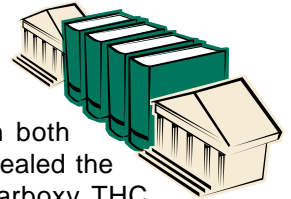


The YELLOW LIGHT LEGAL UPDATE

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Case Law Update



Published Cases

MSC OVERRULES PEOPLE vs. LARDIE, 452 MICH 231 (1996).

Lardie held that in a prosecution for OWI causing death, the prosecution must prove that the defendant's intoxicated or impaired driving was a substantial cause of the victim's death. All seven Justices agreed that *Lardie* was an incorrect interpretation of the plain language of MCL 257.625(4). In a prosecution for OWI causing death the prosecution must prove that:

1. The defendant operated a vehicle while intoxicated, impaired, at .08, under the influence of a controlled substance, or with the presence of a schedule 1 controlled substance in his or her body, and
2. That the defendant's driving was a factual and proximate cause of the victim's death.

Factual cause is determined by using the "but for" test. That is, but for the defendant's driving would the death have occurred? If factual cause is established, it must then be determined whether the defendant's operation of the vehicle was a proximate cause. In making this determination:

...one must inquire whether the victim's death was a direct and natural result of the defendant's operation of the vehicle and whether an intervening cause may have superseded and thus severed the causal link. While an act of God or the gross negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, ordinary

negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable.

Justices Cavanagh and Kelly, while concurring with the majority in their interpretation of the statute, would hold it violates due process to apply this new interpretation retroactively to these defendants. *People vs. Schaefer*, MSC No. 126067, July 27, 2005.

Editor's Note: PAAM's Traffic Safety Training Attorney, David Wallace, has written proposed jury instructions for OWI Causing Death, including Section (8), and DWLS Causing Death based on this new case. If you would like copies, please call him at the PAAM offices.

THE PRESENCE OF CARBOXY THC CAN BE USED AS EVIDENCE THAT A PERSON HAS MARIJUANA (THC) IN THEIR BODY.

One defendant crossed the centerline and hit another vehicle. She killed one person, and crippled two others. Marijuana cigarettes were found in her purse, and she admitted smoking a joint four hours earlier. She was charged with operating with the presence of a schedule 1 controlled substance causing death and serious injury under MCL 257.625(4) and 257.625(5).

The other defendant was pulled over for erratic driving. A marijuana pipe was found in his pocket, and he admitted smoking marijuana 30 minutes before his arrest. He was charged with operating with the presence of a schedule 1 controlled substance in his body under MCL 257.625(8).

Blood tests on both defendants revealed the presence of carboxy THC, the metabolite of THC, the active ingredient in marijuana. Judges Cooper, Jansen and Hoekstra noted that carboxy THC is a harmless product produced by the body as it eliminates THC, and is not a controlled substance. Even though carboxy THC is not a controlled substance, its presence indicates the prior presence of THC, which is a schedule 1 controlled substance. Accordingly, they held that evidence of carboxy THC is admissible to assist the jury in determining whether THC was present in the defendants' bodies when they were operating their vehicles.

On another issue, they held consistent with *People vs. Lardie*, 452 Mich 231 (1996) that the crimes of operating a motor vehicle with the presence of a schedule 1 controlled substance causing death or serious injury are not strict liability offenses. The prosecutor needs to prove that the presence of the controlled substance in the defendant's body was a proximate cause of the accident that caused the death or serious injuries. *People vs. Derror, CA* No. 258346, July 12, 2005.

Editor's Note: As noted above the *Lardie* holding was overruled by the Michigan Supreme Court in *People vs. Schaefer*. That makes the causation ruling in this case, questionable. This is also true for the recent case of *People vs. Schut*, CA No. 256377, released March 17, 2005 for DWLS Causing Death and causation. Both cases have been appealed to the Supreme Court.

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Unpublished Cases

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

While defendant challenged his OUIL conviction on the basis the evidence was insufficient to show he was the driver of the wrecked car, his presence in the vehicle at the time of the accident (which was undisputed) together with his unsatisfactory account of someone else's driving, was sufficient to support his conviction. The undisputed fact defendant was in the car at the time of the accident was solid circumstantial evidence he was driving, to be weighed against the evidence he was not, consisting only of his inconsistent and vague descriptions of a friend he contended was driving. The credibility of defendant's account was for the jury to decide. The fact he initially spoke of an armed assailant stealing his car, and then of a companion with a nebulous name and whereabouts, could be taken to indicate he was trying to avoid responsibility for OUIL. Likewise, as to the resisting and obstructing conviction, the jury was free to infer from the testimony defendant acted to resist the blood draw at the hospital after the accident. The court affirmed both convictions. *People vs. Canaca*, CA No. 259237, released August 9, 2005.

The trial court did not err in denying defendant's motion to suppress and in determining probable cause existed for his arrest. Defendant was convicted after a bench trial of OUIL, third offense and operating a vehicle without security. While most of his arguments concerned the alleged improper administration of the horizontal gaze nystagmus sobriety test and its impact on probable cause, even if the test was improperly administered, the results were not admitted into evidence or relied on by the trial court in finding probable cause existed. The court concluded there was more than sufficient evidence to support a finding of probable cause. The court also rejected defendant's claim the trial court

erred in considering his blood alcohol content test results when the machine had not been tested for accuracy in the week before his arrest. The proper functioning of the machine went to the weight of the evidence, not its admissibility. The case was affirmed. *People vs. Marsland*, CA No. 253147, released August 2, 2005.

The court held a chemical analysis was not required to establish the crime of UBAL. The action arose from incidents including an accident involving defendant's motor vehicle shortly after midnight culminating in the death of a pedestrian. The prosecution offered expert testimony from a toxicologist with the Michigan State Police, as an expert in the field of toxicology. Defendant challenged the toxicologist's qualifications to give testimony on the effects of alcohol on a person's ability to operate a motor vehicle. The court found no support for defendant's contention subsection (6) reflects blood alcohol levels may only be "shown by chemical analysis." The section merely provides for the admissibility of chemical tests. As plainly provided in subsection (7), which allows for the admission of other competent evidence, the Legislature did not intend blood alcohol levels to be exclusively "shown by chemical analysis." Under the rules of evidence, defendants are sufficiently protected because considerations of unfair prejudice may preclude the disclosure of the facts underlying an expert's opinion on a defendant's blood alcohol level, thus evidence on which an expert bases his opinion may not be automatically admissible. The jury trial convictions for OUIL and failure to stop at the scene of a serious personal injury accident were affirmed. *People vs. Swanson*, CA No. 252906, released June 21, 2005.

Viewing the evidence in the light most favorable to the prosecution, resolving all conflicts in its favor, and leaving to the jury questions of witness credibility, the

inferences to be fairly drawn, and the weight they should be afforded, the court held the evidence was sufficient to permit a rational trier of fact to find the defendant operated her vehicle in a negligent manner, she was a substantial cause of the accident, and to convict her of negligent homicide. The case arose from an automobile accident at an intersection at 2:50 pm. The victim was beginning a left turn when her car collided with defendant's car. The victim was fatally injured. The prosecution presented eyewitness testimony the victim had the green arrow for the left turn at the time of the accident and the light was red for defendant's lane of traffic. Plaintiff's reconstruction expert opined at the time of the accident, the victim had the green arrow and defendant had a red light, and was at fault for the accident. The defense expert opined the victim was at fault for the accident. The case was affirmed. *People vs. Levitte*, CA No. 256630, released June 19, 2005.

While the trial court had jurisdiction to review petitioner's claim, the respondent-Secretary of State did not exceed its statutory authority or jurisdiction when it imposed an additional license revocation on petitioner, and the trial court erred in setting aside the imposition of the additional revocation period. Since petitioner's claim was brought under MCL 257.323(4), the trial court had jurisdiction to review the claim. However, the court agreed with respondent that petitioner's license was revoked at the time of his 5/30/00 arrest for driving without a valid license. The trial court's prior grant of a temporary license did not alter the fact petitioner's operator's license was revoked, because the revocation remained effective until reinstatement was approved. The temporary license was preliminary to the adjudication of petitioner's rights and did not reinstate his license. Petitioner derived no driving



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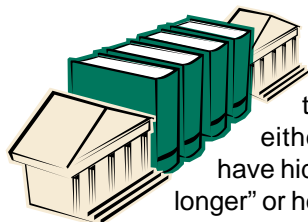
authority from the temporary license after it expired (which it did prior to his 5/30/00 arrest), and his original license was still in a state of revocation. The 5/30/00 violation occurred while petitioner's license was officially revoked, and he was never officially approved for reinstatement of a license. The case was reversed. *Boatman vs. Secretary of State*, CA No. 252575, released June 16, 2005.

Since the defendant, who was arrested for OUIL, was deprived of her statutory right to have an independent blood alcohol test performed by a person of her own choosing within a reasonable time after her detention, the proper remedy was dismissal with prejudice of the charges against her. Defendant's attorney arrived at the jail about one-half hour after her arrest. He was not allowed to speak with defendant, but he told an officer he wanted defendant to have an independent test if the breathalyzer results showed she was intoxicated. The attorney was unable to arrange for an independent test to be performed due to the lack of cooperation by the police. The record indicated defendant did not waive her right to an independent test. The relevant statute requires a defendant to be given a reasonable opportunity to have an independent test within a reasonable time after detention. The court held defendant was not given the opportunity to have an independent test. The failure of the police, for whatever reason, to facilitate an independent test when defendant's attorney was present at the jail and made repeated requests for a test clearly deprived defendant of her statutory right. The court affirmed the decisions of the lower courts the defendant was deprived of her statutory right to an independent test and ordered the cases dismissed with prejudice. *People vs. Piotrowski*, CA No. 251670, released May 19, 2005.

The trial court abused its discretion by dismissing criminal charges against defendant. Defendant claimed the police department violated his right to due process when it failed to

provide him with a copy of the squad car's videotape of the events leading up to his arrest. Defendant further claimed the tape would show the police officers' assertion they tried to pull defendant over because he failed to properly signal a turn was a pretext. Defendant failed to show an actual tape of the events leading to his arrest existed and failed to show, even if the tape did exist, it contained exculpatory evidence or was destroyed in bad faith. Nothing in the police conduct described at the evidentiary hearing indicated the destruction of the evidence, if it existed at all, was motivated by bad faith. At best, the testimony indicated the police department was negligent in following its own policies. The case was reversed and remanded. *People vs. Love*, CA No. 252360, released May 19, 2005.

While the prosecution produced no direct evidence defendant was the driver, the circumstantial evidence presented was sufficient to allow a jury to find beyond a reasonable doubt he was driving at the time of the collision. Police found a Ford LTD flipped upside down, on the edge of a bridge, and surmised the accident took place within 10 minutes of their arrival. The driver was not immediately located. However, while going to block traffic under the dangling vehicle, an officer saw defendant run across the expressway. He did not stop when the officer activated his overhead lights, and a foot chase followed before defendant was apprehended. The prosecution showed the Ford LTD involved belonged to defendant's mother and he had a set of Ford keys in his pocket. He was found near the scene of the accident and ran from the



police. When he was caught, he told the police either he "should have hid in the bushes longer" or he "should have hid in the bushes." While defendant contended someone else was driving, no one else was discovered nearby. The court agreed with defendant

the prosecutor argued facts not in evidence, and concluded the misconduct was not inadvertent. However, in light of the overwhelming evidence of defendant's guilt, it was unlikely the error was outcome determinative. The case was affirmed. *People vs. Trostle*, CA No. 253862, released May 17, 2005.

Considering the totality of the circumstances and the officer's experience with persons leaving the scene of an accident, the police officer had a reasonable suspicion sufficient to justify a *Terry* stop. The officer testified based on his experience with persons leaving the scene of an accident, and in view of the lack of traffic on a residential road around 2:00 a.m. on a Monday morning, there was a high probability the person whose tracks he was following was in the car he stopped. Further, his suspicions were aroused by the fact the person had been dropped off in the parking lot of a business closed for the night. In addition, since it was cold and snowing, a person was not likely to walk very far. The circuit court erred in reversing the district court's decision denying defendant's motion to suppress. Reversed and remanded for further proceedings. *People vs. White*, CA No. 252245, released May 17, 2005.

There was sufficient evidence to support defendant's OUIL causing death conviction. Defendant's theory was there was a lack of evidence showing his intoxication was the cause of the victim's death. He argued given the lack of lighting and the darkness of the victim's clothing, the accident was an unavoidable one he could not have prevented, and was not caused by his intoxicated condition. Alternatively, he suggested the accident may have been caused by his low blood sugar, not by his intoxication. The victim wore mostly dark clothing, although he was wearing a white hat and white shoes. However, his bicycle had amber and red reflectors, making it visible if approached from behind, which was the

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direction from which defendant approached. An eyewitness, who came to the victim's assistance immediately after the accident, had no trouble seeing the bicycle lying in the road and avoiding it. Additionally, the paramedic who diagnosed defendant's low blood sugar stated the effects of low blood sugar on behavior are generally less severe than those of intoxication. Further, defendant was driving on the wrong side of the road at the time of the accident, and his vehicle was, according to one of the accident reconstruction experts, partly off the road, although the wheels were on the road surface. Defendant hardly hit his brakes, according to the reconstruction experts, before or after striking the victim. Defendant's blood-alcohol level when he was tested three hours after the accident was more than twice the legal limit. The case was affirmed. *People vs. Bank*, CA No. 252182, released May 12, 2005.



In light of the trial court's cautionary instruction concerning the challenged evidence, the abundant evidence of alcohol consumption and intoxication, and the conviction of a lesser offense than the charged offense, the court held assuming error, it did not result in a miscarriage of justice. The court concluded it was unnecessary to decide whether the trial court erred in allowing the prosecution to elicit testimony from the arresting officer concerning defendant's statement he did not have a driver's license due to prior drunk driving convictions. Defendant made the statement in response to the officer's request for his license. He was convicted of OWI and resisting or obstructing an officer. The court could not find it was more probable than not the alleged error was outcome determinative. The case was affirmed. *People vs. Pohl*, CA No. 252301, released May 12, 2005.

Since no evidence supported the district court's findings that the abbreviated waiting periods observed between the breath tests undermined the reliability of the result and the results were not shown to be inaccurate, suppression of the test results was not warranted under the circumstances. Defendant was arrested for OUIL and agreed to take a breath alcohol test. The first test, administered at 2:33 am after a 15-minute observation period, returned an "invalid result" reading. The second and third tests administered at 2:37 am and 2:39 am, resulted in breath alcohol analyses of .25 percent and .28 percent respectively. The lower courts

agreed because the presence of mouth alcohol resulted in an "invalid sample" message when the first test was done, longer waiting periods between the tests were required to ensure the mouth alcohol was no longer present. However, defendant's claim mouth alcohol was likely present when the second and third tests were done was unsubstantiated, and he offered no explanation as to why, if mouth alcohol was still present, the second and third tests produced valid results. The case was reversed and remanded. *People vs. Stukkie*, CA No. 253823, released April 19, 2005.

The trial court properly permitted a police officer to give an opinion regarding defendant's intoxication. Defendant did not meet his burden of establishing plain error. Because the officer was not qualified as an expert, MRE 701 governed the admissibility of his opinion. The officer indicated he had an opportunity to observe and speak with defendant shortly after arriving at the accident, and defendant admitted he was the driver of the inverted vehicle at the scene. 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.



This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.

officer detected the odor of beer on defendant's breath and noted defendant's speech was slurred, his eyes were watery, and he staggered when he walked. The officer could rationally infer from his observations defendant's behavior was consistent with someone who was intoxicated. Because his opinion was not overly dependent upon scientific, technical, or other specialized knowledge, it was admissible under MRE 701. Defendant's conviction was affirmed, but the case was remanded for resentencing. *People vs. Morningstar*, CA No. 248138, released April 14, 2005.

