



# The YELLOW LIGHT LEGAL UPDATE

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## Case Law Update

### Federal District Court

Four minors went to parties that had alcohol present in different locations in the state. In each situation, law enforcement conducted a raid on the party due to underage drinking taking place. While at these parties the minors in this case were required to take a Preliminary Breath Test (PBT) to determine if they had been drinking. The officers were relying on MCL 436.1703(6) which provides that if an officer has reasonable cause that a minor has been drinking, the officer can request the minor to take a PBT. If the minor refuses, that is a civil infraction with a fine of \$100. Three of the minors came back with zeros and the fourth showed a positive reading and, thus, received a MIP ticket. The parties made a motion for summary judgment and the court granted the Plaintiff's motion stating: "The Court finds that Michigan Compiled Laws § 436.1703(6), under which the police officers were operating in this case, is unconstitutional on its face because it purports to authorize searches and seizures without a warrant and absent exigent circumstances; therefore it sanctions official conduct that violates the Fourth Amendment." The court enjoined the parties in the case from compelling a minor to take a PBT pursuant to 436.1703(6). *Platte v Thomas Township*, case no. 05-10200, released September 27, 2007.

**Editor's Note:** While the court did not enjoin all law enforcement agencies, the practical impact of this ruling, as it presently stands, is that police officers may not rely on any authority granted them through the enactment of MCL



436.1703 (6). Police officers should not request a minor submit to a PBT unless they have previously secured a search warrant for the test or alternatively, have obtained a valid and documented consent from the minor to be tested.

### Published

**For a Fleeting and Eluding Resulting in Death charge, the defendant does not have to be the proximate "cause" of the death – he just has to be the factual cause.** Rejecting defendant's argument "interpretation of the term 'result' should be the same as when the term 'cause' is used in a statute," the court held his criminal act of fleeing and eluding resulted in the police officer's death because the only causation required by the statute was factual causation, not proximate causation, and factual causation existed because the officer would not have lost control of his vehicle during the pursuit absent defendant's fleeing and eluding. The police were notified defendant was recklessly weaving in and out of traffic. A police vehicle pulled up behind him and activated its lights. Witnesses saw defendant accelerate away from the police vehicle, run a red light, and continue at a high rate of speed. The police vehicle, while trying to navigate an

S-curve in pursuing defendant's vehicle, spun out of control and hit a tree. One of the officers died and the other was injured. Defendant argued the evidence was insufficient to establish beyond a reasonable doubt his fleeing and eluding "resulted in" the officer's death. The court disagreed. The distinction between "results in" and "cause" was noted by the Supreme Court in *Schaefer and Robinson*. "Results in" is "more general and broader in scope than the term 'cause' which has acquired a unique, technical meaning in the law." While defendant relied on *Robinson* to argue he should not be held liable for first-degree fleeing and eluding because he did not hit the police vehicle or physically force it off the road or into another object, this analysis from *Robinson* did not apply. A narrow construction of the phrase "resulting from" was appropriate in *Robinson* because an exception to governmental immunity was at issue, and "the factual scenario presented in *Robinson* was in stark contrast to the factual scenario presented here." Concluding defendant's criminal act of fleeing and eluding clearly resulted in the police officer's death, the court affirmed his first-degree fleeing and eluding conviction. *People v Wood*, case no. 269157, released on September 18, 2007.

**The defendant's water trucks were designed and used to transport property and operate on a regular basis upon Michigan roads in the course of the performance of the work, therefore, they must have a proper Michigan registration.** The court held defendant's

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water trucks did not qualify for the statutory exemption in MCL 257.62 and the district court erred in dismissing the citation. The plain language of MCL 257.62 as applied to the stipulated facts showed defendant did not qualify for the exemption. The statute exempts special mobile equipment “not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways....” The stipulated facts indicated the water trucks transport water, well pipe, grout, and electrical generators. Photographs of the vehicle showed it carried “a significant amount of material for use in defendant’s water business and appears to be a common commercial truck.” The stipulated facts also showed the water trucks were used on a daily or semi-daily basis and traveled “on any and all roads or highways open to the general public.” This usage did not satisfy the incidental usage requirement to qualify for the exemption. Thus, the court concluded the water trucks were “designed and used to transport property and operate on a regular basis upon Michigan roads in the course of performance of the work.” This was contrary to the criteria for the exemption. Further, the plain language of the statute was consistent with Davidson. The case was reversed and remanded. *People v Metamora Water Service, Inc*, case no. 268346, released on August 2, 2007.

### Unpublished Cases

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

Concluding defendant failed to show why an expert was needed to protect his rights, the court held he failed to satisfy his burden of proving he could not safely proceed to trial without the requested experts and the trial court did not abuse its discretion in denying his requests for the appointment of a psychological expert to testify about his condition causing his breathing problems and a forensic analyst to testify about the unreliability of a BAC test. MCL 775.15 gives trial courts the authority to appoint an expert

witness for an indigent defendant upon his request. A defendant has the burden of demonstrating he could not safely proceed to trial without expert assistance. A jury convicted defendant of OUIL third offense in connection with a traffic crash. The prosecution argued defendant was under the influence of alcohol at the time of the crash. Defendant contended the alcohol in his



system was consumed shortly following the crash. Regarding the requested psychologist, while defendant identified an expert to testify he suffered from post-traumatic stress disorder, he gave no indication she could explain why he allegedly consumed alcohol after the crash. Defendant testified about his condition and presented other evidence corroborating the existence of his condition. As to the BAC test expert, defendant did not articulate what procedures the police officer allegedly failed to follow or how the testing instrument was not working properly. He was able to cross-examine the officer at trial about the protocol for giving tests on the instrument, and he cross-examined the officer and a police sergeant about the accuracy and reliability of the instrument. The court affirmed defendant’s conviction. *People v Waldeck*, case no. 264613, released on September 18, 2007.

The court affirmed defendant’s sentences for his convictions of first-degree fleeing and eluding, operating a motor vehicle without a license causing death, failure to stop at the scene of a crash resulting in death, failure to stop at the scene of a crash resulting in serious impairment, and involuntary manslaughter, concluding the trial court’s reasons for departing

upward from the guidelines were objective and verifiable, and substantial and compelling. The guidelines recommended a minimum term range of 50 to 100 months for defendant’s failure to stop at the scene of a crash resulting in death conviction. The trial court sentenced him instead to the statutory maximum of 10 to 15 years’ imprisonment, adopting the prosecution’s proposed reasons for exceeding the guidelines, including, *inter alia*, the facts defendant had previously fled from the police, the guidelines did not take into account the serious injuries to two individuals or the second death, he was apprehended after this crash while again fleeing from police in a stolen car, and his OV score was twice the maximum covered by the guidelines. The court concluded defendant’s arguments had little merit since the trial court correctly determined the guidelines did not adequately take into account his circumstances and the circumstances of the crimes. His 20-point score for OV 7 did not adequately reflect his 10 concurrent serious convictions, and the fact he received 5 points for OV 4 did not adequately reflect the seriousness of his “pattern of extremely dangerous behavior.” The court agreed with the trial court the extent to which defendant’s OV score exceeded the maximum range indicated the guidelines were inadequate to address the situation. The case was affirmed. *People v Lewis*, case no. 272822, released on September 13, 2007.

Sufficient evidence was presented for a rational jury to convict the defendant of second-degree murder. The court concluded based on the record, sufficient evidence was presented to prove malice beyond a reasonable doubt. Defendant’s BAC level was more than twice the legal limit at the time of the crash. He was driving a large and cumbersome vehicle in moderately adverse conditions, and was not authorized to drive the vehicle (he took it without permission). There was a strong inference defendant was

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not familiar with the vehicle and could not control it. Also, he never obtained a driver's license, and when the crash occurred, defendant was driving in the lanes reserved for traffic traveling in the opposite direction. Evidence showed he swerved from the northbound lanes into the center turn lane two or three times. A crash reconstructionist testified there was no evidence at the scene indicating defendant had tried to apply his brakes, and a mechanic who inspected the vehicle found no evidence the truck was not in proper working order. Malice can be inferred from evidence establishing the intent to do an act, which is in obvious disregard of life-endangering consequences. Here, the evidence supported a finding the defendant intended to do an act—drive a large unfamiliar vehicle while under the influence of intoxicants, in wanton and willful disregard of the likelihood the natural tendency of his behavior would be to cause death or great bodily harm. Thus, sufficient evidence was presented from which a rational jury could find defendant guilty of second-degree depraved heart murder. The case was affirmed. *People v Stewart*, case no. 270215, released on September 13, 2007.

Since MCL 257.323(1) did not authorize the circuit court to set aside a revocation of the petitioner's driver's license because the Legislature has clearly expressed its intent to proscribe that authority, the court reversed the circuit court's order setting aside the "additional 904 suspensions" and directing an immediate DLAD hearing. Petitioner has an extensive record of driving violations. His driver's license had been revoked several times and the periods of revocation extended. In March 2005, his eligibility date for review of his license revocation was extended to April 2010. He filed a petition in the circuit court stating he had received a citation for driving while his license was suspended precluding him from a hearing before the DLAD, and asking the circuit court to set aside the "additional 904 suspension" and order the DLAD to hold an immediate hearing. The circuit court granted the

petition. The respondent filed a motion for relief from judgment pursuant to MCR 2.612(C)(1)(a) and (d), which was denied. The court concluded the version of the statute taking effect in October 1999, changed the statute, which previously authorized actions regarding the "denial, suspension, restriction, or revocation of the person's license," to exclude revocation. The court's reading of the amended statute lead it to conclude the Legislature intended to exclude "revocation" from the list of actions the circuit court is authorized to "affirm, modify, or set aside." Thus, a circuit court's review of a license revocation must be confined to a "review of the record prepared pursuant to § 322 or § 625f of the driving record created under § 204a for a statutory legal issue." Further, the court shall set aside the secretary of state's determination only if the petitioner's substantial rights have been prejudiced in one of several enumerated ways. The circuit court did not state in its order which, if any, of the enumerated statutory conditions were met. The case was reversed and remanded. *Kowalski v Secretary of State*, case no. 269670, released September 13, 2007.

There was sufficient evidence to support the defendant's second-degree murder convictions. He claimed the evidence was insufficient to show malice. The jury heard evidence from which it could infer defendant's conduct was far more egregious than mere drunk driving causing death, and he acted with malice where he willfully disregarded the natural tendency of his actions to cause death or great bodily harm. More specifically, the jury heard evidence defendant had a BAC of .16 about an hour and a half after the crash, which would have been higher at the time of the crash, and his earlier ingestion of cocaine and marijuana may have further impaired his ability to drive. The jury also heard evidence defendant was angry because he had argued with a patron in one bar and then told a doorman at another he was angry because he had been previously banned from that bar by its owners.

After the doorman told him to find a way home, a witness saw him drive away, squealing his tires, driving over a curb, and going the wrong way down a one-way alley. The witness also said defendant appeared to be upset when he drove off. The evidence additionally showed defendant then drove at least 56 mph in a speed zone whose limit was less than half that speed and made no attempt to stop or even slow down before driving through an intersection with a flashing red light. Defendant emphasized there was also evidence he told a nurse he had fallen asleep at the wheel. However, the prosecution was not required to disprove every arguable theory of innocence, but was required to prove its theory beyond a reasonable doubt. Further, the jury was free to disbelieve defendant's protestations he fell asleep at the wheel. The case was affirmed. *People v Booth*, case no. 268085, released on September 13, 2007.

While the prosecutor's line of questioning of defendant's brother was improper because it was designed to "discredit [the witness] by inviting him to label prosecution witnesses 'liars,'" the court held that defendant failed to meet his burden of establishing plain error. The witness testified for the defense he, not defendant, was driving at the time of the crash, but left to find help. He testified he was unimpaired, driving carefully, and did not cross the centerline. The prosecutor asked him if prosecution witnesses testified this happened, would they be lying. The witness replied he believed so. However, defendant's brother's testimony was the only evidence indicating someone other than defendant was driving the vehicle. The occupants of the other vehicle involved in the crash testified defendant was driving and he was the only person in the vehicle. A police officer testified defendant at first told him his brother was driving, but also said several times during their conversation, "I should not have made that left turn." None of the

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police officers on the scene saw anyone besides defendant there, and two officers who checked the area around the vehicle observed only footprints in the snow on the driver's side of the vehicle. The court affirmed defendant's conviction of operating a motor vehicle while intoxicated, third offense notice, but vacated the award of attorney fees contained in the judgment because the



trial court erred in ordering the indigent defendant to repay his attorney fees without considering his ability to pay. While defendant's counsel failed to object to the assessment of attorney fees at sentencing, the court held plain error affecting defendant's substantial rights occurred. The case was remanded for a decision on attorney fees considering defendant's current and foreseeable future ability to pay. *People v Alfrey*, case no. 269644, released on August 28, 2007.

There was sufficient evidence to support the defendant's conviction of negligent homicide. He argued the prosecutor failed to show he was negligent. Defendant specifically pointed to the lack of evidence he engaged in erratic driving before the crash, or he was intoxicated on the

day of the crash. However, at trial, four witnesses testified they observed defendant's pickup truck travel across a double yellow line, travel into the lane designated for oncoming traffic, and strike the victim's blue van, killing the victim. There was no evidence defendant lost control of his truck because of mechanical failure, and there was no evidence he was blinded by the sun or otherwise distracted from driving by external events. The prosecutor presented evidence at trial defendant was traveling at a rate of speed between 60 and 63 mph at the time of the crash, in an area where the posted speed limit was 55 mph. Defendant's vehicle actually picked up speed immediately before the collision, and he never decelerated or attempted to avoid the collision. The negligent homicide statute does not require the prosecutor to prove intentional conduct, reckless driving, or gross negligence—the statute allows for prosecutions based on proof of mere ordinary negligence. Ordinary negligence has been defined as the failure to take reasonable care under the circumstances. On the record, a rational trier of fact could have found beyond a reasonable doubt defendant was traveling at an “immoderate speed” or otherwise operated his vehicle in a negligent manner. *People v George*, case no. 269465, released August 21, 2007.

The trial court did not abuse its discretion by admitting evidence of the defendant's PBT, contrary to MCL 257.625a(2)(b)(i). Defendant claimed the admission of this evidence denied him his right to due process and a fair trial as well as his right of confrontation. Defendant's reliance on *Keskinen* was misplaced because the results of his PBT were not revealed to the jury. Rather, in response to a series of questions defense counsel posed to the deputy, implying there was no justification for defendant's arrest, the prosecutor asked the deputy whether he included the justification for 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.



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arrest in his report, whether it was based on “an additional test” he gave the defendant, and whether based on this test, the deputy concluded defendant was intoxicated. The trial court allowed the questioning because defense counsel's questioning of the deputy implied there was no justification for defendant's arrest. However, the trial court specifically did not allow the prosecutor to ask the deputy the result of defendant's PBT and the result was not admitted. Further, the prosecutor did not refer to the “additional test” given to defendant as a PBT, and the jury was not otherwise informed the additional test was in fact a PBT. Because no abuse of discretion occurred, defendant could not establish plain error affecting his substantial rights with respect to his constitutional claims. The case was affirmed. *People v Hagadorn*, case no. 269525, released on August 21, 2007.