



The YELLOW LIGHT LEGAL UPDATE

Volume 4, Issue 4

November 2006

Case Law Update

Published Cases

From the Michigan Supreme Court

Holding because MCL 257.625a(6)(d) does not specify a remedy, dismissal or suppression of the evidence is not warranted for a violation of the statute, the court reversed the judgment of the Court of Appeals and remanded the case to the trial court for reinstatement of the OUIL/UBAL charges against defendant. After defendant's arrest, he agreed to take a police officer-administered chemical breath test of his bodily alcohol level. The prosecution did not dispute the statute was violated when defendant's requests to be transported for an independent chemical test were denied. The trial court held *Koval* and its progeny interpreting MCL 257.625a had consistently ruled dismissal was the appropriate remedy for the unreasonable denial of an independent chemical test. The Court of Appeals affirmed. Overruling *Koval* and its progeny, the court reversed, holding when the trial court determines the defendant was "deprived of his or her right to a reasonable opportunity for an independent chemical test under MCL 257.625a(6)(d)," it may instruct the jury the defendant's statutory right was violated and "the jury may decide what significance to attach to this fact." The court also held defendant's due process right to present a defense was not violated because the officer had no constitutional duty to assist him in

obtaining an independent chemical test by transporting him to a hospital that was a 15 to 20 minute drive away from the jail. Reversed and remanded to the trial court for reinstatement of the charges against defendant.

Justice Weaver concurred with the majority's opinion overruling *Koval* and its progeny, reversing the Court of Appeals judgment, and remanding the case to the trial court for reinstatement of the charges against defendant. However, she dissented from the portion of the majority's opinion creating a remedy providing that when a defendant is unreasonably denied the opportunity for an independent chemical test, the trial court may instruct the jury to this effect. She would leave it to the

Legislature to consider whether to revise MCL 257.625a(6)(d) to supply a remedy for violation of the subsection.

Justices Cavanagh and Kelly would find depriving a driver of the mandatory right to an independent chemical test was a due process violation for which dismissal of the charges was the only remedy, concluding to hold otherwise was "not only to ignore the clearly mandatory nature of the statute, but to disregard the constitutional implications of its violation." The dissent concluded a "toothless jury instruction designed merely to inform the jury that the right was violated" did nothing but elevate the prosecution's position and could not "be any further from adequate." The dissent

noted the Legislature had declined to repudiate the remedy provided in *Koval* in the 12 times over 43 years it had amended the statute since the decision in *Koval*. *People vs Antsey*, case no.: 128368, released July 31, 2006.

By order of April 28, 2006, the application for leave to appeal the January 10, 2006 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Antsey* (Docket No. 128368). On order of the Court, the case having been decided on July 31, 2006, 476 Mich 436 (2006), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REINSTATE the defendant's conviction because dismissal is not a proper remedy for a violation of MCL 257.625a(6)(d). *People vs. Quada*, case no.: 130425, Order dated October 18, 2006.

From the Court of Appeals

In an order, the court granted the motion for reconsideration and vacated its prior published opinion (see e-Journal # 31819 in the 5/22/06 edition), and held the district court and trial court erred because (1) our Supreme Court has clearly held discovery in criminal cases is governed by MCR 6.201, (2) the subject matter of the district court's discovery order, the booking room

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videotape, did not come within the class of discoverable material permitted by the rule, and (3) defendant failed to establish "good cause" for the discovery under MCR 6.201(l). Since the district court erred as a matter of law in ordering this discovery, it abused its discretion when it suppressed the BAC test results as a sanction. Accordingly, the court reversed the trial court's affirmance of these rulings and its order excluding the test results from trial. The defendant was arrested for OUIL and taken to the police department booking room where he was observed and two BAC tests were performed, which showed his BAC was .11. The police department had recently installed a motion-activated video recording system, which operated on continuous loop. When the tape was full, the system automatically recorded over prior video. Defense counsel sought discovery of various items, including any videotapes or audio recordings. It was later discovered the booking room video may have been overwritten. The district court suppressed the BAC test results on the grounds the prosecutor failed to comply with the court's order and with the defense discovery request. The trial court affirmed the suppression of the BAC test results. The court held under Phillips, because the videotape did not fall under any category of mandatory discovery under MCR 6.201, and because the defendant made no showing of good cause, the district court erred as a matter of law in ordering the production of the tape, it abused its discretion when it suppressed the BAC test results as a sanction for violating its erroneous discovery order, and the trial court repeated both errors. The case was reversed and remanded. *People v Greenfield*, 264879, released June 29, 2006.

Since the prosecution failed to present sufficient evidence to establish the defendant's actions were a proximate cause of the victim's death, the court vacated his conviction of OWI/OWVI. Defendant was driving

his SUV at 2:00 A.M. As he tried to turn onto another road, he drove into the path of an oncoming car driven by Reichelt, whose car hit defendant's SUV, spun 180 degrees, and came to rest on the centerline of the road. The SUV came to rest along the side of the road. It was later determined defendant's BAC was 0.16, twice the legal limit. Reichelt and his passenger, Keiser, were not seriously injured, but Reichelt's car was severely damaged and the headlights stopped working. Both men left the car and walked to the SUV to determine if anyone was injured. Reichelt said oncoming cars could hit his darkened car and he wanted to try to turn on his flashers. As Reichelt and Keiser stood by the car in the middle of the road, an oncoming driver hit Keiser, killing him. Keiser had reached the point of apparent safety at the side of the road. He then made the choice to return to the road and place himself in danger. That decision ended the initial causal



chain and started a new one, for which defendant was not responsible. There was no dispute defendant was intoxicated and his driving was the cause of the first accident. There also was no dispute his driving was the factual or "but for" causation of the second accident. However, whether defendant was the proximate cause of the second accident, and the victim's death was the issue to be decided. The court held the trial court improperly instructed the jury on the issue of proximate cause, the instructions on proximate cause and superseding intervening causes were "virtually nonexistent," and there was insufficient evidence to establish proximate cause at all. The case was reversed and remanded. *People vs. Rideout*, case no.: 261233, released October 26, 2006.

Unpublished Cases

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

Holding the trial court erroneously applied MCL 257.303 in setting aside the five-year revocation of petitioner's driver's license, the court reversed. Two revocation penalties were imposed on petitioner on May 10, 2002. Respondent revoked petitioner's license for one year as a result of her second drinking and driving offense within seven years, which occurred on March 5, 2002. Petitioner did not challenge this revocation. Second, respondent revoked petitioner's license for five years as a result of her third drinking and driving offense within 10 years, which occurred on April 12, 2002. The issue was whether MCL 257.303 rendered invalid the five-year revocation because it was imposed on the same date as the one-year revocation. The court concluded because MCL 257.303(4)(a)(ii) pertains to the issuance rather than the revocation of a driver's license, the fact petitioner's five-year revocation occurred on the same date as her one-year revocation was of no consequence. There is no requirement in MCL 257.303 the respondent impose revocations on different dates. Thus, the trial court's order was erroneous. However, the court rejected respondent's argument a trial court lacks jurisdiction to set aside a driver's license revocation of a habitual offender unless the revocation was arbitrary and capricious. This was an incomplete statement of the law. The decision of the lower court was reversed. *Calibeo v. Secretary of State*, case no. 262631, released on October 19, 2006.

Defendant was not denied the effective assistance of counsel because his trial counsel did not call defendant's son as a witness. He argued a different outcome was probable if his son had

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testified because there would have been reasonable doubt concerning whether defendant was driving the ATV and was drunk at the time of the accident. He contended witnesses were mistaken about who was driving the ATV because after the accident, he was still on the ATV while his son was thrown off. Defendant also argued there was no evidence showing he was over the legal BAC limit while operating the ATV and his son would have testified defendant only drank alcohol after the accident. However, nothing in the record supported defendant's claim his son was driving the ATV. Three witnesses testified defendant was driving it. There was also nothing in the record indicating his son was with him at any time prior to being on the ATV with him. Thus, the record did not support the claim his son could have testified concerning the timing of defendant's drinking. The record supported defendant was intoxicated at the time of the accident. Although defendant's ex-stepfather testified defendant only became intoxicated later, two unbiased witnesses testified he was intoxicated at the time. Defendant did not overcome the strong presumption defense counsel engaged in sound trial strategy. The court further held there was sufficient evidence to support defendant's conviction of OUIL with an occupant under 16. The case was affirmed. *People vs. Badenhoop*, case no.: 264180, Released October 19, 2006.

Since the defendant was susceptible to enhanced sentencing for his conviction of possession with intent to deliver marijuana and the trial court sentenced him two to eight years, the court affirmed his maximum sentence of eight years. The court vacated the trial court's sanctions on defendant's driving privileges including suspension of his operator's license for 365 days and that the convictions be reported to the Secretary of State. The court vacated the one-year license suspension because MCL 333.7408a authorizes a trial court to order license suspension in connection with convictions of the pertinent part of the Public Health Code,

but subsection (11) bars this action in connection with sentences exceeding one year. Since defendant's minimum sentence exceeded one year, the suspension order was improper. MCL

257.732 requires reporting a felony conviction involving a motor vehicle to the Secretary of State, but subsection (6) clarifies a "felony in which a motor vehicle was used" means a felony during the commission of which "the person operated a motor vehicle". In this case the evidence showed defendant to be a passenger, not the driver, in connection with the conduct for which he was prosecuted. The court vacated defendant's sentence as to the driving privilege sanctions and remanded. The case was affirmed in part, vacated in part, and remanded. *People v Hall*, case no.: 264174, released October 19, 2006.

There was insufficient evidence to support the defendant's operating a vehicle with a suspended license conviction because a rational fact-finder could not have found the notice element of the crime was proven beyond a reasonable doubt. The plain language of the relevant statutes requires notice of a suspended license to a defendant must have been provided by personal delivery or first-class U.S. mail addressed to the defendant's address shown on the Secretary of State records. There was no evidence presented the defendant was sent notice at his address of record with the Secretary of State by either personal delivery or U.S. mail. The prosecution referred to the driving record introduced in the case as including a reference of a warning letter being sent to defendant. The trial court instructed the jury the driving record was "only" admitted for the purpose of determining whether defendant was driving on a suspended license. Thus, the driving record did not constitute evidence he was given notice of the suspension. A police officer testified she recently assisted in an



incident "involving this subject and he was suspended," evidently meaning defendant was stopped on a suspended license some weeks before this incident. But, the plain language of §

904(1) requires a person to have been notified as provided in § 212 of the suspension in order to be guilty of the crime of operating a vehicle with a suspended license. Thus, even if defendant had actual notice, such notice would not fulfill the notice element of § 904(1). Further, the federal Double Jeopardy Clause bars retrial for a crime after a judicial determination there was insufficient evidence to support a conviction. The court reversed defendant's conviction for driving with a suspended license and remanded for entry of an acquittal on the charge. The court affirmed defendant's other convictions, but remanded for findings under MCR 6.005. *People vs. Harms*, case no.: 260358, released August 8, 2006.

Since no evidence was presented the defendant's alleged violations of federal guidelines relating to duty and rest time in the days before the collision were inextricably related to the collision or the collision followed from his alleged violations, and the testimony regarding his compliance with federal rules constituted testimony of other acts committed by defendant rather than evidence necessary to provide a complete picture of the disputed events, the trial court's failure to provide a limiting instruction regarding the jury's use of the other acts evidence necessitated reversal. A jury convicted defendant of failure to use due care when approaching or passing a stationary emergency vehicle causing injury to an officer. Defendant was traveling on I-94 when his box truck collided with a State Police patrol vehicle. The vehicle was parked on the shoulder with its emergency lights

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on, and the trooper was standing nearby assisting a jackknifed commercial truck partially blocking the road. The collision sent the patrol vehicle into the trooper, breaking his leg. Defendant argued the trial court improperly denied his request to give a limiting jury instruction regarding the use of other acts evidence relating to the motor vehicle inspector's testimony about defendant's lack of compliance with the 11- and 14-hour rules and other log book violations in the 2 days before the collision. Defendant claimed the log book violations were not antecedent events so inextricably intertwined with the events culminating in the collision, as to be an essential part of those events and constitute the appropriate use of other acts evidence. The court agreed and reversed the case. *People vs Savic*, case no.: 261129, released September 19, 2006.

There was sufficient evidence to support the defendant's fleeing or eluding conviction. At trial, an officer testified he was wearing a police t-shirt with the word "police" emblazoned on the front and back. He wore his silver badge saying "Police Detective Sergeant" on his chest attached to a neck chain. He testified the kind of uniform a Roseville police officer wears on routine patrol depends on the officer's assignment. The department manual specified different uniforms, and the shift commander allowed variations. Although defense counsel inquired

whether officers meeting with the public had more limitations on their uniform, the officer maintained, "I meet with the public like on this day here, I could be wearing just a police t-shirt with a silver badge around my neck. All those uniforms are specified by our rules and regulations. And there's other uniforms also, again depending on your assignment." Viewed in a light most favorable to the prosecution, the officer's testimony was sufficient to establish the uniform requirement of the statute beyond a reasonable doubt. Evidence was also adduced defendant eluded a marked Wayne County Sheriff's vehicle being operated by a uniformed deputy before defendant came to stop. The case was affirmed. *People v Schneider*, case no.: 260482, released June 24, 2006.

The trial court properly denied the defendant's motion for a directed verdict because the evidence was sufficient to justify a rational trier of fact in finding defendant was driving while impaired due to his alcohol consumption. The evidence showed the officer pulled defendant over for making an illegal U-turn to avoid waiting for a train to pass. Defendant could have turned right or left down a side street before getting to the train to avoid it. While talking to defendant, the officer noticed a "moderate odor of intoxicants coming from inside the car." Defendant told the officer he had just finished drinking.

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.

The officer received training for drunk driving detection, standardized alcohol sobriety, and standardized field sobriety testing. Defendant did not do well on three of the five field sobriety tests. The entire incident was captured on videotape from the officer's dash-mounted camera, which was played for the jury. The officer testified since January 1, 1998, he had made 223 drunk driving arrests. Based on his experience, the officer felt defendant could not safely operate a motor vehicle and would test as legally intoxicated. The result for both breath samples taken at the station was .08 percent alcohol content. The case was affirmed. *People vs Yarbrough*, case no.: 261513, released August 15, 2006.

