



The YELLOW LIGHT LEGAL UPDATE

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Case Law Update

Unpublished Cases

Upward Departure of sentencing guidelines affirmed. The trial court did not abuse its discretion in departing upward from the sentencing guidelines and sentencing defendant to 18 to 60 months for his OUIL conviction when the guidelines called for a minimum sentence of 0 to 11 months. The trial court concluded the guidelines did not adequately reflect the fact this was defendant's fifth drunk driving conviction and seventh driving while license suspended conviction. The court held in light of defendant's prior record, an upward departure of seven months was not disproportionate. While the guidelines designate points for prior misdemeanors impacting the statutory minimum sentence range, they do not consider whether the misdemeanors fit a pattern of recidivist behavior and the trial court emphasized the recidivist nature of defendant's record. In light of defendant's long and repetitive record of drunk driving, it was not beyond reason for the trial court to impose seven more months on his sentence. The court also concluded the guidelines inadequately and disproportionately weighed the number of defendant's misdemeanors. PRV 5 reaches a ceiling of 20 points after 7 prior misdemeanors – defendant had 16. The case was affirmed. *People v Brown*. Case no. 249863. Released December 28, 2004.

The trial court erred by affirming the district court's denial of defendant's request for youthful trainee status. The district court agreed

the offense was very minor and, in fact, expressed its disagreement with the Legislature's criminalization of MIP. The court construed the district court's comments in denying the request as suggesting a sentencing policy to never grant youthful trainee status to individuals who are charged with MIP, regardless of their backgrounds. Even the trial court acknowledged the district court's reasons consisted only of the need for equality of treatment and the epidemic of underage drinking, and the prosecutor stated he did not recall ever having seen a defendant charged with MIP be granted youthful trainee status. The district court did not take into consideration defendant was an outstanding athlete and had also been the recipient of several academic awards, nor did it consider defendant's age. As for the seriousness of the offense, the district court itself thought it to be a minor criminal offense. Thus, the district's court's decision was an abuse of discretion because it was made on the basis of a sentencing policy and not in consideration of the relevant factors. The district court's denial of defendant's request for youthful trainee status was reversed, as well as the trial court's ruling, the judgment of sentence was vacated, and the case was remanded. The denial of defendant's request for sanctions was affirmed. *People v Bartoy*. Case no. 250244. Released December 16, 2004.

Editor's Note: Under the new MIP law, do not forget that there is a provision contained in the new law to allow for first time offenders to get diversion. (See MCL 436.1703(3)) Using this procedure allows the Secretary of State to get notice of the

diversion so it can be maintained in a non-public record. This way we are able to keep accurate records for the offender.

The prosecutor did not improperly present evidence defendant refused a Breathalyzer test. Even if the evidence was not relevant to the prosecution's case-in-chief, it was potentially relevant to rebut defense evidence suggesting defendant was not intoxicated at the time the police found him, and his blood alcohol level increased after his arrest. Therefore, admission of the evidence did not amount to plain error. Furthermore, in light of the trial court's jury instruction defendant's refusal to take the test was not to be considered as evidence of his guilt, the court held any error did not affect defendant's substantial rights. Because admission of the evidence was not plain error, defendant's substantial rights were not affected, and defendant was not prejudiced by trial counsel's failure to object to the evidence. The case was affirmed. *People v Bachi*. Case No.: 250254. Released December 14, 2004.

Defendant intelligently waived his right to counsel in the district court plea proceedings related to a prior conviction, even if the provisions of MCR 6.610 were not followed. Defendant argued the trial court erred in denying his motion to quash the enhanced charge of OUIL-

(Continued on page 2)

(Continued from page 1)

third because a prior conviction was obtained in violation of his Sixth Amendment rights. This constituted a collateral attack on the prior conviction for driving while impaired. The sole claim that can be raised in a collateral attack on a predicate offense is the prior conviction was obtained in violation of the Sixth Amendment right to counsel. Where the only real question presented in a collateral attack is whether the defendant intelligently waived the right to counsel, compliance with all requirements of MCR 6.610 in taking the defendant's guilty plea is immaterial. Here, defendant was provided with a written statement of his rights informing him of his right to counsel. The trial court referred to the statement before accepting defendant's plea, asked him if he understood those rights, and whether he intended to give up those rights in offering a guilty plea. Defendant answered yes. The case was affirmed. *People v Ruse*. Case no. 249144. Released December 9, 2004.

Use of the prior convictions was proper. Since the two convictions used to enhance defendant's sentence were identified well before sentencing and he did not express why he believed they were invalid, a proper challenge to the prior convictions would have been futile. Defendant's sole issue on appeal concerned the prior convictions used to enhance his sentence. The statute in effect at the time of sentencing provided a prior conviction shall be established at sentencing by an abstract of conviction, a copy of the defendant's driving record, or an admission by the defendant. The statute does not require separate findings of fact or impose trial-type evidentiary burdens. *Callon* provides "[I]t is incumbent on a defendant to first mount an effective challenge to invoke his right to a hearing on a contested fact at sentencing and, thus, the need for an evidentiary hearing with a finding by the trial court based on a preponderance of the evidence." Defendant repeatedly asked which of his prior convictions would be considered

for enhancement. However, from the time the information was amended, there was no question which two convictions were being relied on by the prosecutor. Moreover, defendant's driving record was placed before the trial court. The case was affirmed. *People v Kareus*. Case no. 249431. Released November 30, 2004.

Upward departure of sentencing guidelines affirmed. The extent of defendant's repeated behavior and the fact his behavior apparently was impervious to treatment provided the trial court with substantial and compelling reasons that were objective and verifiable to depart upward from the guidelines in sentencing defendant. Defendant contended the trial court erred in relying on the fact 6 of 11 misdemeanor convictions were not scored in calculating the guidelines because his prior record was already taken into consideration and adequately weighed. The court held there was no clear error in finding there were six misdemeanors not factored into the prior record score and this fact was objective and could be verified. Defendant also argued the trial court's assumption he posed a risk to the community was subjective and non-verifiable. While his future actions could not be predicted with factual accuracy and clearly could not be verified, he had six previous alcohol-related offenses, including an OUIL third offense, yet he repeated this behavior. In addition, he had several unsuccessful attempts at rehabilitation. Defendant's sentences were affirmed. *People v Carpenter*. Case no. 248456. Released November 2, 2004.

The Secretary of State Hearing Officer properly denied returning petitioner's license. Given the record, the hearing officer's conclusion petitioner failed to prove by clear and convincing evidence he completely abstained from alcohol for the requisite

time period and the hearing officer's decision to deny petitioner's request for a reinstatement of his license were not arbitrary and capricious. Petitioner's driver's license was administratively revoked after he accumulated two alcohol-related driving offenses within seven years. At the hearing for reinstatement of his driver's license, the petitioner asserted he no longer consumed alcohol, but consumed "an occasional O'Doul's," which contains a small amount of alcohol. In support of his petition, he submitted a substance abuse evaluation, an AA attendance sheet, and letters attesting to his sobriety. The hearing officer denied the petition, finding petitioner failed to prove by clear and convincing evidence he had abstained from the use of alcohol for at least 12 months, his continued attendance at activities at which alcohol was prevalent was risky behavior, and his failure to obtain an AA sponsor indicated his commitment to AA was questionable. The trial court reversed the decision, concluding it was arbitrary and capricious. The court concluded the hearing officer's conclusion the petitioner failed to prove by clear and convincing evidence he had completely abstained from alcohol for at least 12 months was not arbitrary and capricious. The trial court improperly substituted its judgment for that of the hearing officer. The case was reversed. *McWilliams v. Secretary of State*. Case no. 248364. Released October 28, 2004.

There was sufficient evidence to support defendant's conviction of third-degree fleeing and eluding a police officer. Defendant argued the evidence did not show he attempted to flee or elude as the elements are defined. Defendant continued to drive after the officers activated their vehicle's lights and siren. He knew the police wanted him to stop his vehicle. The jury was entitled to reject defendant's claim he was not attempting to flee and elude the

(Continued on page 3)

(Continued from page 2)

officers and simply wanted a relative to witness his arrest. The jury was entitled to conclude, instead, defendant took affirmative actions to avoid capture, including continuing to drive in a circuitous route at speeds exceeding the speed limit of 35 mph, failing to stop at stop signs, and making an illegal turn while looking at the police vehicle from time to time. The case was affirmed. *People v Chandler*. Case no. 248430. Released October 28, 2004.

There was sufficient evidence to support the conviction for failing to stop at the scene of an accident. Since the evidence supported an inference defendant was able to see the object he struck, even if only briefly, sufficiently to see he had hit a human being, not a deer, and to determine the accident resulted in serious injury or death, the evidence was sufficient to support his conviction. Defendant testified the object he struck rolled up onto his vehicle's hood and shattered the windshield, and then rolled off the vehicle. He discovered no animal fur or parts on his vehicle after the accident. In addition, he removed the vehicle's grill and discarded it, parked the vehicle behind a building, and concealed it under a tarp. The court also rejected defendant's argument he was entitled to resentencing on the basis the trial court erred in scoring 100 points for OV 3. The death of a human being is not an element of the offense of failing to stop – a person can commit the offense without causing another individual's death. MCL 257.617(3) is a penalty provision and does not make homicide an element of the offense. The trial court did not err in scoring 100 points for OV 3. The case was affirmed. *People v Conklin*. Case no. 248542. Released October 28, 2004.

The circuit court committed plain error by substituting its judgment for that of the Secretary of State

Hearing Officer. Concluding competent, material, and substantial evidence supported the DLAD's grant of only a restricted license and requirement of a breath alcohol analyzed ignition interlock device on petitioner's car, the court reversed the circuit court's order of full restoration of driving privileges. The hearing officer noted petitioner's participation in Alcoholics Anonymous had gone below recommended levels recently and his last arrest for an alcohol-related driving offense was in the past two years. The circuit court did not dispute the evidentiary support for these conclusions. Rather, it simply implied the DLAD was prone to relying on habit rather than individualized judgments. The court reminded the circuit court it must apply specific standards in reviewing the determination of a lower tribunal, and its scope of review of DLAD decisions was sharply limited. The case was reversed. *Riling v Secretary of State*. Case no. 248694. Released October 28, 2004.

Defendant's statements were admissible under the corpus delicti rule. Even if defendant's statements to the state trooper constituted an admission of guilt, they were admissible under the *corpus delicti* rule because there was sufficient independent direct and circumstantial evidence of the commission of the OUIL/UBAL offense. The trooper was at defendant's ex-husband's home investigating a personal property damage complaint when the ex-husband informed the trooper defendant had just pulled up in the driveway. The trooper went outside and saw defendant exiting the driver's side door of her parked vehicle. When he approached her, he "smelled the strong odor of intoxicants coming from her breath." No one else was in the vehicle, there were no other vehicles in the area, and no noises to indicate a vehicle was leaving. It was necessary to operate on a public roadway to access the driveway. Defendant failed a field sobriety test, and her blood alcohol content was shown by a blood test to be 0.18 percent. The court

concluded these facts were sufficient, independent of defendant's statements, to establish the OUIL/UBAL offense occurred, satisfying the *corpus delicti* rule, and the trial court did not abuse its discretion in admitting defendant's statements. Affirmed. *People v Spriks*. Case no. 25009. Released October 21, 2004

Defendant's blood seized from the warrantless search should have been suppressed. The warrantless search of defendants' home following defendant-Kucharski Jr.'s accident was unconstitutional and the evidence obtained as a result, including Kucharski Jr.'s blood alcohol test result and the condition the police found him in, should have been suppressed as the fruit of the poisonous tree. Thus, the court concluded there was a reasonable doubt whether Kucharski Jr. would have been convicted of OUIL had the results of the illegal search been suppressed, and vacated his two OUIL convictions. The case began with a single motor vehicle accident. Eyewitnesses indicated Kucharski Jr. was erratically driving a Jeep that went off the road and crashed into a ditch. Shortly, two trucks arrived at the scene, including a Dodge from which Kucharski Sr. emerged. The men then pulled Kucharski Jr. out of the Jeep, he staggered into the driver's seat of the Dodge, and drove away. His appearance was described as "glassy"-eyed and "zombied." The police traced the Jeep to an address where they found Kucharski Jr. and arrested him. The police arrested Kucharski Sr. outside the house. Both were uncooperative and resistant. The police obtained a warrant for a blood alcohol test on Kucharski Jr. Testing revealed he had a BAC of 0.20. The arresting officer confirmed he entered the home without a warrant and the court concluded there was no consent, exigent circumstances, or probable cause to enter the home. Kucharski, Sr.'s conviction of aiding and abetting OUIL was vacated because there was

(Continued on page 4)

(Continued from page 3)

reasonable doubt whether Kucharski, Jr. would have been convicted of the second instance of OUIL without the evidence from the improper search of his home, and the prosecutor could not show Kucharski, Sr.'s derivative conviction was not similarly tainted. Reversed in part, affirmed in part, and remanded. *People v Kucharski*. Case no. 246841. Released September 30, 2004.

Failure to wait 15 minutes before giving a second breath test after the first test failed to provide a valid reading was not grounds for a mistrial. Concluding the trial court erred in denying the prosecution's motion to admit the results of a second breath alcohol test, which was taken after the first test returned an invalid sample reading, the court reversed the trial court's order declaring a mistrial. The trial court based its ruling on the failure by the officer who administered the tests to conduct a second 15-minute observation period before giving the second test. While *Fosnaugh* involved a second test administered after an initial valid test result, both that case and this one concerned the proper procedure to follow when an invalid sample is obtained. Although defendant was free to argue the weight of the evidence was affected by the officer's failure to conduct a second waiting period, the trial court erred in suppressing the evidence on this ground. The case was remanded for further proceedings. *People v Parton*. Case no 247646. Released on September 30, 2004.

The trial court erred by granting defendant's motion to suppress evidence. The police had a reasonable suspicion for conducting a traffic stop of the vehicle in which

defendant was riding. The vehicle had a cracked windshield and the driver and front seat passenger were not wearing seat belts. As the police officers exited their vehicle, defendant was seen reaching into his pocket and placing something between his seat and the center console, which created reasonable suspicion to believe he was potentially dangerous and justified the officer's limited search of the vehicle. Reversed and remanded. *People v Wiggins*. Case no. 247433. Released September 30, 2004.

The trial court properly denied defendant's motion to suppress the Breathalyzer results. Defendant claimed although he made several requests, he was denied his right to an independent blood alcohol test, in violation of MCL 257.625a(6)(d). Although defendant testified at the hearing he had requested a blood test at least three times, the deputy testified defendant never requested a blood test. The trial court held defendant was not credible and the court deferred to the trial court's assessment of the credibility of witnesses at a suppression hearing. The court was not left with a firm and definite conviction a mistake had been made by the trial court. Affirmed. *People v Posner*. Case no. 247783. Released August 17, 2004.

Sufficient evidence was presented at trial to find beyond a reasonable doubt the defendant operated the motor vehicle to convict him of OUIL 3rd. An officer testified that upon arriving at the scene of the accident, he saw defendant standing near the vehicle and two witnesses at the scene told him the defendant had operated the vehicle that night. 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.



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same witnesses testified at trial the defendant had operated the vehicle at some point during the night, one of which testified she saw defendant operating the vehicle at the scene shortly before the accident. This evidence alone was sufficient for a jury to find defendant guilty of OUIL 3rd beyond a reasonable doubt. The case was affirmed. *People v Scott*. Case no. 248034. Released August 12, 2004. a finding the defendant's intoxicated driving was a substantial cause of the victim's death as required by Lardie. The case was affirmed. *People v Large*, COA no. 253261, released August 10, 2004.