

# The YELLOW LIGHT LEGAL UPDATE

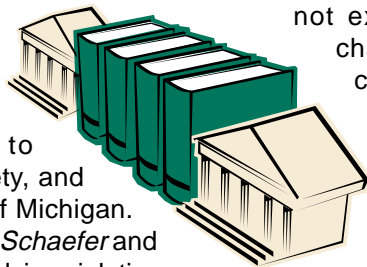
Volume 4, Issue 3

July 2006

## Case Law Update

### Published Cases

In these consolidated appeals, the Michigan Supreme Court held 11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212 of the Public Health Code for the purpose of MCL 257.625(8). Thus, a person operating a motor vehicle with 11-carboxy-THC in his or her system may be prosecuted under MCL 257.625(8). Both defendants were charged with violating MCL 257.625(8), which prohibits the operation of a vehicle while a controlled substance is present in the body. The court applied the term "derivative" as defined in the second part of the *Merriam-Webster's Online Medical Dictionary*, which includes 11-carboxy-THC as a derivative of THC because it is related structurally to THC, but is not so broad as to include other metabolites such as carbon dioxide. This definition is consistent with the purpose of the Public Health Code to protect the health, safety, and welfare of the people of Michigan. The court also modified *Schaefer* and held in prosecutions involving violations of subsection 8, the prosecution is not required to prove beyond a reasonable doubt a defendant knew he or she might be intoxicated. However, because subsections 1 and 3 were not at issue in this case, the court did not disturb its holding in *Schaefer* with regard to these subsections. Reaffirming its holding in *Schaefer* the prosecution need only prove a



defendant's driving, not his or her intoxication, was a proximate cause of the accident, and *Schaefer's* holding applies to both MCL 257.625(4) and (5). *People v Derror*, MSC no. 129269, released June 21, 2006.

The defendant and his girlfriend were arguing as she drove down the road. He grabbed the steering wheel and turned the car, which drove off the road striking and severely injuring a jogger. He was charged with felonious driving, but the district court held that he was not operating the vehicle and dismissed. Four Justices held that when a person grabs the steering wheel and turns the car they are operating the vehicle. The Court noted that the term operate requires only "actual physical control," not exclusive control and by changing the direction the car was traveling, that demonstrated physical control. They reinstated the felonious driving charges. Justice Weaver concurred in the judgment, Justices Cavanagh and Kelly dissented. *People v Yamat*, MSC No. 128724, released May 31, 2006.

The lower courts erred in suppressing the defendant's breath alcohol test results and excluding the results from trial as a

discovery sanction for the prosecution's failure to produce a booking videotape of the tests. MCR 6.201 governs discovery in criminal cases and the videotape did not fall within the class of discoverable material permitted by the rule, and defendant did not establish good cause for the discovery under MCR 6.201(l). Defendant was arrested and booked on September 29, 2004. Evidence indicated the videotape might have been overwritten as early as October 1, 2004 and was certainly overwritten by October 13, 2004. Defendant's preliminary examination was on November 2, 2004 and the district court issued the disputed discovery order on November 3, 2004. The Supreme Court in *Phillips* held "discovery in criminal cases is constrained by the limitations expressly set forth in" MCR 6.201. The court of appeals agreed with the prosecution that the district court erred as a matter of law under *Phillips* in ordering the production of the tape because the tape did not fall under any category of mandatory discovery under the rule and defendant made no showing of good cause. Further, the district court abused its discretion in suppressing the Datamaster test results as a sanction for violating the erroneous discovery order, and the circuit court repeated both errors. The case was reversed and remanded. *People v. Greenfield*, Court of Appeals case no. 264879, released May 18, 2006

(Continued on page 2)

(Continued from page 1)

## Unpublished

Since the defendant's statements to the officer did not constitute a confession of guilt, the *corpus delecti* rule did not apply to bar the prosecutor from using them and the circumstantial evidence established the required *corpus delecti*. Defendant merely admitted he drove the car that morning, he was involved in a hit-and-run accident, and he drank alcohol earlier the night before but did not drink alcohol that morning. "Driving after drinking is not illegal unless it impairs a driver's ability to drive or raises a driver's blood alcohol level above the legal limit." Defendant did not admit his ability to drive was impaired because of drinking alcohol or his blood alcohol level exceeded the legal limit. His denial he drank alcohol that morning underscored the fact his statement was not a confession, but a denial. The investigating officer's observation the defendant's eyes were bloodshot and his breath smelled of alcohol within less than an hour after the hit-and-run accident, circumstantially indicated his ability to drive the car may have been impaired by the consumption of alcohol. The court reversed the trial court's order affirming the district court's order dismissing the charge against defendant. Reversed and remanded. *City of Royal Oak v. Delehant*, Court of Appeals case no. 260189; released May 9, 2006.

Defendant was not entitled to be resentenced on his conviction of manslaughter with a motor vehicle because the trial court articulated substantial and compelling reasons for exceeding the sentencing guidelines. Defendant was convicted by a jury of manslaughter with a motor vehicle and two counts of felonious driving. He was driving at a high rate of speed when his vehicle collided with a vehicle. The driver was killed in the

accident, and two passengers in defendant's vehicle suffered disfiguring injuries. The trial court sentenced defendant to concurrent prison terms of 7 years, 2 months to 15 years for manslaughter, and 1 year, 4 months to 2 years for felonious driving. Defendant's minimum sentence for manslaughter was within the statutory sentencing guidelines as scored by the trial court. Defendant's reckless disregard for others was accounted for in OV 17, and the fact he was on probation at the time he committed the instant offenses was accounted for in PRV 6. However, the undisputed evidence showed defendant's act of driving on a busy street at nearly twice the speed limit resulted in the death of one person and disfiguring injuries to two other persons. Moreover, defendant had been on probation for only about one month before he committed these offenses. The consequences of defendant's actions were objective and verifiable, and irresistibly caught the attention of the trial court. The trial court did not err in determining the consequences of defendant's reckless behavior and his disregard of the requirements of probation were not adequately accounted for in the guidelines and the trial court did not abuse its discretion by determining that these factors constituted substantial and compelling reasons for exceeding the guidelines. The case was affirmed. *People v Smith*, Court of Appeals case no. 259439, released April 11, 2006.



Holding the evidence was sufficient to permit a rational trier of fact to infer beyond a reasonable doubt the defendant actually caused a collision by driving his vehicle, the court affirmed defendant's conviction of OUIL or UBAL, third offense. Defendant contended the evidence was insufficient to establish he operated the vehicle. The court found the facts of the case analogous to *Stephen*, in which the court determined the evidence was sufficient to support an operating under the influence of intoxicating liquor conviction where the defendant admitted driving to a fairground to sleep off the effects of having too much to drink, striking a parking log while trying to leave, turning off the engine, and falling asleep. While the defendant here did not admit to driving the vehicle, a police officer testified the vehicle was over a curb-type cement barrier and against a building, the engine was running, the gear was in the drive position, and defendant was asleep in the driver's seat. The case was affirmed. *People v Sears*, Court of Appeals case no. 259466, released April 6, 2006.

Concluding the evidence the victim suffered serious impairment of a body function was sufficient under *Thomas*, and sufficient under the *Schaefer* test for the jury to find defendant's operation of the vehicle caused the injury, the court affirmed his conviction of operating a motor vehicle while intoxicated causing serious impairment of a body function. In *Thomas*, the court held an injury under MCL 257.58c need not be a permanent injury to qualify as a serious impairment of a body function. The treating physician testified he considered the victim's pulmonary contusion to be a serious impairment of a body function. Further, it was undisputed the victim also sustained broken ribs and a spinal

(Continued on page 3)

(Continued from page 2)

column injury, and spent 10 days in intensive care plus 5 additional days in the hospital. The jury also heard testimony excessive speed caused the accident and defendant's blood alcohol level was three and a half times the legal limit. Applying the *Schaefer* test, the court held the jury could have properly inferred from this testimony defendant's operation of the vehicle caused the injury. The case was affirmed. *People v Vidergar*, Court of Appeals case no. 257867, released April 6, 2006.

The trial court properly denied defendant's motion for a directed verdict. The jury convicted defendant of OUIL/UBAL third offense. On January 9, 2003, while defendant was attempting to exit a freeway, his vehicle struck a curb and rolled over down an embankment. A Breathalyzer test showed defendant had a blood alcohol level of 0.20 grams per 100 milliliters. Defendant argued the Breathalyzer test results should have been suppressed because the officer failed to continually observe him for the full 15 minutes. The officer's view of defendant was not obstructed for any length of time during the observation period. Although defendant found it significant the officer left him while he washed his hands and relied on another officer to monitor him, according to the video footage, that brief absence—approximately one minute—occurred before the 15-minute observation period commenced. Even if it could be said the observation clock was running at that time, *Wujkowski* supported a conclusion the operator's brief absence was excusable if there was another officer present to monitor the defendant. Again, the purpose of the administrative rule is to ensure the accuracy of the test, and there was no indication or allegation defendant put anything in his mouth or regurgitated at any point. The officer started the 15-minute observation period at 12:03 p.m. video camera time. Although he

admitted, at 12:07 p.m. video camera time, he walked out of the Breathalyzer room, he explained he did not restart the 15-minute period because he was still able to view defendant. Thus, the 15-minute protocol was not violated. The case was affirmed. *People v May*, Court of Appeals case no. 258238, released on March 23, 2006.



There was sufficient evidence to support the defendant's convictions for involuntary manslaughter with a motor vehicle. Defendant claimed the evidence was insufficient to establish he was grossly negligent and caused the accident. The jury could have inferred from the evidence defendant, an experienced driver, knew driving on the interstate, in the evening traffic, required ordinary care. The eyewitness and expert testimony, however, indicated defendant was driving erratically, swerving in and out of traffic, racing other vehicles at speeds of at least 100 mph, when he lost control of his vehicle and hit the van in which the victims were passengers, causing the van to roll over. It was reasonable for the jury to conclude defendant could have avoided the accident by using ordinary care and diligence. Defendant's argument his speeding alone was insufficient to establish gross negligence was rejected. This was not a case in which defendant was merely speeding when the collision occurred. His driving behavior was so obviously dangerous other motorists traveling in his vicinity telephoned 911 even before the collision occurred. Defendant's explanation his front tire blew out and caused the accident was rejected by the jury, whose role it is to make credibility determinations and weigh

the evidence. The case was affirmed. *People v Hepburn*, Court of Appeals, case no. 258288, released March 21, 2006.

The trial court did not abuse its discretion when it permitted the prosecution's toxicology expert to testify. The case arose from an early morning automobile collision between a vehicle driven by defendant and a vehicle driven by the decedent, and occupied by three friends, two of whom were injured. Defendant claimed the trial court abused its discretion when it permitted the expert to give his opinion regarding the potential effects of cocaine on defendant's driving and the likely impact of cocaine on the accident, and on the question whether either vehicle involved in the crash crossed out of its lane of travel and into the oncoming lanes of traffic. The record established the witness, who holds a PhD in toxicology and had been the supervisor of the toxicology units of the Michigan State Police Crime Lab for 11 years, was qualified to give testimony about the potential effects of cocaine on defendant's driving and the likely impact of cocaine on the accident. With regard to the question whether either vehicle involved in the accident crossed out of its lane, looking at the challenged testimony in context, it was clear the witness was not, in fact, expressing an opinion on this point. Rather, he was reviewing the facts in evidence regarding how the accident appeared to have occurred, and was then expressing his opinion as to whether such facts were consistent with a person having cocaine in the person's body at the level defendant did at the time of the accident. Such an opinion was within his area of expertise as a toxicologist. Moreover, his testimony was based on facts already in evidence. The case was affirmed. *People v Fetterolf*, Court of Appeals case no. 258484, released March 14, 2006.

(Continued on page 4)

(Continued from page 3)

There was sufficient evidence to establish the defendant's operation of a motor vehicle was both a factual and proximate cause of the accident causing one victim's death and the other victim's serious impairment of body function. The case involved a motor vehicle/pedestrian accident in which one victim was seriously injured and the other was killed. The testimony indicated three young people wearing dark clothing were walking at night on the shoulder of a road next to each other. The victim who was killed was walking near the fog line, but would occasionally step onto the traveled portion of the road, although she was never fully walking on the traveled portion. One of the three pedestrians, Reinhardt, saw headlights and told the other two pedestrians to move onto the grass, but they stated the car would move for them. Reinhardt then saw a big truck hit one victim and throw her into the air about 100 feet. Reinhardt tried to grab the other victim, but the truck clipped her and threw her into a yard. Reinhardt also testified he did not see the truck take any evasive action to avoid hitting the girls and did not see the truck's brake lights, even after the collision. He thought if the truck had stayed straight in its lane, it would not have hit the two victims. Defendant initially drove off, but returned to the accident scene. A police officer arriving at the scene noticed he smelled of alcohol and defendant volunteered he had consumed two beers. Another officer arrived and also noticed defendant smelled of alcohol and he told him he had three beers.



The results of a blood draw indicated defendant's BAC was 0.20. Based on *Schaefer*, the prosecutor had to establish the defendant's operation of a motor vehicle was the substantial cause of the accident, not that his intoxicated driving was a substantial cause. The court held there was sufficient evidence to establish the injuries to the victims were a direct and natural result of defendant's driving. The case was affirmed. *People v Erskine*, Court of Appeals case no. 258572, released March 3, 2006.

### Out of State Cases

In the case of *State v Brown*, the Ohio Court of Appeals ruled that failure to testify that the Standardized Field Sobriety Tests (SFSTs) were conducted substantially in accordance with the NHTSA Manual resulted in the exclusion of the tests. The officer had testified that he performed the tests as he had been taught, but there was no testimony that it was "in substantial compliance with the guidelines set forth in the NHTSA manual." Thus the tests were suppressed.

The court went even further to say that since those tests were excluded and could not be considered, the arrest was improper as there was no probable cause for the arrest. (According to the opinion, there was no poor driving mentioned - the stop was for 10 miles over - and only mention of blood shot and glassy eyes and fumbling with a license. No mention of slurred speech or odor of alcohol.) *Ohio v Brown*, Case no. 2004-T-0123, 2006 Ohio-1172.

*Editor's Note: There is no requirement in Michigan that the SFSTs be done in substantial compliance with the NHTSA manual, however, be ready for that argument to be made here.*

### 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.