

# The Yellow Light Legal Update

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## Case Law Update

### Published Cases

**In a DWLS Causing Death Sentencing, Proper Score for OV 3 is 0 points.** In an issue of first impression, the court held 100 points could not be scored for OV 3 in sentencing defendant for DWLS causing death because the sentencing offense was a homicide as defined by the statute, and the appropriate score for OV 3 was 0 points. Defendant admitted he was driving while his license was suspended and exceeding the speed limit, he saw a ball come into his path but paid little attention to it, and he struck a young boy chasing the ball because he was unable to stop in time. The child sustained fatal injuries. On appeal, the prosecution acknowledged assessing 100 points for OV 3 was error, but contended the proper score was 25 points, while defendant argued the correct score was 0 points. The court concluded the plain meaning of the Legislature's language for OV 3, in a case where a victim is killed, but the sentencing offense is homicide not falling under MCL 777.33(2)(c), should be 0 points. Since the prosecution conceded OV 3 was erroneously scored at 100 points, and because defendant's sentencing score was significantly reduced with OV 3 properly scored, defendant established plain error affecting his substantial rights. The case was remanded for resentencing. *People v Brown*, CA No. 250016, released January 27, 2005.

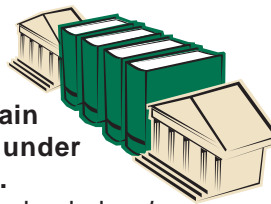
**A DWLS Causing Death Charge Requires Proof of Causation.** The defendant's license was revoked, and he was driving a truck with a snow blade on the front when the victim drove in front of him on a snowmobile. The victim died

instantly, and the defendant left the scene. He was charged with DWLS causing death and leaving the scene of a serious injury accident. The defendant claimed that because his driving did not cause the death, he could not be charged with DWLS causing death.

Judges Schuette and Bandstra agreed. They held that *People v Lardie*, 452 Mich 231 (1996) required a finding that the defendant's driving caused the death.

Judge Fitzgerald, concurring in part and dissenting in part, noted that reconsideration of the holding in *Lardie* is currently before the Supreme Court, and he would hold the decision in abeyance pending the Supreme Court's decision in *People v Large* and *People v Schaefer*, lv gtd 471 Mich 923 (2004). *People v Schut*, CA No. 256377, released March 17, 2005.

**The trial court properly awarded the victim \$250,000 for pain and suffering under MCL 780.766(5).**



Defendant, who pleaded *nolo contendere* to a drunk driving charge, claimed because the victim did not suffer any out-of-pocket expenses, no restitution was "otherwise allowed under this section." However, the trial court ordered defendant to pay \$659,128.09 to Allstate Insurance Company for medical expenses and lost wages paid for the victim. MCL 780.766(4)(a) & (c) allows a court to award restitution for medical bills and lost wages. MCL 780.766(8) allows courts to award restitution to any person, government entity, or business or legal entity, which

compensates the victim for losses arising out of a defendant's criminal conduct. Therefore, the award of restitution to Allstate was restitution "otherwise allowed under this section," and the \$659,128.09 award could potentially be tripled under MCL 780.766(5). The case was affirmed, but remanded. *People v Byard*, CA No. 259519, released January 20, 2005. APPROVED FOR PUBLICATION March 22, 2005.

**A Passenger Who Grabs and Turns the Steering Wheel is not Operating the Vehicle.** The defendant was the front seat passenger in a vehicle. He grabbed and turned the steering wheel, causing the vehicle to leave the road and strike a jogger. He was charged with felonious driving. Judges Murray, Markey and O'Connell held that in order to be convicted of felonious driving, a defendant must be the operator of the vehicle. They further held that although the defendant interfered with the operation of the vehicle, he was not in actual physical control of the vehicle because he could not have started or stopped it, increased or decreased its speed, nor use any of its other instruments. Accordingly, they affirmed dismissal of the charges. *People v Yamat*, CA No. 257923, released March 24, 2005.

### Unpublished Cases

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

The court concluded the admission of the Breathalyzer test results was not error in this case where defendant was convicted of OUIL/

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UBAL, third offense. The defendant argued the results should have been suppressed because the administrative rule regarding the observation period was violated, and she presented expert testimony the fact she rinsed her mouth out with water shortly before the tests might have affected the results. The prosecution's expert witness, however, testified both test results (0.17) were accurate and unaffected by the water. The officer observed defendant driving somewhat erratically and he testified regarding all six field sobriety tests, providing detailed descriptions of the tests and defendant's performance. Defendant admitted she drank more than a few beers, the officer found an open bottle of beer in her car, she smelled strongly of intoxicants, her eyes were bloodshot, and her speech was slurred. Further, the jury viewed a videotape of the traffic stop, the waiting period, and administration of the Breathalyzer tests. The jury received an abundance of evidence other than the Breathalyzer test results. Although the administrative rule was technically violated, the prosecution expert testified the tests were not affected. The case was affirmed. *People v Markos*, CA No. 249780, released March 29, 2005.

While holding the evidence was sufficient to establish the elements of gross negligence and supported defendant's vehicular manslaughter conviction, the court concluded it appeared the trial court focused on facts already considered by the guidelines in departing upward in sentencing defendant, and remanded for resentencing. Eyewitnesses, police officers, and an emergency medical technician testified road conditions were icy and slippery on the night of the victim's death. Evidence indicated because of the dangerous conditions, it was apparent to other drivers the use of ordinary care and diligence to avoid injuries to others required driving at low speeds, between 10 and 15 miles per hour. There was also evidence defendant was traveling at an estimated speed of 50 to 60 miles per hour, he never slowed his vehicle as he

approached the victim and other pedestrians, and at best he merely tried to swerve without ever slowing. Defendant failed to apply his brakes even after the accident. However, in sentencing defendant, the trial court's determination he continued to be a danger to the community was not an objective and verifiable factor, and the fact of the victim's death and the circumstances of the offense were accounted for in the guidelines. The case was affirmed in part and remanded for resentencing. *People v Ford*, CA No. 254003, released March 15, 2005.

The trial court did not abuse its discretion by determining there were substantial and compelling reasons for exceeding the sentencing guidelines. Defendant's sentence was proportionate and did not constitute cruel or unusual punishment. Defendant's minimum term of 15 years constituted a significant upward departure from the minimum guidelines range of 10 to 46 months. Although the trial court, without the benefit of *Hendrick*, did



not believe it needed to comply with the sentencing guidelines, it nonetheless articulated its reasons for the lengthy sentence imposed on defendant. Defendant's prior record and status as a parole violator were accounted for in the calculation of the guidelines but the trial court found the guidelines gave defendant's prior record inadequate weight because they did not take into consideration the fact he had five prior OUIL convictions. The trial court based its sentencing decision on the nature and extent of defendant's prior record, including his status as a parole violator, and his failure to utilize the opportunity afforded him to rehabilitate himself in the substance abuse treatment program. These reasons were objective and verifiable and were of considerable worth in determining the length of the sentence. The case was affirmed. *People v Duddles*, Case No. 251824, released March 10, 2005.

Under the circumstances, where defendant claimed he had previously had run-ins with police officers in Gratiot County and an officer had threatened him with harm, but he continued speeding over 120 mph after he crossed into Midland County, the jury was entitled to reject his claims he fled because he feared immediate harm. Defendant moved for JNOV or in the alternative, a new trial, maintaining the verdict was against the great weight of the evidence because the prosecution did not prove beyond a reasonable doubt he had not acted under duress. However, defendant could not recall the agency for which the threatening officer worked. He also acknowledged he did not know what agency the Gratiot County officers pursuing him were in and he could have been speeding when they activated their sirens and lights. The evidence was sufficient to persuade the jury beyond a reasonable doubt defendant was not acting under duress, but was attempting to evade arrest. Therefore, the verdict was not against the great weight of the evidence and the trial court properly denied defendant's motions. The case was affirmed. *People v Robinson*, CA No. 251810, released March 10, 2005.

Since defendant did not claim his conviction of driving while visibly impaired was the result of jury compromise, or there was insufficient evidence to support his conviction, the court held the trial court's inappropriate questioning of the defense witness was harmless error. The record showed the trial court tried to ensure a fair and legally proper trial in general. However, the trial court's questioning of the defense expert openly challenged the expert's credentials and reliance on certain source materials to conclude defendant's blood alcohol level could not have been over the legal limit for driving while intoxicated at the time of his arrest. The tone of the questioning clearly showed the judge viewed the expert's testimony with incredulity, which was improper. Nevertheless, the court found the error to be harmless. The testimony of the

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defense expert challenged only the blood alcohol level element of the offense of driving while intoxicated. The expert never opined the amount of alcohol defendant admitted consuming could not result in his driving while impaired. That the apparent bias was harmless error was established by the fact defendant was acquitted of driving while intoxicated. The jury must have concluded defendant's blood alcohol level was not proven beyond a reasonable doubt to support a conviction of driving while intoxicated and thus, sided *with* the position of the defense and *against* the trial court in its effort to impeach the credibility of the expert witness. The case was affirmed. *People v Barton*, CA No. 249222, released February 24, 2005.

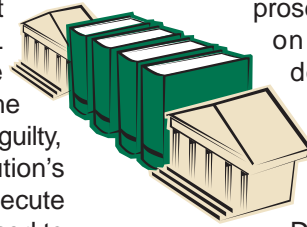
**T**he trial court properly ordered the dismissal of the charges against defendant. The prosecution filed an interlocutory appeal from orders dismissing alternate charges of operating a motor vehicle while under the influence of intoxicating liquor, or operating a motor vehicle with an unlawful bodily alcohol level, second offense and urged the court to apply *Dicks* to the case. The court did not agree *Dicks* should control where here the police conducted their chemical test, but failed to accommodate defendant's reasonable request for transportation to a facility of his choosing for an independent test and as a result, defendant did not receive the requested independent test. Defendant was not required to accept transportation to an independent facility of the officer's choice where he had the right to select a facility within reason. The case was affirmed. *People v Anstey*, CA No. 255416, released February 8, 2005.

**T**he court affirmed the trial court's initial decision to drop the OUIL charge, but on the alternative ground the prosecution had waived objections by agreeing to the subsequent plea arrangement. Defendant filed a motion with the trial court to dismiss his OUIL charge on the ground the police kept his blood sample too long, and he was unable to timely arrange for his own

blood alcohol test. The trial court agreed and dismissed the OUIL charge. The case then went to the district court for adjudication of the DWLS charge. Defendant pleaded guilty, partly in reliance on the prosecution's agreement not to continue to prosecute the OUIL charge and was sentenced to pay a fine and serve three days in jail. The prosecution then obtained leave to appeal the trial court's initial decision to dismiss the OUIL charge, and resisted defendant's motion to dismiss the appeal after leave was granted. The court held defendant had established the prosecutor signed a motion and order of *nolle prosequi* in connection with the OUIL charge based on the plea agreement under which defendant was convicted and sentenced on the DWLS charge, and affirmed dismissal of the OUIL charge. *People v Amey*, CA No. 250599, released February 3, 2005.

**S**ince the traffic stop and drunk driving investigation were both supported by reasonable suspicion, the trial court erred in granting defendant's motion to suppress and in dismissing the case. Defendant was charged with OUIL-third, DWLS, and driving with expired plates. The computer check by the officer showed the vehicle was registered to defendant and his license had been revoked. Based on *Jones*, the officer had a reasonable suspicion the vehicle was being driven by a person whose driver's license had been revoked and could conduct an investigatory stop. Upon stopping the van, the officer noted defendant's breath and body smelled of alcohol. The strong smell of intoxicants on a driver's breath may give rise to a reasonable suspicion the driver has recently consumed alcohol, which may have affected the driver's ability to operate the vehicle, thus the officer may order the driver to perform field sobriety tests. Reversed and remanded for reinstatement of the charges against defendant. *People v Roose*, CA No. 251034, released January 27, 2005.

**T**here was no prosecutorial misconduct because defendant's credibility was at issue, and the



prosecutor could comment on the inference the defendant tailored his testimony to the information in the police reports and witness statements.

Defendant's account of the accident changed several times. He told the police officer at the scene of the accident he was driving his vehicle and he was going 25 to 30 mph. He told the officer who administered the breathalyzer at the police station he earlier drank one bottle of beer. The following morning he admitted to another officer he drank one bottle beer, but alleged a woman was driving when the vehicle struck the victim. At trial, defendant testified he drank 6 or 7 bottles of beer in 30 minutes, he was the one driving the vehicle, and he driving 40 to 45 mph when he struck the victim. He asserted the alcohol had not affected him and the victim jumped out in front of his vehicle from between two parked SUVs or trucks. When defendant chose to take the witness stand and testify differently from what he previously told the officers, the prosecutor had the right to confront him about the reasons for the change in his story. Thus, it was not improper for the prosecutor to question defendant during recross-examination about reading the discovery materials or to comment during his rebuttal argument on defendant's reading of the discovery materials. The case was affirmed. *People v Hogan*, CA No. 250428, released January 25, 2005.

**T**here was sufficient evidence to prove beyond a reasonable doubt the defendant was operating the van while intoxicated, and without a driver's license. Defendant argued the evidence failed to show he was operating the vehicle in which he was seated when the police arrived. The evidence indicated the van was on a public street, away from the curb, not legally parked, and the motor was running. As in *Solmonson*, there was sufficient circumstantial evidence to enable the jury to find the defendant had operated the van while intoxicated to the location in

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the street where the police found him. Defendant's convictions of OUIL, third offense and DWLS, second offense were affirmed. *People v Hunt*, CA No. 250369, released January 25, 2005.

**T**he prosecutor did not commit misconduct. Defendant argued the prosecutor committed misconduct by asking him on cross-examination if the police officers' testimony was truthful, and by expressing his personal opinion during closing argument. The prosecutor acted improperly by asking defendant to comment on the officers' credibility. However, the trial court instructed the jury that it alone determined the credibility of the witnesses. The prosecutor's assertion he believed defendant was operating a vehicle and therefore was guilty, was made after he summarized and commented on the evidence. The prosecutor did not ask the jury to convict defendant based on his personal knowledge. The case was affirmed. *People v White*, CA No. 250130, released January 20, 2005.

**T**he trial court did not err in denying defendant's motion for a directed verdict on the OUIL charge, rejecting his argument absent evidence of poor driving, there was insufficient evidence to sustain his OUIL conviction. Although there was evidence defendant was driving normally prior to his vehicle being pulled over, there was sufficient circumstantial and direct evidence he was operating the vehicle under the influence of intoxicating liquor due to the consumption of alcohol. After defendant was arrested, he consented to a blood alcohol test, which showed his blood alcohol level was .21. A trooper also testified when he approached defendant's vehicle, defendant's eyes were red and watery, and he detected a strong odor of intoxicants coming from the vehicle. Defendant admitted to the trooper he had drunk approximately two to three beers and had finished the last one about 10 minutes before he was pulled over. The trooper stated defendant

had trouble putting the vehicle in park, he swayed and had difficulty keeping his balance, and did not step heel to toe. The trooper contended defendant did not satisfactorily complete the field sobriety tests and in his opinion, he was too intoxicated to drive. Defendant's conviction and sentence were affirmed. *People v Wolf*, CA No. 250723, released January 13, 2005.



**Out of State Case Law**  
**A tongue stud is not a foreign substance for purposes of breath test administrative rules.** Indiana breath test administrative rules require that a person be observed for 20 minutes. During that time, a person "must not **put** any foreign substances" in his or her mouth prior to taking the breath test. In the case before the Indiana Supreme Court, defendant had a tongue stud in her mouth at the time of the test. The court of appeals had ruled that the tongue stud was a foreign substance and therefore the test had to be suppressed. In reversing the court of appeals, the Supreme Court noted that the rule purposefully uses the word "put." Since the stud was previously in the defendant's mouth, it was not put in her mouth during the 20 minutes and therefore did not apply under the rules. The breath test results were admissible. The court also noted that there is scientific support that dentures and other similar objects do not affect the test results, as long as the rules for the required waiting period are followed. *Guy v Indiana*, Case No. 49S04-0407-CR-00301, released March 2, 2005.

**Statutory Update**  
Public Act 2005, Number 3 amended the Michigan Vehicle code to clarify that fleeing the scene of an accident

### 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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resulting in injury or death to a person or damage to property is a crime irrespective of whether the driver knew of the injury, death, or property damage.

This section was revised in light of the Michigan Court of Appeals' decision in *People v. Lang*, 250 Mich App 565 (2002), regarding a hit-and-run case. In ruling in favor of the defendant, the court of appeals held that a conviction of violating MCL 257.617 "requires a showing that the individual knew or had reason to believe that the accident in which he was involved resulted in serious injury to or the death of another person." That is no longer true with this statutory change. The changes are contained in 2005 PA 3, EHB 4210, and include changes to MCL 257.617, 257.617a, 257.618, and 257.619. The effective date of these changes is April 1, 2005.