

**MICHIGAN CRIMINAL
CASE LAW UPDATE
November 2006 - October 2007**

November 30, 2007

**Prepared by Professors Ronald J. Bretz and James M. Peden
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for the Wayne County Criminal Advocacy Program
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PRETRIAL PROCEDURE

Appointment of Expert for Indigent Defendant

Independent blood test

Indigent defendants are not entitled to appointment of funds for an expert witness unless defendant can show a nexus between the facts of the case and the need for an expert. Defendant charged with possession of methamphetamine founding his car needed to show that the expert would be more helpful than just testifying about the prescription drugs present in his blood.

People v. Carnicom, 272 Mich. App. 614 (2006)

Independent psychological evaluation

The trial court erred in denying defendant's request for an independent psychological evaluation. The defendant is not required to comply with the notice requirements of the insanity defense statute in order to obtain an evaluation. The purpose of the independent evaluation is to determine whether to raise an insanity defense. The notice provisions only apply after defendant has decided to pursue the defense.

People v. Shahideh, ___ Mich. App. ___ (No. 267961, Oct. 25, 2007)

Subpoenas

Business records

Defendant argued that subpoenas issued by the prosecution violated the investigative subpoena statute, MCL 767A.1 *et seq*, because the prosecutor did not comply with the statute in that defendant was not given an opportunity to contest the subpoenas. However, the subpoenas were only issued for business records kept by third parties who did business with defendant. Since the defendant wasn't named as a party on the subpoena and the subpoena wasn't sent to him, defendant lacked standing to contest the subpoenas. There is no individual privacy right in business records kept by a third party other than a financial institution. The court also held that even if the prosecutor failed to comply with 767A.1, suppression is not an appropriate remedy.

People v. Gadomski, 274 Mich. App. 174 (2007)

Disqualification of the Prosecutor

Necessary witness

If the defendant intends to call the prosecutor as a necessary witness, the prosecutor must be disqualified as the People's representative at the preliminary exam. The district court's decision to disqualify the assistant prosecutor from representing the People in this case was not clearly erroneous where the assistant prosecutor took the lead role in the forensic interview of the child CSC victim.

People v. Tesen, 276 Mich. App. 134 (2007)

GUILTY PLEAS

Involuntariness

Guilty plea waives defenses

Defendant pled guilty to failure to pay child support. On appeal he claimed his plea was involuntary because he had valid defenses to the charge including statute of limitations and double jeopardy. The court held that the statute of limitations claim was not only waived by the plea but was also without merit. The court similarly rejected the double jeopardy argument because defendant was only subjected to one criminal prosecution. The other proceeding, a contempt finding for failure to pay was clearly civil contempt and therefore not within the double jeopardy protection.

People v. Parker, 275 Mich..App. 213 (2007)

Plea Procedure

Assuring an understanding plea

Defendant pled guilty to resisting and obstructing, a 2-year felony, as a fourth habitual offender. The trial court only advised defendant that the maximum was two years. The court failed to advise defendant that with the habitual offender designation, his maximum sentence was actually 15 years. MCR 6.302 explicitly requires the trial court to advise the defendant of “the maximum possible prison sentence for the offense.” In this case, the “offense” was only the two-year resisting and obstructing. Despite its concern that only advising defendant of the charged offense maximum and not the habitual maximum fails to adequately convey the consequences of the plea, the court of appeals holds that it does not have the authority to change the clear language of MCR 6.302. The court remands to permit defendant to withdraw his plea due to another defect. Defendant’s plea bargain included a promise that the prosecutor would recommend a sentence with the guidelines. However, there were two very different guidelines involved in this case: the range for the underlying offense and the much higher range for the habitual offender status. Because the record reflects that the defendant and his counsel were unaware of the enhanced habitual offender guidelines, defendant’s plea was not knowingly and understandingly made.

People v. Boatman, 273 Mich. App. 405 (2006)

TRIAL PROCEDURE

Jury Trial

Anonymous jury

The trial court's policy of identifying jurors by numbers instead of names did not violate defendant's right to due process. Defendant failed to establish that he was not provided the ability to effectively voir dire the prospective jurors. Defendant has access to complete biographical information in the jurors and was allowed to engage in extensive voir dire.

People v. Hanks, 276 Mich. App. 91 (2007)

Instructions

Deadlocked Juries

During the second day of deliberations, the jury informed the court that it had reached an impasse. The court told the jurors that if they were truly unable to reach an agreement, it would result in everyone, the victim and defendant included, having to come back to try the case again in front of a different jury. The court then gave the standard jury instruction on deadlocked juries, CJI2d 3.12. Although the Court of Appeals reversed defendant's conviction based on its finding that the trial court had implied that it was the jurors' civic duty to reach a verdict, the Supreme Court reversed in an order. The Supreme Court adopted Judge Jansen's dissenting opinion in which she found that the trial court had not improperly appealed to a civic duty to convict and therefore, did not substantially depart from the instruction approved in *People v. Sullivan*, 392 Mich. 324 (1974).

People v. Rouse, 477 Mich 1063 (2007), reversing 272 Mich App 665 (2006)

Instructions

Causation

Defendant was convicted of operating a vehicle while impaired or while visibly intoxicated causing death when he ran into an oncoming car causing that car to spin 180 degrees in the middle of the road. The victims survived that accident and went to the side of the road to ensure that the defendant was not hurt. The driver of the other vehicle then became concerned for his vehicle in the road so he returned to turn on the hazard lights. The passenger of the vehicle was then struck and killed by another oncoming driver. Although the trial court instructed the jury on factual cause, it failed to give proper instructions on proximate cause and superseding cause. For proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions. A properly instructed jury could have found that the victim placed himself in peril when he went back to the car and the next accident was a superseding cause that couldn't have been a direct and natural result of defendant's actions. The trial court's instruction that a superseding cause cannot excuse the defendant unless it was the only cause of the accident was clearly erroneous.

People v. Rideout, 272 Mich. App. 602 (2006), *rev'd in part on other grounds*, 477 Mich. 1062 (2007)

Lesser Included Offenses

Second-degree murder and statutory manslaughter

Statutory involuntary manslaughter (intentional discharge of firearm pointed or aimed at another resulting in death) is not an "inferior" offense of second-degree murder under MCL 768.32(1). Defendants charged with second-degree murder are not entitled to an instruction on statutory manslaughter as a lesser offense.

People v. Smith, 478 Mich. 64 (2007)

Lesser Included Offenses

CSC1 and CSC 2

Second-degree criminal sexual conduct is not an inferior offense of first-degree criminal sexual conduct as “the lesser degree contains an element not found within the higher degree.” Defendant’s conviction on CSC2 following a bench trial on the charge of CSC1 is reversed and defendant is ordered discharged.

People v. Nyx, 479 Mich. 112 (2007)

EVIDENCE

Hearsay/Confrontation

Fingerprint Cards

Defendant’s rights were not violated by the admission of fingerprint cards without the testimony of the technician who lifted the prints at the crime scene. The cards are business records under MRE 806(3) as they contain “matters observed by police officers” and were collected when no adversarial relationship existed between defendant and police. Thus, the cards were prepared as part of a routine investigation and not in preparation for litigation. Also, admission of the cards did not violate defendant’s right to confrontation as they were not testimonial. The absent evidence technician only collected the fingerprints. Any testimony that would link the prints to the defendant would come from another source who would be subject to cross-examination.

People v. Jambor, 273 Mich. App. 477 (2007) (On Remand), reversing 271 Mich. App. 1 (2006)

Confrontation

Testimonial Evidence

Following a domestic violence incident, the victim ran to her neighbor's house and told the neighbor about the assault. The neighbor memorialized the victim's statement in writing and called 911. When police arrived, they obtained a statement from the victim that defendant, her boyfriend, had beaten her up. When the victim did not appear at trial, the court permitted the prosecutor to admit all three out of court statements as excited utterances. Addressing the three statements separately, the court held that the 911 call was not testimonial under *Davis v. Washington*, --- U.S. ----, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and was properly admitted. The victim's statements given to the neighbor and to the police were testimonial and therefore admitted in violation of defendant's right to confrontation. The court also found that despite the lack of an objection at trial, the erroneous admission of the statements was plain error that likely affected the outcome of the proceedings.

People v. Walker, 273 Mich. App. 56 (2006) (On Remand), reversing 265 Mich. App. 530 (2005)

Questions to Enable Police Assistance to Meet Ongoing Emergencies

Defendant's confrontation right was not violated by the admission of the victim's statements to a neighbor who called 911 and to a longtime friend that the 73-year-old victim was raped. The fact that the victim died before trial did not render her statements to her neighbor and to her friend inadmissible. The neighbor and the friend were not acting as agents of the police when they questioned the victim. Even if they were agents of the police, the victim's statements to them were not testimonial because they were made to obtain emergency assistance.

People v. Jordan, 275 Mich. App. 659 (2007)

Ongoing Emergency & Dying Declaration

Police officers advised the shooting victim that he “might not make it” and asked him to identify his assailant. The victim identified defendant by his nickname. Within minutes, EMT personnel arrived and another officer again advised the victim that he would not survive and asked him to identify the shooter. Again, the victim identified defendant. The victim died a few weeks later. The Court of Appeals held that admission of the statements did not violate defendant’s right of confrontation as they were not testimonial under *Crawford*. Because the police officers took the statements “in the hectic minutes immediately following what turned out to be the fatal shooting,” they were made in response to an ongoing emergency. The statements were also “admissible as dying declarations because the United States Supreme Court in *Crawford* opined, in dicta, that dying declarations may be afforded special historical status as an exception to the Confrontation Clause.”

People v. Taylor, 275 Mich. App. 177 (2007)

Dying Declaration

Actual death not required

The defendant shot Crittendon on September 8, 2003. While hospitalized, Crittendon gave a statement naming defendant as his assailant. Crittendon recovered from his injuries only to be shot and killed on February 3, 2004. At defendant’s trial for Crittendon’s murder, the trial court admitted Crittendon’s statement made at the hospital in September under MRE 804(b)(2), the dying declaration exception. The Defendant appealed, arguing that it was not a dying declaration because Crittendon did not die from the injuries sustained on September 8, 2003. The Court of Appeals disagreed, holding that “as written, the rule imposes no requirement that the declarant actually die[] in order for a statement to be admissible as a dying declaration.” Note: the Court also held that the admission of evidence of the September shooting did not violate MRE 404(b) as it was relevant to motive and identity.

People v. Orr, 275, Mich. App. 587 (2007)

MRE 1101(b)8

Ownership interest in property

According to the clear language of MRE 1101(b)(8), the rules of evidence do not apply at preliminary exams to statements regarding ownership of property. The district court abused its discretion when it refused to permit the complainant in a false pretenses case to testify that the real owner had told him that the defendant did not own the house

People v. Caban, 275 Mich. App. 419 (2007)

Sufficiency of Evidence

The “no inference upon inference” rule is not recognized in Michigan.

The Court of Appeals erred in reversing defendant’s conviction using the “no inference upon inference” rule. That rule was rejected in *People v. Hardiman*, 466 Mich. 417, 424 (2002). The only consideration for the appellate court is whether, viewing the evidence in a light most favorable to the prosecution, a rational juror could find all the elements are proven beyond a reasonable doubt.

People v. Wright, 477 Mich. 1121 (2007)

Rape Shield Statute

Does not bar evidence of complainant’s prior false allegations

Defendant was accused of committing forcible fellatio with his 9-year-old stepbrother. Defense counsel sought to introduce testimony from other witnesses that the victim had made a prior false allegation of sexual abuse. The trial court barred the testimony under the so-called “Rape Shield” law. MCL 750.520j. The Supreme Court held that the rape shield statute does not bar evidence of prior false allegations. The Court also held that evidence that the complainant had “previously been induced by his father to make false allegations of sexual abuse against other persons disliked by the father,” was admissible under MRE 404(b).

People v. Jackson, 477 Mich. 1019 (2007)

Expert Testimony

Defendant's use of sex offender profile

Defendant's stepdaughter accused him of sexually molesting her hundreds of times between the ages of 8 and 13. The prosecutor charged defendant with 10 counts of CSC. Defendant sought to admit expert testimony from a psychiatrist that defendant did not fit the profile of a typical sex offender. The trial court's decision to bar the testimony under MRE 702 was not an abuse of discretion because it was not scientifically reliable and was not supported by sufficient scientific data. The opinion contains a lengthy discussion of the reasons why sex offender profiling is unreliable.

People v. Dobek, 274 Mich. App. 58 (2007)

MRE 404B

Common Plan or Scheme

The defendant was charged with four counts of criminal sexual conduct for sexual abuse of his daughter starting when she was 13 or 14. Evidence was admitted that the defendant allegedly sexually harassed a co-worker that the defendant did not have a personal or family relationship with. The court held that the evidence was "too attenuated" to find that it fits within the exception of MRE 404(b)(1) there must be a showing of "common plan or scheme."

People v. Pattison, ___ Mich. App. ___ (No. 276699, Sept. 11, 2007)

SENTENCING

Sentencing Guidelines

PRV1 - Convictions from other countries cannot be scored

In calculating the PRV1 to determine a defendant's sentencing range, MCL 777.51(2) defines a "prior high severity felony conviction" as a "conviction for [...] a felony under a law of the United States or another state [...], if the conviction was entered before the sentencing offense was committed." The common understanding of "state" is a state of the United States. The court held that this definition of state did not include a province of Canada or other foreign state. However, foreign convictions can give rise to a "substantial and compelling" reason to justify a departure from the sentencing guideline range.

People v. Price, 477 Mich 1 (2006)

OV1 - HIV Infected Blood is a Harmful Biological Substance

Defendant, an HIV-positive prisoner, was convicted of assault for spitting on a corrections officer. Defendant's mouth was bleeding at the time. The trial court did not err in scoring for OV 1 ("victim was subjected or exposed to a harmful biological substance. . ."). The Court of Appeals held that HIV infected blood is a "harmful biological substance," as defined by the guidelines statute, "because it is a substance produced by a human organism that contains a virus that can spread or cause disease in humans."

People v. Odom, 276 Mich. App. 407 (2007)

OV1 - Error to score at 5 points when conviction is for armed robbery

Defendant was convicted of armed robbery and resisting or obstructing a police officer. He was scored 20 points for OV1 (aggravated use of a weapon) based on 5 points for each of the four victims. However, the instructions clearly prohibit a score of 5 points when the conviction offense is armed robbery, as it was here. The Supreme Court remands for resentencing even though defense counsel at sentencing stipulated to the OV1 score.

People v. Greene, 477 Mich. 112 (2007).

Multiple offender scoring only applies if offenders convicted of the same offenses

Defendant was convicted of larceny from the person and conspiracy to commit larceny from the person based on his participation as the getaway driver in an armed robbery. Because defendant was convicted of different offenses than the other two defendants, it was error to score OV1,2, and 3 identically to the scores given to his co-defendants. Sentencing guidelines instructions require that defendants in multiple offender cases be given the same scores on these three offense variables. But since defendant was the only one convicted of larceny and conspiracy to commit larceny, this was not a multiple offender case.

People v. Johnston, 478 Mich. 903 (2007)

Probation was a departure without reasons

The trial court sentenced defendant to probation for the charge of indecent exposure by a sexually delinquent person even though the guidelines called for a minimum sentence of 42 to 70 months. The Court of Appeals erred in finding the probationary sentence a valid alternative to prison. Courts have discretion to sentence defendants to probation for the charge of indecent exposure but not indecent exposure by a sexually delinquent person. Defendant's sentence of probation was therefore a departure from the guidelines without a record of substantial and compelling reasons. The case was remanded for a statement of reasons or resentencing.

People v. Buehler, 477 Mich 18 (2007), reversing 271 Mich.App. 653 (2006)

Unjustified Downward Departure

The trial court abused its discretion in sentencing defendant to a term below the sentencing guidelines based on: "(1) the [small] size of the knife used in the robbery, (2) defendant's lack of a criminal history, including the fact that defendant did not commit any further offenses after the robbery, (3) the fact that defendant has maintained a continuous work record, (4) defendant's young age, and (5) defendant's cooperation with the court and law enforcement." The Court of Appeals found these factors not compelling and substantial. The first two reasons were accounted for in the guidelines and the latter three did not rise to the level of compelling and substantial.

People v. Young, 276 Mich. App.446 (2007)

Upward departure from an intermediate sanction does not violate *Blakely*

The defendants argued that when the guidelines minimum sentence range calls for an intermediate sanction (requiring probation or up to 12 months in the county jail absent compelling and substantial reasons for departure), as it did in these cases, the intermediate sanction of 12 months becomes the relevant statutory maximum sentence under *Blakely* and a defendant is constitutionally entitled to such a sanction. The Supreme Court disagreed. The sentencing guidelines in these joined cases called for intermediate sanctions but the sentencing judges departed from the guidelines and sentenced defendants to prison terms of 24 to 48 months and 18 to 60 months respectively. The Court held that the departures did not violate the defendants' right to a jury trial. *Blakely* and its progeny prohibit a judge only from exceeding the maximum sentence authorized by the jury verdict or the guilty plea. In the cases before the Court, defendants' maximum sentences were in fact authorized by their convictions. The Court also held that even if the intermediate sanction was the effective maximum, in each of these cases the trial court's departure was based on facts that were established by "overwhelming evidence such that we are convinced beyond a reasonable doubt that a jury would have reached the same result."

People v. Harper, 479 Mich. 599 (2007)

Judicial fact-finding to score OV's does not violate *Blakely*

In an earlier decision in this case, [*People v. McCuller*, 475 Mich. 176 (2006)], the Supreme Court held that even if scoring of the prior record variables (PRV) alone would have resulted in a guidelines range of 0 to 11 months, judicial fact-finding to score the offense variables (OV) did not violate *Blakely* even though the scoring of the OV's resulted in a higher range. The United States Supreme Court then remanded the case back to Michigan for reconsideration in light of *Cunningham v. California*, 549 U.S. ----, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). The Michigan Supreme Court reaffirmed its earlier decision. "A sentencing court does not violate *Blakely* and its progeny by engaging in judicial fact-finding to score the OVs to calculate the minimum recommended sentencing guidelines range, even when the defendant's PRV score alone would have placed the defendant in an intermediate sanction cell."

People v. McCuller, 479 Mich. 672, (2007)

Restitution

Mandatory restitution cannot be avoided by a civil settlement

Following defendant's no contest pleas to four counts of embezzlement, he entered into a settlement with the victim that released defendant from "any and all claims, demands, actions, causes of action, controversies, grievances, charges, and suits of every kind...." The trial court abused its discretion in refusing to order restitution due to the civil settlement. Because restitution is mandatory, it is not open to negotiation during the pleas process and cannot be affected by a civil settlement between two private parties and to which the state is not a party.

People v. Bell, 276 Mich. App. 342 (2007)

Restitution

Properly assessed for expense of inventory to determine losses

Defendant was convicted of breaking and entering of a building, unlawfully driving away a vehicle, and other charges. Defendant was ordered to pay restitution for the tools that he took and the labor of the true owner in inventorying the items that were taken. Restitution encompasses losses that are easily ascertained and are a direct result of defendant's actions. The property owner presented sufficient documentation for all items he was to be compensated for. He also presented evidence of the time and hourly pay for taking inventory and reequipping the trucks. Since defendant's crime was the cause for the trucks to be inventoried and restocked, the restitution amount for labor was also proper.

People v. Gubachy, 272 Mich. App. 706 (2006)

Sex Offender Registration Act

Required for conviction of sending sexually explicit emails

The underlying factual basis for a conviction governs whether or not the offense by its nature constitutes a sexual offense requiring the defendant to register under SORA. In this case the underlying offense was sending sexually explicit emails so the defendant was required to register. Defendant was convicted of unauthorized access to computers when defendant sent sexually explicit emails to a female student during or immediately after school hours. The court found that three conditions must be met to require registration under the act: 1) defendant must have been convicted of a state-law or municipal ordinance violation; 2) the violation, by its nature, must constitute a sexual offense; and 3) the victim must be under the age of 18 years.

People v. Golba, 273 Mich. App. 603 (2007)

POST-CONVICTION MOTIONS

Motion for Relief From Judgment

Failure to Show Good Cause

In a motion for relief from judgment, the defendant must show good cause for failure to raise the grounds on appeal or in a prior motion. Failure to show good cause is a sufficient reason to deny the motion. In this case, the defendant filed an issue in his third motion for relief from judgment that had not been raised in his appeal of right or in his two previous motions filed *in pro per*. The trial judge granted the motion, finding that appellate counsel was ineffective in failing to raise the issue on direct appeal. However, the court never found good cause for defendant's failure to raise the issue in his two previous post-conviction motions. The Court of Appeals makes clear that the good cause requirement applies to those motions. Thus, the trial court erred in granting the third motion.

People v. Clark, 274 Mich. App. 248 (2007)

CRIMES

First Degree Criminal Sexual Conduct

During commission of another felony

Defendant's motion to quash his bindover on four counts of CSCI was improperly granted. The court held there must be a nexus between the sexual penetration and the underlying felony to support a conviction under MCL 750.520(b)(1)(c) and if consent isn't a viable defense to the underlying felony then consent is not a defense to the sexual penetration. In this case, delivery of a controlled substance, the underlying felony, does not permit the defense of consent so the defendant cannot use the defense of consent to the sexual assault. Victim admitted that the only reason for the sexual activity with the defendant was to obtain drugs so the delivery of the drugs was part and parcel of the act of sexual penetration by the defendant.

People v. Waltonen, 272 Mich. App. 678 (2006)

Ethnic Intimidation

Complainant's state of mind

MCL 750.147b, requires the prosecutor to prove the defendant maliciously, and with specific intent to intimidate or harass another because of that person's race, color, religion, gender or national origin, did certain prohibited acts. Here a cross was burned in the complainant's yard two nights in a row. Although the court found that proof of the complainant's state of mind in this situation is not an element of the crime, it may be relevant to the issue of the defendant's intent

People v. Mackin, 477 Mich. 1125 (2007)

First Degree Fleeing and Eluding

Factual Causation

The defendant was observed recklessly weaving in and out of traffic. When the police attempted to pull him over, he continued at a high rate of speed. While chasing the defendant the police vehicle spun out of control and hit a tree killing one officer and injuring the other. The defendant was charged with fleeing and eluding under MCL 257.602a. The court held that the defendant's actions resulted in the officer's death. The court construed that the statutory interpretation of "resulted in" language, to mean factual causation and not proximate causation. Here the officer's death would not have occurred, but for defendant's fleeing and eluding.

People v. Wood, _Mich. App_ (No. 269157, Sept. 18, 2007)

Vehicle Registration

Exemption for "special mobile equipment"

A well drilling company refused to register any of its water tanker trucks. One of their trucks was ticketed by the Michigan State Police for failing to have a valid Michigan registration. The company defended asserting that the vehicle was "special mobile equipment" and therefore exempt from registration under MCL 257.62. The Court of Appeals held that "the water trucks are designed and used to transport property and operate on a regular basis upon Michigan roads in the course of the performance of the work. This is contrary to the criteria for claiming the statutory exemption."

People v. Metamora Water Service, Inc., 276 Mich. App. 376 (2007)

Anti-Terrorism Act

Not unconstitutionally vague

The Court of Appeals rejects defendant's arguments that the Anti-terrorism act is vague and fails to provide adequate notice. Defendant's emails containing specific and violent threats against others were sufficient to uphold his conviction. These were "true threats" under the statute as they expressed a serious intent to commit an unlawful violent act under MCL 750.543(a).

People v. Osantowski, 274 Mich. App. 593 (2007)

Felony Firearm

Pipe bomb

Unassembled pipe bombs meet the requirement of “firearms” constituting a weapon under MCL 750.222 (d).

People v. Osantowski, 274 Mich. App. 593 (2007)

Racketeering & Conspiracy

Inference upon Inference

Reasonable inferences, even in the absence of direct proof, may suffice to sustain a conviction provided those inferences are supported by established fact. Here, the court holds that testimony at preliminary examination established probable cause that the defendant committed racketeering, conspiracy to commit racketeering, and ten counts of delivery of less than 50 grams of cocaine because he allowed his pub to be used for illicit drug sales.

People v. Lowery, 274 Mich. App. 684 (2007)

Carrying A Concealed Weapon

Momentary innocent possession defense not established

The momentary innocent possession of a concealed weapon is not a defense to a charge of unlawfully carrying a concealed weapon. Here the defendant took the weapon from two men who offered to sell it to him. He also shot at them when they pursued him. Police chased defendant and ordered him to stop whereupon he surrendered the gun. To use the defense, defendant had to show that he took the weapon from a wrongful possessor and his intention to turn the weapon over to police at the earliest time. The court overrules *People v. Coffey*, 153 Mich. App. 311, 395 N.W.2d 250 (1986).

People v. Hernandez-Garcia, 477 Mich. 1039 (2007)

Maintaining A Drug House

Sufficient evidence for control of house

Where the defendant's clothing was found, where there was a money order in his name, and where he could not provide an address where he lived, there is sufficient evidence to establish control over a home pursuant to MCL 333.7405(d).

People v. Head, ___ Mich. ___ (No. 133691, Sept. 12, 2007)

Maintaining a Drug Vehicle

Continuity of behavior

Defendant was convicted of delivery of less than 50 grams of cocaine, and maintaining a drug vehicle, MCL 333.7405(1)(d). The latter conviction was reversed because evidence of using a vehicle for one drug sale was insufficient to establish a "continuity of behavior" necessary to sustain the charge of "maintaining.

People v. Thompson, 477 Mich. 146 (2007)

Unlawful Disposal of Scrap Tires

Strict Liability

Defendant was convicted of violating MCL 324.16902(1), which requires that scrap tires be delivered only to a duly registered collection site, a scrap tire processor, or a retailer or recycler. The Court finds that this is a public welfare offense and therefore, strict liability. It is not a defense that defendant did not realize his actions were illegal.

People v. Schumacher, 276 Mich. App 165 (2007)

CONSTITUTIONAL ISSUES

Writ of Habeas Corpus

Failure to retry within 90 days

Defendant claims that the state lost jurisdiction over his case when they failed to retry him within 90 days after a US District Court granted a writ of habeas corpus. Defendant's ability to put on a defense was not affected in any way by the retrial delay. Therefore, the state retained jurisdiction over defendant's case. Defendant also failed to show that his counsel was ineffective for failing to raise these issues in the lower court.

People v. Scott, 275 Mich. App. 521 (2007)

Miranda Rights

Invocation of *Miranda* rights is not an objection to co-tenant's consent to search

Invoking any of defendant's *Miranda* rights does not constitute an express objection to a consensual entrance into his premises. Co-tenant gave police permission to enter home to use phone when cop spotted shoes matching tread marks near attempted arson scene. The US Supreme Court has ruled that a person must be physically present to expressly refuse consent to a police search, regardless of a co-occupant's consent. Invoking *Miranda* rights is not a tacit objection to the consent to search in this case since defendant was not present in the premises. Police could have seized shoes without warrant through plain view exception but police waited until they had a warrant so no police misconduct occurred.

People v. Lapworth, 273 Mich. App. 424 (2006)

Waiving *Miranda* Rights

Defendant was a deaf mute who was arrested for the murder of her boyfriend. An interpreter was called to the station before *Miranda* warnings were given. The interpreter signed word-for-word and no one verified that the defendant completely understood her rights. The fact that defendant signed a waiver form was sufficient to show that she waived her rights but based on the totality of the circumstances it was not clear that defendant knowingly, intelligently, and voluntarily waived her rights. It was not clear from the totality of the circumstances that the defendant could read and understand the rights form she signed.

People v. McBride, 273 Mich. App. 238 (2006)

Resuming police interrogation following invocation of the right to silence

Defendant was arrested as a suspect in a car jacking. He refused to give a written statement to the first investigator to interview him. However he made statements to a second interviewer after being read his *Miranda* rights again that were later used against him at trial. The court found no violation of the defendant's right to remain silent.

People v. Williams, 275 Mich. App. 194 (2007)

Right against Self-Incrimination

Failure to inform of right prior to testimony

Defendant was subpoenaed to testify in a murder trial in which he would have to testify to filing a false police report or commit perjury. Defendant was not informed of his 5th Amendment right against self-incrimination. The court held the right against self-incrimination only protected a witness from incriminating himself or herself in crimes that have already been committed. Perjured testimony is committing a crime currently, which has nothing to do with a prior crime. Even if defendant was entitled to be informed of his 5th Amendment right against self-incrimination, defendant still didn't have a right to present false testimony.

People v. Bassage, 274 Mich. App. 321 (2007)

Search and Seizure

Unreasonable Searches of a Vehicle

Although the Court of Appeals held that the deputy was mistaken in pulling over a car believing that the driver failed to stop at a stop sign, the Supreme Court reverses. Failure to come to a complete stop when pulling out of a private drive on to a public road is a violation of Michigan traffic law. Thus, the stop was legal as was the subsequent search. The driver validly consented to a search of the vehicle. The search was also justified as a search incident to the arrest of the driver for failing to produce a valid license. Finally, since the stop was lawful, defendant/passenger lacked standing to challenge the search of the car.

People v. LaBelle, 478 Mich. 891 (2007), reversing 273 Mich. App. 214 (2006)

Expectation of privacy

Defendant placed a bag containing illegally copied recordings on an electric box attached to a utility pole when he saw an unmarked police car approaching him. The court found that the defendant gave up any expectation of privacy by the action of abandoning the property and remaining silent when the officer searched the bag.

People v. Henry, 477 Mich. 1123 (2007)

Constructive Entry without a Warrant

Here, the defendant testified that the officers never used physical force nor did they have their weapons drawn, yet claimed he felt threatened because of their repeated demands for him to exit his house. The court held that the defendant failed to establish constructive entry under the Fourth Amendment and the officer's repeated requests to step out of the house were not coercive.

People v. Gillam, 479 Mich. 253 (2007)

Warrants & Probable Cause

The Michigan Supreme Court held that the anonymous tip that began the investigation process (that defendants were growing and distributing marijuana from their home) was unreliable. However, probable cause existed to issue a warrant to search for evidence of distribution when the officers found a partially burnt marijuana cigarette in the defendant's trash.

People v. Keller, 479 Mich. 467 (2007)

Exclusionary Rule

Exclusionary Rule does not apply to statutory violations

While investigating a home invasion case in which large sums of money were taken, the Sanilac County Prosecutor's Office served on various institutions approximately 34 subpoenas seeking private documents relating to defendant and his wife. These investigative subpoenas were sought pursuant to MCL 767A.1 *et seq.*, but were, as the prosecutor admitted, defective insofar as they failed to properly denominate the information sought. In addition to finding that the defendants had no expectation of privacy in information in the hands of third parties, the Court held that, "Where, as here, there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied."

People v. Earls, 477 Mich. 1119 (2007)

Witness testimony discovered as the result of a Sixth Amendment violation not excluded

Here, the defendant validly waived his Miranda rights in front of counsel and told police about two witnesses he had encountered the night of the offense. The court held that the testimony from the witnesses was admissible because its connection to the defendant's statements was too attenuated to make out a Sixth Amendment violation and the statement obtained from the defendant was not the product of police misconduct and so the exclusionary rule did not apply.

People v. Frazier, 478 Mich. 231 (2007)

Double Jeopardy

First-degree felony murder and non-predicate armed robbery

First-degree felony murder and non-predicate armed robbery each have an element not found in the other. Therefore, these crimes are not the “same offense” and a defendant may be punished separately for each offense without violating double jeopardy.

People v. Smith, 478 Mich. 292 (2007)

Armed robbery and felonious assault

The defendant was convicted of armed robbery and assault with a dangerous weapon for using a gun to hold up a woman at an ATM machine, and assaulting her. The defendant argues that his conviction violates his constitutional protection against double jeopardy, and that Sixth Amendment rights to confront witnesses against him. Felonious assault requires proof of the use of a dangerous weapon while armed robbery does not. Further, armed robbery requires actions in the course of committing a larceny.

People v. Chambers, __ Mich. App __ (No. 271216, Oct. 9, 2007)

Ineffective Assistance of Counsel

Failure to move for a change of venue

The defendant argued that he was denied the effective assistance of counsel due to counsel’s failure to move for a change of venue. The Court of Appeals held that even though the trial court excused 36 percent of the jury venire for bias, this was “not so high as to engender the presumption of a widespread community hostility toward defendant.” The totality of the circumstances surrounding the jury selection did “not overcome the seated jurors’ assurances that they could decide the case impartially.”

People v. Cline, __ Mich. App. __ (No. 268604, Sept. 18, 2007)

NOTES