



July 2003

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# The Yellow Light Legal Update

## Case Law Alert !!!

### Special Cases of Interest

- There is no violation of the *ex post facto* clauses of the U.S. and Michigan Constitutions when using a zero tolerance conviction as a prior conviction for OUIL 3rd. *People v Haynes*.
- The repeat offender bill is not a violation of the *ex post facto* clauses of the U.S. and Michigan Constitutions. *People v Callon*.
- Fleeting and Eluding is a general intent crime. *People v Abramski*.

### Published

**D**efendant was charged with operating a vehicle under the influence of intoxicating liquor, third offense. One of the prior convictions was for a zero tolerance offense in violation of MCL 257.625(6) that occurred in 1997. On motion of the defendant the trial court ruled that the zero tolerance conviction could not be used as a prior. The defendant argued that use of the zero tolerance conviction was a violation of due process, equal protection, and *ex post facto* laws.

The Court of Appeals reversed the trial court's ruling finding no viola-

tion of defendant's due process or equal protection rights. Furthermore, the court noted that a prior conviction being used as an enhancement is not a violation of the *ex post facto* clause of the Michigan and U.S. Constitutions. The case was reversed and remanded. *People v Haynes*, CA No. 244327, released April 22, 2003.

**T**he court rejected defendant's argument that 1998 PA 350, (Repeat Offender Law) which included impaired driving convictions in the definition of a "prior conviction" and may be used to enhance a conviction of OUIL/UBAL to a felony, operates as an *ex post facto* law in violation of the state

and federal constitutions. The court held the amended statute did not attach legal consequences to defendant's prior impaired driving conviction; rather, it attached legal consequences to his future conduct of driving under the influence or with an unlawful blood alcohol level.

### Delegation of a Physician

On another issue, after the defendant was arrested, he refused a chemical test. A search warrant was obtained, and the blood was withdrawn by a phlebotomist at a hospital. On appeal, he claimed that the phlebotomist was not acting under the delegation of a physician as required by MCL 257.625a(6)(c).

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The Yellow Light Legal Update is an addition to The Green Light News. With this insert, you can keep a notebook for just the traffic safety cases.

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Judges Markey, Smolenski and Meter disagreed holding that when a blood sample is taken pursuant to a search warrant, the implied consent statute doesn't apply. Accordingly, it doesn't matter whether the sample was taken under the delegation of a physician as required by MCL 257.625a(6)(c).

They further held that the phlebotomist, in performing his assigned duties at the hospital, was delegated to take a blood sample without specific direction from a physician. The conviction was affirmed. *People v Callon*, CA No. 234421, April 15, 2003.

The trial court did not err in ruling fleeing and eluding is a general intent crime, preventing defendant from obtaining a jury instruction on the defense of voluntary intoxication. The Court of Appeals held the fleeing and eluding statute only requires intent to do the physical act of fleeing and eluding a police officer; it does not require intent beyond the act of fleeing and eluding. Proof of the intent to cause a particular result or intent that specific consequences occur is not required by the statute. The court also upheld



the trial court's upward departure from the sentencing guidelines in sentencing defendant to 40 to 60 months' imprisonment when the guidelines range was 7 to 23 months. The trial court's reasons, including that defendant was drunk and drove over 100 mph the wrong way on I-96 for almost 35 miles, were objective and verifiable, and constituted substantial and compelling reasons to depart. The conviction was affirmed. *People v Abramski*, CA No. 237810, released June 10, 2003.

### Unpublished

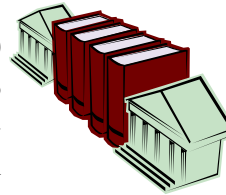
*(An unpublished opinion is not binding as precedent but may have persuasive value in court.)*

Since defendant's counsel expressly approved the trial court's jury instructions, defendant's claim that the instructions erroneously failed to instruct the jury that the fleeing and eluding 3rd degree charge required proof of "observable damage" was waived. In any event, the statute only requires a "collision", not "observable damage". The conviction was affirmed. *People v Morgan*, CA No. 237237, released March 6, 2003.

Officers saw a white pickup in a grassy area by an exit off of a highway. There was evidence that it was involved in a roll over crash. Next to the white pickup was a gray pickup truck with two people in it. As the officer approached the gray truck, the passenger got out and ran away. The officer gave dispatch a description of the man and ran the plate of the white truck. The white truck was registered to the defendant. Defendant, who was the person that had fled the scene, was stopped shortly by additional officers, where as they approached him, telling him to get on the ground, the defendant stated that he was sorry that he had run from the officer since he was drunk and had crashed his truck. There had been no questioning at that point. A search warrant was obtained to get the defendant's blood. His BAC was .16.

The Court of Appeals held that there was sufficient probable cause to obtain a search warrant. The court noted that there was sufficient evidence to support a conviction, thus there was more than enough evidence to support

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a search warrant. Also challenged were the statements by the defendant. The court agreed that the defendant was in custody, however, he was not being questioned, thus the statements were not the result of a custodial interrogation as required by *Miranda*, and were admissible. The conviction was affirmed. *People v Oumedian*, CA No. 234758, released April 17, 2003.



There was sufficient evidence to support defendant's conviction of OUID causing death. Defendant claimed the prosecutor presented insufficient evidence she knowingly took a controlled substance, or she was in fact under the influence of a controlled substance at the time of the accident. The court held it did not read the statute to apply only to those who are acquainted with the "controlled substance" term as used by the Legislature. She clearly understood that the medicine she was taking was subject to heightened regulation, which rendered it illegal except as provided by law. Defendant conceded she took prescription pain medicine hours before the accident, and her pharmacist testified the bottles for defendant's prescription drugs routinely display warnings of the dan-

gers of driving while under their influence. A blood sample taken on the day of the accident revealed the presence of prescription drugs consistent with defendant's prescription history. Defendant's conviction was affirmed and the case remanded for resentencing. *People v Perrier*, CA No. 237511, released May 6, 2003.

Defendant was convicted of DWLS Causing Death. On appeal he argued that the case should have been dismissed because the motor vehicles involved in the crash had been destroyed by the police, thus destroying possible exculpatory evidence. As a second issue, defendant argued that Negligent Homicide should have been given as a lesser included offense.

The Court of Appeals affirmed the conviction finding that there was no evidence that the police destroyed the vehicles in bad faith, especially when they had held the cars for 5 1/2 months after the collision. The court questioned that if it was that important to have the cars examined, why did the defendant fail to have them examined in that time period when the cars were available. As to the issue of the lesser included

offense of Negligent Homicide, the court noted that the charge was a cognate offense of DWLS Causing Death, and thus the trial court could not give the instruction. The conviction was affirmed. *People v Morency*, CA No. 238358, released May 15, 2003.

There was sufficient evidence to support Defendant's conviction of fourth-degree fleeing and eluding a police officer. Defendant argued that because the officers were not wearing uniforms, but a blue nylon jacket with the word "POLICE" printed on it, that there was no compliance with the statutory requirement of being in uniform. The Court of Appeals noted that whether or not an officer was in uniform is a factual issue to be resolved by the jury. Furthermore, the police in this case were driving a semi-marked patrol car. The conviction was affirmed. *People Davis*, CA No. 237601, released May 22, 2003.

Sufficient evidence supported both defendants' convictions of aiding and abetting involuntary manslaughter and aiding and abetting OUIL causing death because a rational factfinder could have concluded

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both defendants encouraged and contributed to the minor's driving in an intoxicated state, which played a role in the ultimate commission of the offense. There was evidence on the record defendants gave the driver, Cross, beer throughout the evening, and despite this, defendant-Middleton allowed Cross to drive his car. There was also testimony defendants knew Cross was only 15 years old and did not have either a driver's license or a learner's permit. The record also demonstrated Cross appeared visibly intoxicated shortly before she collided with the other vehicle, resulting in the death of Cross's 16-year old friend, a passenger in Middleton's car. While defendant-Espinoza might have lacked physical control of the vehicle, the record showed he actively contributed to Cross's intoxication by providing her with alcoholic beverages. The case was affirmed, but remanded for correction of the judgment of sentence. *People v Middleton*, CA No. 236547, released May 29, 2003.

**T**here was sufficient evidence to support defendant's conviction of operating a motor vehicle under the

influence of intoxicating liquor. Defendant claimed the prosecution did not present sufficient evidence he operated the motor vehicle, which was found abandoned in a ditch, or that he operated it while intoxicated. The evidence showed defendant, while in possession of the vehicle's ignition key, arrived at the marina alone a short time after the accident was reported. While there, he told a witness his car was in a ditch and later told a deputy "no one else was in the car". Only one set of footprints was found leading away from the car, which was located in a ditch a short distance from the marina. The evidence, considered in connection with the prescription medication bottle with defendant's name on it discovered inside the car, was sufficient for the jury to reasonably infer defendant had been driving the car at the time of the accident. Defendant's eyes were bloodshot and he could not walk in a straight line when he arrived at the marina only a short time after the police were called to the accident. The conviction was affirmed. *People v Shonk*, CA No. 236785, released June 17, 2003.



**T**here was no violation of double jeopardy because defendant's convictions for Operating a motor vehicle without a license causing death (OMVCD) and negligent homicide did not constitute multiple punishment of the same offense. Although both OMVCD and negligent homicide have in common the operation a motor vehicle and causing the death of another, the negligent homicide statute also contains the element of operation of a motor vehicle at an "immoderate rate of speed or in a careless, reckless or negligent manner," while the OMVCD statute requires proof defendant has a suspended or revoked license. Therefore, each offense requires proof of at least one fact that the other offense does not. The negligent homicide statute prohibits the causation of the death of another human being, while the OMVCD statute addresses the culpable act of deciding to drive without a license. The convictions were affirmed. *People v Andrews*, CA No. 237022, released June 17, 2003.

***Consult Your Prosecutor Before Adopting Practices Suggested by Reports in this Article.***

*The statutes and court decisions in this article 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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