult with counsel prior to taking a PBT. The case was affirmed. *People v Kabanuk*, CA no. 245608, released May 6, 2004.

### **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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