

The YELLOW LIGHT LEGAL UPDATE

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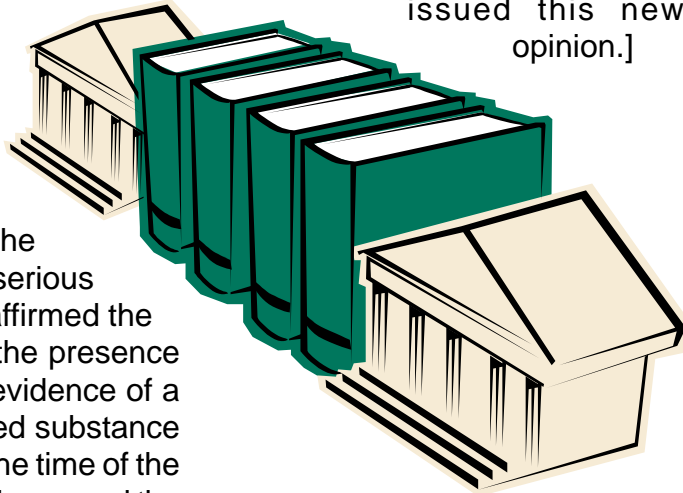
December 2005

Case Law Update

Published Opinions

In *People vs. Schafer* and *People vs. Large*, the Supreme Court recently overruled *Lardie*, holding it is the defendant's *operation* of the motor vehicle that must cause the victim's death. Although the defendant's intoxication is an element of the offense, it is not a component of the *causation* element. To establish the causation element, the prosecution must prove Derror's operation of her vehicle, rather than the presence of a controlled substance in her body, was both a factual and proximate cause of the victims' death and serious injuries. The court affirmed the trial court's finding the presence of carboxy THC is evidence of a schedule 1 controlled substance in Derror's body at the time of the alleged violation and reversed the order the prosecution had to establish causation consistent with *Lardie*. In Docket No. 259315, the court affirmed the trial court's holding carboxy THC is not a schedule 1 controlled

substance, but reversed the dismissal of charged violation of 257.625(8) against Kurts. Remanded. *People vs. Derror*, Court of Appeals Case No.: 258346, and *People vs. Kurts*, Court of Appeals No.: 259315, released for publication on September 6, 2005. [NOTE: This was before the court on a motion for reconsideration of the previous decision, the court granted the motion, vacated its previously published opinion issued on 6/12/05 and issued this new opinion.]



Editor's Note:

The Supreme Court has granted leave to appeal on this case on two issues. First: whether carboxy THC is a schedule 1 controlled substance within the

meaning of MCL 257.625(8), and second, whether, in a prosecution under MCL 257.625 (4)(5) and (8), the prosecutor must prove beyond a reasonable doubt that the defendant knew the ingestion of the controlled substance may cause intoxication. Supreme Court Order dated October 19, 2005.

Unpublished Cases

(An unpublished opinion is not binding as precedent but may have persuasive value in court.)

The Court of Appeals agreed with respondent, Secretary of State, that petitioner's license was revoked at the time of his may 30, 2000 arrest for driving without a valid license. The trial court's prior grant of a temporary license did not alter the fact petitioner's operator's license was revoked, because the revocation remained effective until his reinstatement was approved. The temporary license was preliminary to the adjudication of petitioner's rights

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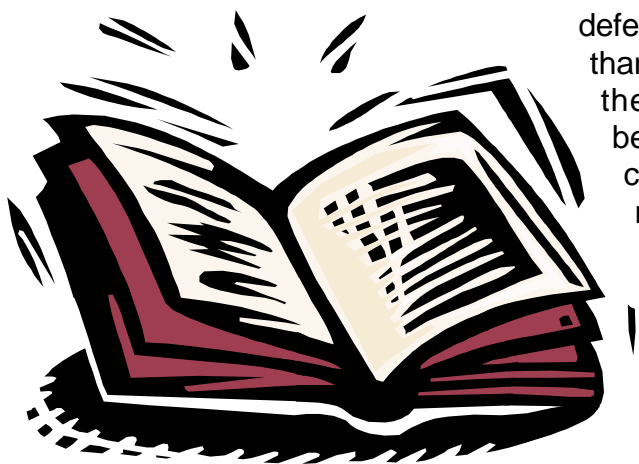
and did not reinstate his license. Petitioner derived no driving authority from the temporary license after it expired (which it did prior to his May 30, 2000 arrest), and his original license was still in a state of revocation. The May 30, 2000 violation occurred while petitioner's license was officially revoked, and he was never officially approved for reinstatement of a license. The decision of the circuit court was reversed. *Boatman vs. Secretary of State*, Court of Appeals No.: 252575, released June 16, 2005.

The district court abused its discretion in excluding defendant's breathalyzer tests as a sanction for the prosecution's failure to produce a videotape of defendant's arrest in accordance with a discovery order, and the circuit court properly reversed the district court's suppression order. A discovery order was served on

the police department in August 2002, and a copy of the tape was made. However, the assistant prosecutor stated he never received the message from the police station stating the tape was at the front desk waiting for defense counsel, and consequently, the message was never relayed to defense counsel. The tape was destroyed in February 2003. The circuit court reversed the district court and the defendant filed leave to appeal to the court of appeals. The court of appeals concluded there was no showing of bad faith or a showing the tape would have been exculpatory. Therefore, defendant was not denied due process. Further, the tape was not the only evidence supporting admission of the breathalyzer test results. The preliminary breath test defendant consented to on the scene and the arresting officer's testimony would have supported administration of the breathalyzer tests. In excluding the breathalyzer test results, the district court placed defendant in a better position than he would have been if the discovery order had been complied with. The circuit court properly reversed the district court. The decision was affirmed. *People v. Tiedt*, Court of Appeals Case No.: 254111, released on August 30, 2005.

On remand, the trial court's reference to the parties' stipulation the defendant's BAC three hours after the accident was 0.16 did not result in a miscarriage of justice. The defendant argued by repeating this information, the trial court essentially directed a verdict on the driving while intoxicated element of the charge of OUIL causing death. The parties stipulated his BAC three hours after the accident was 0.16 percent. The trial court reminded the jury of the stipulation while instructing on the elements of OUIL causing death, but also properly informed the jury it was entitled to either accept or reject the stipulation. The trial court's repeated references to the stipulation did not direct a verdict on the OUIL causing death charge, and did not deny defendant a fair trial. Further, on the entire record there was ample evidence of guilt apart from the stipulation. The conviction was affirmed. *People vs. Schaefer*, Court of Appeals Case No.: 245175, released on October 6, 2005.

There was sufficient evidence to support defendant's convictions of OWI 3rd and DWLS 2nd. Defendant argued the prosecution failed to prove he was operating a motor vehicle on



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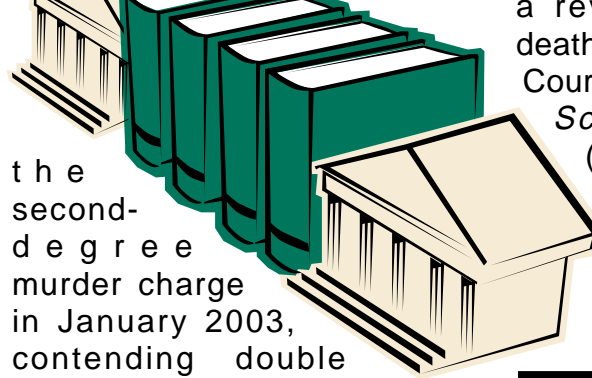
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the night in question and the officers falsely identified him as the driver of a pickup truck. The arresting officers testified they both knew defendant from previous encounters, and they were able to identify him as the driver of the pickup truck when they first saw it. The officers further testified, after briefly losing sight of the truck, they were able to catch up with it and identify it as the vehicle they had just seen defendant driving. Both officers testified they saw the truck stop in a parking lot, and they saw defendant climb out of it. They did not see anyone else near the truck. One of the officers further testified defendant told him he owned the truck. From this evidence a rational trier of fact could conclude beyond a reasonable doubt defendant was driving the pickup truck. The conviction was affirmed. *People vs. Smith*, Court of Appeals Case No.: 259831, released on October 11, 2005.

Defendant's convictions and sentences for both OUIL causing death and involuntary manslaughter did not violate his double jeopardy protections against successive prosecutions. He pleaded no contest to OUIL causing death in June 2002 and was sentenced to 4 to 15 years in

prison in August 2002. A judgment of sentence was subsequently filed, indicating a second-degree murder charge had been dismissed when in fact, it had not been dismissed, nor was it to be dismissed. The trial court vacated the judgment of sentence in September 2002 "due to a clerical error" and issued an amended judgment of sentence indicating the second-degree murder charge was still pending. Defendant

moved to dismiss



the second-degree murder charge in January 2003, contending double jeopardy protections precluded separate convictions for OUIL causing death and second-degree murder. The second-degree murder charge was not dismissed, and defendant moved to withdraw his plea in March 2003, which the trial court granted. Following a jury trial, defendant was convicted of OUIL Causing Death and Involuntary Manslaughter. The convictions were affirmed. *People vs. Russo* Court of Appeals Case No.: 256298, released for publication November 17, 2005.

Other Court Decisions and Orders

Supreme Court Orders

The case of *People vs. Schut*, Court of Appeals No.: 256377, released for publication on March 17, 2005, is **reversed** and the case remanded back to the district court for reconsideration on whether it should bind over defendant on the charge of operating a motor vehicle with a revoked license causing death, in light of the Supreme Court's decision in *People vs. Schaefer*, 473 Mich 418 (2005). Order dated September 21, 2005.

The case of *People vs. Anstey*, Court of Appeals No.: 255416, is **granted** leave to appeal on the issue of whether dismissal is the proper remedy for the denial of an independent chemical test in violation of MCL 257.625a(6)(d) and secondly, whether the Supreme Court's decision in *People vs. Koval*, 371 Mich 453 (1963), was correctly decided. Order dated October 19, 2005.

Out of State Court Decisions

Store has duty not to gas up drunken driver. Tennessee merchants selling products to visibly intoxicated people are subject to more exposure because of a recent ruling by the state's high court, which found a convenience store had a duty not to sell gasoline to an inebriated customer who was later involved in a head-on collision.

The Tennessee Supreme Court ruled it is a jury question whether the company owning a gas station was negligent in selling gasoline to an intoxicated person. *West v. East Tennessee Pioneer Oil Co.*, No. E2002-03039-SC-R11-CV (Aug. 18).

According to the opinion, in July 2000, employees of an Exxon convenience store in Knox County, Tenn., sold gasoline to Brian Tarver. An employee at the station, operated by East Tennessee Pioneer Oil Co., had previously refused to sell Tarver beer because she felt he was intoxicated. Allegedly, store employees helped Tarver pump gas into his car. Shortly afterward, Tarver drove in the

wrong lanes of a highway and crashed into plaintiffs. Plaintiffs sued the company in June 2001, claiming its employees were negligent in allowing a clearly intoxicated person to buy gasoline and operate a car. The plaintiffs also alleged that furnishing gas to an intoxicated driver amounted to negligent entrustment, and the defendant was negligent per se because it violated certain statutes related to drunken drivers. The defendant countered that its employees owed no duty of care to third parties on the road and that the sale of gasoline was not the proximate cause of the accident.

On appeal, the Tennessee Supreme Court unanimously found the defendant could be liable both under a general negligence claim and a claim for negligent entrustment. "Simply stated, the defendant



convenience store owed a duty to act with reasonable care under all the circumstances," the

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.

court wrote. "Under the facts of this case, we conclude that the acts of the defendant in selling gasoline to an obviously intoxicated driver and/or assisting an obviously intoxicated driver in pumping gasoline into his vehicle created a foreseeable risk to persons on the roadway, including the plaintiffs." From the

ABA Journal.Com, September 2, 2005.