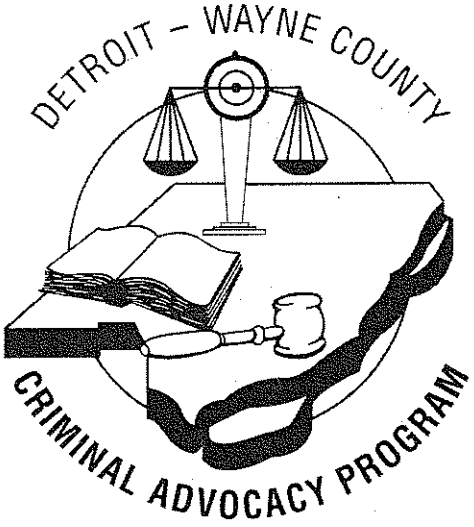
MICHIGAN CRIMINAL CASE LAW UPDATE November 2011-October 2012



November 16, 2012

Prepared by Professors Ronald J. Bretz and James M. Peden
Cooley Law School
For Wayne County Criminal Advocacy Program

Moderator: Judge Thomas E. Jackson
Wayne County Circuit Court/Criminal Division

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PRETRIAL PROCEDURE

Jury Selection

Fair cross-section

Where a defendant's jury venire contained only one African-American member, the trial court did not err in finding no violation of defendant's Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. The jury venire was the product of a computer programming error which caused underrepresentation of certain zip codes containing higher concentrations of African-Americans in the county. The defendant's prima facie case failed on the second prong of the *Duren* test [*Duren v Missouri*, 439 U.S. 357, 99 S.Ct. 664 (1979)], which requires a showing that the venire was not a fair and reasonable representation of the community. The court found that the community contained 8.25% African Americans, while the computer program only sent questionnaires to 4.17% due to the programming error. After examining venires over a significant period of time and applying numerous mathematical analyses, the court found that representation of African-Americans in the defendant's jury venire was fair and reasonable. Reverses *People v. Bryant*, 289 Mich App 260 (2011). Overrules *People v. Hubbard*, 217 Mich App 459 (1996).

People v. Bryant, 491 Mich 575 (2102)

Voir Dire

Waiver of Defendant's right to be present

Although defendant asked to be excused from the courtroom during jury voir dire, it is not a knowing waiver of the right to be present because the record does not establish that he was ever advised of his constitutional right to be present. The Court of Appeals finds no error requiring reversal as there was no evidence that defendant was prejudiced by his short absence.

People v Buie, ___ Mich App ___ (No. 278732, decided 10/2/12)

EVIDENCE

MRE 404(a)(1)

Good Character

Where a defendant was accused of CSC I against his 13-year-old granddaughter and was an employee in good standing at a juvenile detention facility, evidence of his reputation for positive interaction with the juveniles should have been allowed under MRE 404(a)(1). The trial court erred in prohibiting the good character evidence but the omission constituted harmless error.

People v King, ___ Mich App ___ (No. 301793, decided 7/31/12)

MRE 404b & MCL 768.27a

Statute controls conflict

MCL 768.27a irreconcilably conflicts with MRE 404b. The statue permits the use of propensity evidence when the defendant is charged with certain offenses against children. Under MRE 404b, other bad acts cannot be used to show the propensity of the defendant to commit the charged offense. With regard to covered offenses, the statute prevails over the rule of evidence. Although both rules are subject to the 403 balancing test, the tendency of the evidence to show propensity weighs in favor of admissibility under the statute.

People v Watkins, 491 Mich 450 (2012)

MCL 768.27a

Propensity is a proper purpose

At defendant's trial on CSC I charges involving an adult victim and two minor victims, the trial court did not err in admitting testimony from a former victim of sexual assault perpetrated by defendant when the former victim was 13. Under MCL 768.27a the prosecution may seek to admit against a defendant accused of an enumerated offense against a child, including CSC I, any evidence that the defendant previously committed an enumerated offense against a child. The jury can consider the evidence for its bearing on any matter relevant to the case including propensity. MRE 403 can be used to exclude such evidence if it is overly prejudicial but unfair prejudice cannot be based on the argument that such evidence may allow a jury to draw a propensity inference.

People v Buie, ___ Mich App ___ (No. 278732, decided 10/2/12)

Cleric-Communicant Privilege

No waiver

The trial court correctly excluded under MCL 767.5(a)(2) statements made by defendant, who was a minor at the time of the statements, to his pastor despite disclosure of the content of the communication by parties other than the defendant and the presence of an adult family member during the communication. Waiver of the privilege must be done by defendant, thus the disclosure of the content of the communication by the defendant's mother and pastor did not destroy the privilege. Additionally, the privilege will not be destroyed by the presence of a third party where that party is an adult family member aiding in the support of the minor defendant during a difficult conversation.

People v Bragg, ___ Mich App ___ (No. 305140, decided 5/8/12)

MRE 702

Admissibility of expert testimony on false confessions

The defendant attempted to present an expert witness to testify regarding the published literature on police interrogation techniques and another expert to testify on the psychological characteristics of defendant that could contribute to false confessions. The trial court did not abuse its discretion in excluding the expert testimony that related to police interrogation techniques as it was not shown to be reliable. However, the trial court did abuse its discretion in excluding expert testimony that related to the psychological factors and false confessions. The trial court excluded the second expert on the basis that his testimony was dependent on the first expert. The Supreme Court disagreed and remanded for the trial court to determine if the second expert's testimony is sufficiently reliable for admissibility under MRE 702.

People v Kowalski, ___ Mich ___ (No. 141932, decided 7/30/12)

PLEA PROCEDURE

Advice of Consequences

Lifetime GPS monitoring

MCR 6.302 requires the trial court to advise a defendant pleading guilty to first or second degree CSC against a minor that he or she will be subject to the lifetime GPS monitoring. The monitoring requirement is not a collateral consequence but part of the sentence itself. Any plea without this advice will be considered unknowing and involuntary.

People v Cole, 491 Mich 325 (2012)

Failure to advise of the habitual offender maximum

The trial court advised defendant during his guilty plea to second-degree home invasion as a second-offense habitual offender that the maximum possible penalty was only 15 years. In fact the maximum sentence was 22 ½ years and the court sentenced defendant to a prison term of 6 years and 3 months to 22 years and 6 months. As a result, defendant's plea was defective. Where the trial court fails to advise the defendant of his or her habitual offender status and the impact on his maximum sentence, a plea is no longer understanding and voluntary. The appropriate remedy for a plea made involuntarily is to allow withdrawal under MCR 6.310(C). Overrules *People v. Boatman*, 273 Mich App 405 (2006).

People v Brown, 492 Mich 684 (2012)

SENTENCING

Sentencing Guidelines – Scoring

OV 1 – Aggravated use of a weapon

The trial court erred in assessing 20 points for OV 1, aggravated use of a weapon, for the defendant's delivery of heroin to an individual who later overdosed when using the heroin. The prosecution argued that heroin qualified as a chemical weapon under the statute. The court rejected this argument, holding that to qualify as a weapon under OV 1 the chemical must be "used against" the victim, not merely delivered.

People v Ball, ___ Mich App ___ (No. 303727, decided 6/19/12)

OV 3 – Physical injury to victim

OV3, physical injury to the victim, applies if the co-defendant is killed. Defendant and his co-defendant were committing a home invasion. The homeowner shot and killed the co-defendant. The Court held that defendant was correctly assessed 100 points for the death of his companion. Since the instructions do not define victim, the majority finds that anyone harmed as a result of defendant's actions is a victim.

People v Laidler, 491 Mich 339 (2012)

OV 4 – Causing psychological injury

The trial court erred in scoring 10 points for OV 4 for causing psychological injury to the victim that requires professional treatment. Although the victim never sought treatment, that fact is not dispositive. More importantly, there was no evidence that the victim in fact suffered a severe psychological injury.

People v Lockett, 295 Mich App 1675 (2012)

Trial court correctly assessed 10 points for OV 4, scored when a victim suffers from "serious psychological injury requiring professional treatment". Defendant was convicted of bank robbery and at sentencing the bank teller's victim impact statement showed she had a constant fear of being robbed by her bank customers and suffered from sleeplessness, sufficient to justify a score of 10 points for OV 4.

People v Earl, ___ Mich App ___ (No. 302945, decided 6/19/12)

The trial court correctly assessed 10 points for OV 4 where the victim reported feeling angry, hurt, violated, and frightened by the defendant's home invasion. Ten points are assessed for OV 4 under circumstances where serious psychological injury requiring professional treatments occurs to the victim, regardless of whether the professional treatment is sought. The fact that the victim never sought treatment was irrelevant, and the statements made by the victim were significantly similar to those previously upheld as warranting a score of 10 points under OV 4.

People v Williams, ___ Mich App ___ (No. 306917, decided 10/16/12)

OV 7 – Conduct designed to substantially increase fear and anxiety

The trial court erred in assessing 50 points for OV 7 because defendant's conduct did not fall within the statute. Defendant struck each victim once in the head, but there is no evidence that either was injured. This behavior, while illegal, was not savage or inhuman in comparison with behavior that has occurred during other armed robberies or felonious assaults. Defendant's conduct was reprehensible, and his actions were undoubtedly designed to cause fear and anxiety in his victims, as is the conduct in all armed robberies. However, because OV 7, by its own terms, is to be scored at 50 points only for conduct "designed to substantially increase the fear and anxiety" of a victim, the Court of Appeals concluded that zero points should have been assessed for OV 7, and vacated the defendant's sentences and remand for resentencing.

People v Glenn, 295 Mich App 529 (2012), *lv. gt'd.*, 491 Mich 934 (2012)

OV 9 – Number of victims

The trial court erred in assessing 25 points for OV 9, finding that 20 or more individuals were put at risk for property damage based upon defendant's vandalism of two school buildings. The Court of Appeals identified a difference between direct victims, those immediately affected by the defendant's actions, and indirect victims, such as the community at large who are more remotely affected. The court held that the community, and the individuals that comprise the community, are indirect victims and cannot be used when scoring OV 9.

People v Carrigan, ___ Mich App ___ (No. 302090, decided 8/2/12)

OV 10 – Predatory conduct

The trial court correctly assessed 15 points for OV 10 where defendant, convicted of CSC I, picked up and drove the victim to his house to engage in sexual activity with her, bought her numerous gifts, and purchased a cell phone to enable their communication. OV 10 is scored at 15 points when predatory behavior is involved, meaning conduct occurring before the offense that is aimed at victimization. The court held that all of these actions qualified as predatory conduct, especially with a susceptible, young victim and 15 points was appropriate.

People v Johnson, ___ Mich App ___ (No. 302173, decided 10/16/12)

OV 10 – Domestic relationship

The trial court assessed defendant 10 points for OV 10 based on the court's finding that defendant exploited a domestic relationship. This was error. The defendant and the victim had stopped dating at least two months prior to the assault. Although they remained friends, both were dating other people, they did not continue to have sex, and they did not live together. The victim and defendant had limited contact, although the defendant took the victim to school and they occasionally talked on the phone. Consistent with *People v Jamison*, 292 Mich App 440, 447 (2011) this did not constitute a domestic relationship for the purpose of scoring OV 10.

People v Brantley, ___ Mich App ___ (No. 298488, decided 5/17/12)

OV 11 – Other sexual penetrations

The trial court correctly scored 50 points for OV 11 where defendant had been convicted of CSC I and had engaged in sexual intercourse and other penetrative sexual conduct over the course of three years with the victim. OV 11 is scored at 50 points for two or more sexual penetrative acts above and beyond the penetration required to form the basis for the offense. Defendant was convicted of three separate counts of CSC I and the victim testified to having sexual intercourse more than once with the defendant, performing fellatio on defendant more than once and engaging in cunnilingus with the defendant more than once, thus engaging in at least three penetrative acts beyond those needed to form the basis of the defendant's CSC I convictions and warranting a score of 50 points for OV 11.

People v Johnson, ___ Mich App ___ (No. 302173, decided 10/16/12)

OV 13 – Continuing pattern of criminal behavior

Trial court correctly assessed 10 points for OV 13, which examines a defendant's "continuing pattern of criminal behavior." Defendant argued that trial court incorrectly considered a dismissed bank robbery charge from 2008. However, if the crimes occur within 5 years the court must consider it regardless of whether or not the charge resulted in a conviction. The surveillance tapes from the 2008 robbery and no record of the charges being dismissed for lack of probable cause were enough to justify scoring 10 points for defendant on OV 13.

People v Earl, ___ Mich App ___ (No. 302945, decided 6/19/12)

OV 15 – Aggravated controlled substance offenses

Trial court erred in assessing 50 points for OV 15 when it based the score on conduct related to a charge dismissed as part of a plea deal. Defendant was pulled over for failure to stop at a stop sign and upon search of the vehicle police discovered .6 grams of cocaine. The officers also obtained information that led to the discovery of an additional 64 grams of cocaine located with the defendant's girlfriend at a nearby hotel. Defendant pled guilty to several charges, including, possession with intent to deliver less than 50 grams of cocaine under MCL 333.7401(2)(a)(*iv*). In exchange for his plea, the more serious charges relating to the cocaine in the hotel room were dropped. OV 15 is scored at 50 if there are more than 50 grams but less than 450 grams of a controlled substance involved. However, scoring is to be based upon the sentencing offense alone. The court held that despite the fact that conduct associated with both charges occurred simultaneously, OV 15 requires that the conduct be separated and viewed independently, and then only that conduct associated with the sentencing offense can be considered in scoring.

People v Gray, ___ Mich App ___ (No. 302168, decided 6/5/12)

PRV 1 – Prior high severity felony convictions

The trial court correctly assessed 25 points for PRV 1 where defendant had been previously adjudicated responsible for first-degree home invasion, considered a high-severity felony, and served a term under the Holmes Youthful Trainee Act (HYTA). A score of 25 is assigned under PRV 1 when the defendant has a prior high-severity felony conviction. According to MCL 777.50(4)(a)(i), a guilty plea to a high-severity felony followed by a term under HYTA qualifies as a conviction for purposes of scoring PRV 1. Defendant erroneously relied on a case decided two years before the legislature's enactment of MCL 777.50, which renders that opinion no longer binding under MCR 7.215(J).

People v Williams, ___ Mich App ___ (No. 306917, decided 10/16/12)

Downward departure

The trial court erred in departing downward from the sentencing guidelines in an effort to protect defendant's right to seek cancellation of deportation proceedings. A court's departure from the sentencing guidelines must have a substantial and compelling reason. In this case, the trial court based its departure on its own misinterpretation of a federal statute. The court mistakenly assumed that the actual sentence, rather than the statutory maximum, was the governing sentence used in making the determination of defendant's right to seek cancellation of deportation proceedings, rendering the reasoning behind the departure less than substantial and compelling as required, and the sentence invalid.

People v Akhmedov, ___ Mich App ___ (Nos. 303129 and 305625, decided 7/26/12)

Mandatory jail

Operating while intoxicated, second offense

Trial court erred in sentencing defendant to 30 days of electronic monitoring in lieu of the 30 day jail sentence required by MCL 257.625(7)(a)(ii)(B). The court found that the 30 days of jail incarceration is mandatory, not discretionary, for a second offense of operating a vehicle while intoxicated and that electronic monitoring is not equivalent to incarceration in the county jail and thus an invalid sentence.

People v Pennebaker, ___ Mich App ___ (No. 304708, decided 9/13/12)

Sentence Enhancers

Sexual Delinquency

Defendant plead nolo contendere to aggravated indecent exposure and indecent exposure. The trial court sentenced defendant as a sexual deviant using the sexual delinquency sentence enhancer under MCL 750.335a(2)(c). However, a finding of sexual delinquency in a case where the defendant pleads guilty requires a separate hearing under MCL 767.71a, which the trial court failed to conduct. Thus, the court vacated the sexual deviant sentence enhancer.

People v Franklin, ___ Mich App ___ (No. 296591, decided 7/3/12)

Habitual Offender

The court did not err in using a circuit court felony conviction, despite the fact that the conviction resulted in a juvenile sentence, when calculating the defendant's habitual offender status under MCL 769.11. In a prior case, defendant had been waived from juvenile court, tried and convicted as an adult of a felony in circuit court, but received a juvenile sentence. However, the habitual offender status is only concerned with the "conviction," rather than the subsequent sentence. Thus, because defendant was convicted of a felony as an adult in circuit court his resulting juvenile sentence is irrelevant and the court properly considered the conviction as a predicate felony for habitual offender status in the defendant's new case.

People v Jones, ___ Mich App ___ (No. 303753, decided 6/19/12)

Lifetime GPS Monitoring

Required in every CSC I case

Despite defendant's "compelling" argument and a string of unpublished Court of Appeals decisions holding that the plain language of MCL 750.520n(1) requires the court to impose GPS monitoring on those convicted of CSC I or II only when the defendant is 17 years old or older and the victim is less than 13 years old, this panel finds that lifetime GPS monitoring is required in every CSC I case regardless of the age of the defendant or the age of the victim.

People v Brantley, ___ Mich App ___ (No. 298488, decided 5/17/12)

The court disagrees with the *Brantley* holding that ages of the victim and defendant do not matter, finding the *Brantley* dissent compelling in its argument that when the statute is read together in the context of all the relevant statutes the legislature was attempting to protect the most vulnerable children from sexual predators when enacting the lifetime monitoring statute. However, the court follows *Brantley* as it is required to do so under MCR 7.215(J)(1) and requests a conflict panel be convened.

People v King, ___ Mich App ___ (No. 301793, decided 7/31/12)

Defendant argued that the trial court erred in imposing lifetime GPS monitoring following his conviction of three counts of CSC I where his victim was not under 13 at the time of his offense. Agreeing with *Brantley*, the court held that when reading the statutes together it is clear that under MCL 750.520b lifetime GPS monitoring is required for any person convicted of CSC I who is subsequently not sentenced to life without parole. The age difference is only a factor for those defendants sentenced under MCL 750.520c. Thus, because defendant was sentenced to a term of years and not life without parole lifetime GPS monitoring was appropriate.

People v Johnson, ___ Mich App ___ (No. 302173, decided 10/16/12)

Restitution

Victim

The trial court did not err when it found that Blue Cross had suffered a loss as a result of the defendant's course of criminal conduct. Defendant, an employee of a Blue Cross vendor with access to customer databases and Blue Cross numbers, attempted to use someone else's Blue Cross number to obtain a controlled substance with a fraudulent prescription. The restitution was proper to reimburse Blue Cross's expenses in an intensive investigation into defendant's actions.

People v Allen, 295 Mich App 277 (2011)

Costs

Specific basis not required

Defendant appealed the trial court's assessment of $1000 in court costs. The Court of Appeals in an earlier opinion held that while costs do not have to be based on the costs of the specific case before the court, there has to be a factual basis for the costs. *People v Sanders*, ___ Mich App ___ (No. 303051, decided 5/29/12). Thus, the court remanded the case to the trial court for an evidentiary hearing on the costs of processing felony cases. Following remand, the court found that processing a felony costs the court between $2237.55 and $4846. The Court of Appeals held that the $1000 court cost assessment in defendant's case was reasonable.

People v Sanders, ___ Mich App ___ (No. 303051, decided 10/2/12)

Holmes Youthful Trainee Act

Abuse of discretion

The trial court abused its discretion in granting defendant HYTA status. During the plea proceeding, the trial court expressed its intention to consider defendant for HYTA status. Defendant was released on bond and 21 days later committed a particularly egregious home invasion. The Court of Appeals held that defendant's actions while on bond established that he lacked the maturity to be considered for HYTA status. The trial court's decision reflected a failure to adequately take into account the severity of defendant's crimes and the importance of public safety.

People v Khanani, 296 Mich App 175 (2012)

POST-CONVICTION REMEDIES

Appeals

Newly discovered evidence

In order to obtain a new trial on the basis of newly discovered evidence, the defense has the burden of showing that the defendant was not aware of the evidence at the time of trial and using reasonable diligence could not have discovered and produced the evidence at trial. The Court holds here that the Court of Appeals erred in finding the evidence newly discovered. The record establishes that defense counsel was aware of the significance of the new evidence and could have produced it at trial with reasonable diligence.

People v Rao, 491 Mich 271 (2012)

Recovery of Appellate Costs

MCR 7.101(O) not applicable to criminal cases

Defendant attempted to recover his costs of appealing his conviction under MCR 7.101(O), which allows the prevailing party to tax the reasonable costs incurred for the appeal from the opposing party. However, the statute allows the tax as provided by MCR 2.625, a civil procedure rule. The only references within the state are to civil procedure rules and thus, the Court held that the tax was not applicable to criminal cases.

People v Rapp, ___ Mich ___ (Nos. 143343 and 143344, decided 7/27/12)

Probation Violation

Defective warrant

Defendant was arrested based on a probation violation warrant that had not been subscribed and sworn to under oath as required by the Fourth Amendment. As a result, the trial court found the arrest illegal and suppressed 35 packets of heroin found in a search incident to arrest. The Court of Appeals reversed. Despite the failure of the probation officer to affirm the probable cause for the warrant under oath, the arrest was legal. Per MCL 764.15(1)(g), any peace officer can arrest without a warrant if he has reasonable cause to believe a person has violated a term of probation. Moreover, the alleged probation violation was an assault for which an arrest can also be made without a warrant. Since a warrant was not required for this arrest, any defect in the warrant is irrelevant.

People v Glenn-Powers, ___ Mich App ___ (No. 301914, decided 5/8/12)

CRIMES

Armed Robbery
Completed larceny not required

The prosecutor does not have to show a completed larceny to convict a defendant of robbery. The statute only requires that the defendant use force "in the course of committing a larceny." The statute further defines "in the course of committing a larceny" as including "acts that occur in an attempt to commit the larceny." Thus, a defendant can be convicted of either robbery or armed robbery without committing a completed larceny.

People v Williams, 491 Mich 164 (2012)

Breaking and Entering a Motor Vehicle
Causing damage

The larceny from a motor vehicle statute also punishes breaking into a motor vehicle including trailers. If the defendant causes damage to "any part" of the vehicle or trailer, he is subject to an enhanced sentence. Defendant here broke into a trailer by cutting the padlock that secured the trailer's latches. The trial court did not err in denying defendant's motion for directed verdict on the enhanced offense. The padlock was sufficiently part of the trailer under the language of the statute. The trailer owner purchased the padlock at the same time he purchased the trailer and the lock was designed for and compatible with the trailer latches.

People v Kloosterman, 295 Mich App 68 (2011)

CSC-I
Under circumstances involving the commission of another felony

Defendant was convicted of CSC-I on the theory that his act of penetrating a 17-year-old victim in view of a 12-year-old also constituted the offense of disseminating sexually explicit material to a minor. The trial court held that because the unlawful penetration occurred during the commission of another felony, it qualifies for first degree CSC. The Court of Appeals reversed. Because the victim of the other felony (the 12-year-old) was not the victim of the sexual penetration (the 17-year-old), there was an insufficient nexus between the two offenses; the victim of the sexual penetration was not impacted by the other felony.

People v Lockett, 295 Mich App 165 (2012)

Driving with a Suspended License and Causing Death
Expired license

The circuit court did not err in granting defendant's motion to quash on the charge of driving on a suspended license causing death. Although defendant did not have a valid driver's license and caused a traffic accident which resulted in the death of the driver of the other car he cannot be prosecuted under this statute. MCL 257.904(4) makes it a felony offense for a person to operate a motor vehicle having never applied for a license or with a suspended or revoked license, and to cause the death of another person by operation of that motor vehicle. Defendant, a Mexican in this country illegally, had a Mexican driver's license that had expired. Since defendant had never had his license suspended and had applied for his Mexican license which if

current is valid in the US under the 1943 Convention on the Regulation of Inter–American Automotive Traffic, he did not meet the requirements of the statute.

People v Acosta-Bautista, ___ Mich App ___ (No. 303015, 5/1/12)

Felony-Firearm
Self defense

Defendant was charged with assault with intent to murder and felony firearm. At trial he raised a self-defense claim. The trial court instructed the jury on self-defense as it related to the assault charge but also instructed that self-defense was not a defense to felony firearm. The jury acquitted defendant of assault with intent to murder and the lesser offense of assault with intent to do great bodily harm but convicted on the felony firearm charge. The Court of Appeals reversed defendant's conviction holding that self-defense can be a valid defense to felony firearm.

People v Goree, 296 Mich App 293 (2012)

Felony Murder
First and second-degree vulnerable adult abuse

The felony murder statute, MCL 750.316, provides that murder is first degree murder if it is committed during, among other crimes, "...vulnerable adult abuse in the first and second degree under section 145n..." Defendant argued that the plain text of the statute requires the prosecutor to prove *both* first and second degree vulnerable adult abuse to sustain a felony murder conviction. The Court of Appeals disagreed and held that since a defendant could not logically be guilty of both offenses for abusing one vulnerable adult, the Legislature could not have intended that both felonies be committed as a predicate to a felony murder conviction.

People v Comella, ___ Mich App ___ (No. 301458, decided 5/24/12)

Felony Non-Support
Impossibility defense

The common law defense of impossibility is a valid defense to MCL 750.165, felony non-support. To be entitled to an impossibility jury instruction the defendant must make a *prima facie* showing that they have: acted in good faith; made every reasonable effort to comply with their family support court order, including exploring every lawful avenue of obtaining the funds; and, their inability to pay was through no fault of their own. Finally, the jury must then find the impossibility by a preponderance of the evidence.

People v Likine, ___ Mich ___ (Nos. 141154, 141181, and 141513, decided 7/31/12)

Larceny from a Person
"From the person of another"

Defendant was seen by a store security guard in the act of hiding a store item in a shopping bag. The security guard followed defendant out of the store and confronted her. A "scuffle" ensued during which defendant bit and scratched the security guard. Following a jury trial, the jury acquitted the defendant of unarmed robbery, but convicted her of the lesser offense of larceny from the person. The Court of Appeals held that while defendant was probably guilty of unarmed robbery, there was insufficient evidence to support a conviction of larceny from a person. That crime requires that the property be taken "from the person or from the person's immediate area of control or immediate presence." There was no evidence to support this element.

People v Smith-Anthony, ___ Mich App ___ (No. 300480, decided 5/30/12)

Medical Marihuana Act
Section 8 affirmative defense

A defendant asserting a section 8 affirmative defense under the MMMA does not have to satisfy the requirements of the immunity provision in section 4. But to assert the section 8 defense the defendant must show that the doctor's statement was made after the enactment of the MMMA but before the defendant's arrest. Reversing *People v King*, 291 Mich App 503 (2011); reversing in part and affirming in part, *People v Kolanek*, 291 Mich App 227 (2011).

People v Kolanek, 491 Mich 382 (2012)

Section 8 pretrial motion

A section 8 defense must be raised in a pretrial motion. The charges will be dismissed if there is a prima facie showing of all the elements, and no factual disputes. The motion will be denied if there is a failure to demonstrate all the elements of the defense and then the defense cannot be raised at trial. If the elements are shown but there remain issues of fact, the jury can consider the defense. The issue here was the doctor's opinion of the amount of marijhuana the patient needed.

People v. Anderson, ___Mich App___, (No. 300641, decided 10/23/2012)

Manslaughter

Imperfect self-defense

The Court of Appeals reversed defendant's bench-tried voluntary manslaughter conviction holding that the trial court misapplied the imperfect self-defense doctrine in its findings. The Supreme Court reversed. The so-called common law imperfect self-defense doctrine does not exist in Michigan. While it had been applied in a few Court of Appeals cases, the Supreme Court has never acknowledged it. It was not part of the common law in Michigan when the Legislature codified crimes in 1846. In fact, the doctrine itself did not appear in any case law nationally until a Texas case in 1882. Although Michigan criminal law does include numerous common law concepts and definitions, they are limited to those that were in effect as of 1846. The circumstances used to show imperfect self-defense can still reduce a murder to manslaughter but the defendant cannot use imperfect self-defense as a shortcut.

People v Reese, 491 Mich 127 (2012)

Misconduct in Office

Specific misdemeanor statute controls

Defendant, a Circuit Court judge, was charged with four counts of felony misconduct in office under MCL 750.505, which provides for criminal penalties and punishment when a person commits an offense that was indictable at the common law, such as misconduct in office, absent a statutory provision that expressly punishes the charged offense. The trial court dismissed three of the four counts. The Court of Appeals affirmed those dismissals and also dismissed the fourth count. The Court relied on the language of MCL 750.505 that prohibits use of that statute if there is a specific statute that punishes the same behavior. In fact, MCL 750.478 specifically punishes misconduct in office as a misdemeanor when it entails willful neglect to perform a legal duty (nonfeasance). Since that was the nature of the misconduct charge in this case, the Court remanded for entry of an order dismissing the fourth count without prejudice.

People v Waterstone, 296 Mich App 121 (2012)

Operating a Vehicle While Intoxicated (OWI)

Sufficiency of evidence of operating

Defendant argued that she was not "operating" her vehicle within the meaning of the OWI statute. However, the police in-car video showed that defendant's vehicle, while in a legal parking space, was running apparently in reverse with the driver's foot on the brake. The driver then shifted back into park, taking her foot off the brake. While the vehicle wheels did not noticeably move, the Court of Appeals held that the trial court properly found that the Defendant was "operating" the motor vehicle within the meaning of MCL 257.625(1) because she had "actual physical control" of the vehicle as set forth in MCL 257.35a.

City of Plymouth v Longeway, 296 Mich App 1 (2012)

Operating Under the Influence of Controlled Substances
Medical marihuana users

The OUICS statute penalizes the act of driving a motor vehicle with any amount of a controlled substance in one's system. Defendant was a registered medical marihuana user who was caught driving with active THC in his system. Although the Medical Marihuana Act itself states that patients cannot drive while under the influence of marihuana, defendant argued that "zero tolerance" provision did not apply to registered users. Instead defendant argued that the prosecutor must be required to prove that defendant was actually under the influence. The Court of Appeals disagreed and held that the "zero tolerance" aspect of the law applied to all drivers. Because marijuana is still classified as a Schedule I controlled substance, it is illegal for everyone, including medical marihuana patients, to drive with active THC in their systems.

People v Koon, 296 Mich App 223 (2012)

Racketeering
"Employed by or associated with"

Defendant was convicted of conducting a criminal enterprise or racketeering under MCL 750.159i(1), for a series of fraudulent returns to Home Depot. The Court of Appeals reversed and vacated the conviction for insufficient evidence. The racketeering statute requires that a person "employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." Since defendant here was apparently working alone, he did not meet the requirement that he be employed by or associated with a criminal enterprise. The Court explicitly rejected the prosecutor's argument that defendant's sole proprietorship constituted a criminal enterprise. To "associate," a person must necessarily align or partner with another person or entity.

People v Kloosterman, ___ Mich App ___ (No. 303443, decided 5/22/12)

Reckless driving
Resulting in serious physical impairment

It was not inconsistent for a jury to find defendant guilty of assault with intent to cause great bodily harm less than murder and also of reckless driving resulting in serious physical impairment.

People v. Russell, ___Mich App___(No. 304159, decided 9/4/2012)

Resisting and Obstructing
Right to resist illegal police conduct

The resisting and obstructing statute, MCL 750.81, does not abrogate the common law right to resist an illegal arrest. Since the Legislature has never demonstrated a clear intent to abrogate the common law rule, the prosecutor must establish that the police conduct being resisted was legal. Overrules *People v Ventura*, 262 Mich App 370 (2004).

People v Moreno, 491 Mich App 38 (2012)

CONSTITUTIONAL ISSUES

Right to bear arms

Tasers and stun guns

The court held MCL 750.224a to be unconstitutional because it completely banned private possession of tasers and stun guns. Tasers and stun guns are not considered "dangerous weapons" under the Second Amendment because they are substantially less dangerous than handguns, which the US Supreme Court refused to ban in *Heller*. Because they are not considered "dangerous weapons" they are protected under the Second Amendment and the prohibition on private possession under MCL 750.224a is unconstitutional.

People v Yanna, ___ Mich App ___ (Nos. 304293 and 306144, decided 6/26/12)

Search and Seizure

Search of a car incident to arrest

After police arrested defendant for outstanding traffic warrants, they secured him in the back of the police car and searched his car, finding a handgun. Although this search would violate the Supreme Court's recent decision in *Arizona v. Gant*, 556 US 332 (2009), since it occurred before the Gant decision, it was done in reasonable reliance on existing precedent. Therefore, the evidence is admissible under the "good faith" exception to the exclusionary rule per *Davis v United States*, 564 US ___ (2011).

People v Mungo (on second remand), 295 Mich App 537 (2012)

The trial court did not err by denying defendant's motion to suppress the evidence found during the search of his vehicle following defendant's arrest for driving under the influence of controlled substances. The legality of the search in this case was based on the second prong of the holding in *Arizona v. Gant*, 556 US 332 (2009), that "it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 347, 351. In deciding defendant's motion to suppress evidence, the trial court properly determined that the officer had a sufficient reasonable suspicion based upon all those factors for him to conduct a search to determine whether there was any narcotics or prescription bottles that might have been in the vehicle that would further support his determination that the Defendant had been in fact driving while impaired by drugs.

People v Tavernier, 295 Mich App 582 (2012)

Reasonable expectation of privacy in a car

Trial court did not err in denying defendant's motion to suppress evidence found in his fiancé's vehicle. Defendant was unable to establish a reasonable expectation of privacy in his fiancé's vehicle on which to base his unreasonable search claim and motion to suppress the evidence found therein. The court held that the engagement alone was not sufficient to establish a reasonable expectation of privacy where the defendant could not also show continuous use of the vehicle or a right of access to the vehicle.

People v Earl, ___ Mich App ___ (No. 302945, decided 6/19/12)

Probable Cause

Search warrant involving marijuana

An affidavit seeking a search warrant concerning the possession, manufacture or delivery of marijuana need not include any information regarding the suspect's status or compliance with the Michigan Medical Marijuana Act, unless there is "clear and uncontroverted evidence that defendant is in full compliance with the MMMA."

People v Brown, ___ Mich App ___ (No. 303371, decided 8/28/12)

Different standards for arrest and bindover

Defendant was arrested for possession of cocaine based on cocaine residue found on a scale in a car in which defendant was a passenger. He was charged with that offense and possession with intent to deliver cocaine based on his unsuccessful attempt to discard a baggie of cocaine at the police station after his arrest. Following a preliminary exam, the district judge bound over on the latter charge but not the former, finding that the cocaine residue and scale did not belong to defendant but to the driver of the car. The circuit court then suppressed the cocaine found at the police station on the basis that the district court had effectively concluded that defendant's arrest for the residue was illegal. Therefore the later-discovered cocaine was fruit of the poisonous tree. The Court of Appeals found problems with the circuit court ruling and remanded the case for reconsideration. Probable cause required for a bind over is "greater" than that required for an arrest in that it imposes a different standard of proof. The arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing and to the probability that the government will be able to establish guilt at trial. Thus, a lack of probable cause to bind over does not equate to lack of probable cause to arrest for that offense.

People v Cohen, 294 Mich App 70 (2011)

Right of Confrontation

Right to present complete defense

Trial court did not err in prohibiting defendant accused of CSC I against his 13 year-old granddaughter from presenting evidence that his daughter would have his granddaughter steal on her behalf. The defendant had presented numerous witnesses who would have provided a complete defense if the jury had found them credible. Additionally, the defendant failed to establish a logical link between the theft acts and his allegation that his daughter and granddaughter were fabricating the allegations of sexual acts and thus the evidence was not relevant under FRE 404(b).

People v King, ___ Mich App ___ (No. 301793, decided 7/31/12)

Notice of license suspension

Confrontation clause inapplicable

A Certificate of Mailing, issued by the office of the Michigan Secretary of State, is admissible as evidence to prove an individual has gotten adequate notice of his license suspension, without corroborating or authenticating testimony of a witness. The certificate is not testimonial in nature. An objective witness would not reasonably believe that the certificate would be used at trial.

People v Nunley, 491 Mich 686 (2012)

Video testimony

The testimony of two prosecution witnesses via two-way television did not violate defendant's right of confrontation. Defense counsel consented to the use of the live video but also advised the trial court that her client "questioned the veracity of these proceedings." The Supreme Court notes that the right of confrontation can be waived and that such a waiver need only come from defense counsel. Finding that defense counsel adequately waived defendant's right of confrontation, the Supreme Court affirmed the conviction. Reverse *People v Buie (After Remand)*, 291 Mich App 259 (2011).

People v Buie, 491 Mich 294 (2012)

Confessions

Functional equivalent of interrogation

After defendant was arrested for murder and read his *Miranda* warnings, he invoked his right to remain silent. The detective immediately responded to defendant's invocation by saying, "I'm not asking you questions, I'm just telling you. I hope that the gun is in a place where nobody can get a hold [sic] of it and nobody else can get hurt by it, okay?" Defendant responded that it was an accident and he didn't mean for it to happen. The trial court suppressed the statement, finding that the officer violated defendant's rights by engaging in the functional equivalent of interrogation after the invocation of the right to silence. The Court of Appeals reversed and held that the officer's statement was not the functional equivalent of interrogation. According to the court, the detective should not have known that his comment would lead to an incriminating statement. Instead, the Court believed that the detective, rather than attempting to get defendant to incriminate himself, was just "expressing his concern."

People v White, 294 Mich App 622 (2011), *lv. gt'd.*, 491 Mich 890 (2012)

Miranda and parole officer custodial interrogation

The police arrested defendant for violating his parole after they received information that he committed a robbery. They advised defendant of his *Miranda* rights and interrogated him. Defendant invoked his right to counsel and the interrogation ended. Three days later, a parole officer served defendant with parole-violation charges while defendant was still in jail. The parole officer did not advise defendant of his *Miranda* rights and asked defendant for his statement regarding the robbery. Defendant told the parole officer that he committed the robbery. The confession was used to convict defendant of the robbery. The Court of Appeals reversed defendant's conviction and held the confession inadmissible as a violation of *Miranda*. The

Court found that the parole officer was interrogating defendant in custody in an effort to obtain incriminating statements. Finally, even though the Court did not find that the parole officer was acting at the behest of the police, she was still bound by *Miranda*. Even though there are no published opinions in Michigan applying *Miranda* to interrogation by a parole officer, many federal courts and other states have done so.

People v Elliott, 295 Mich App 623 (2011), *lv. gt'd.*, 491 Mich 938 (2012)

Ineffective Assistance of Counsel

Deficient performance at both pretrial and trial stages

Defense counsel was ineffective in failing to object to multiple instances of inadmissible hearsay testimony that bolstered the complaining witness. Despite trial counsel's testimony that the failure to object was part of his trial strategy, the Court of Appeals rejected counsel's testimony and found his strategy objectively unreasonable. Counsel was also ineffective in failing to advise defendant that a conviction on the charged offense of CSC I carried a mandatory 25–year minimum. In fact, counsel erroneously advised his client that conviction would likely result in a minimum sentence of between 5 and 8 years. Since defendant rejected a plea to CSC IV based on this advice, the Court of Appeals remanded for reinstatement of the plea offer or a new trial if defendant rejects the plea.

People v Douglas, 296 Mich App 186 (2012); *lv. gt'd.* ___ Mich ___ (No. 145646, decided, 10/24/12)

Prejudice requirement

The trial court did not clearly err in finding that Defendant failed to show that his trial attorney's actions fell below an objective standard of reasonableness. The Court of Appeals noted: "Although we might disagree with these findings, mere disagreement is not a sufficient basis for determining that they are clearly erroneous." Thus, defendant was not denied the effective assistance of counsel. Reversing *People v Gioglio*, 292 Mich App 173 (2011).

People v Gioglio (on remand), 296 Mich App 17 (2012).

Advice of deportation consequences

The United States Supreme Court held in *Padilla v. Kentucky*, 130 S.Ct. 473 (2010), that it is ineffective assistance for defense counsel to fail to advise a client subject to deportation of the deportation consequences of his guilty plea to a criminal offense. The Court of Appeals held this rule non-retroactive as a new rule of criminal procedure.

People v Gomez, 295 Mich App 411 (2012), held in abeyance pending *Chaidez v. United States*, *cert gt'd* 132 S Ct 2101 (2012), ___ Mich ___ (No. 144897, issued 6/25/12)

Decision not to call a witness or object to *voir dire* procedure

Defense counsel was not ineffective because he made a conscious tactical decision to not call a witness and did not object to the trial court partially clearing the courtroom during voir dire. The witness testimony would have contradicted other witness testimony, contrary to the physical evidence, and been inconsistent with the defense theory of the case. The court had a substantial reason for partially clearing the courtroom, a lack of space.

People v. Russell, ____Mich App____, (No. 305159, decided 9/4/2012)

Failure to object to complete clearing of court for *voir dire*

The defendant's right to a public trial protected by the 6th Amendment was forfeited when his defense counsel did not object to the trial court's apparently *sua sponte* order vacating the courtroom prior to *voir dire*. Although it was clear error, it did not affect the outcome of the trial. Nor was counsel ineffective for not objecting to the procedure.

People v. Vaughn, 492 Mich 642,(2012)

Right to Self-Representation

Requires meaningful inquiry

A criminal defendant has a constitutional right of self-representation pursuant to the Sixth Amendment. Before a court can make a determination, there must be an inquiry into (1) whether defendant waived counsel unequivocally, (2) whether the defendant truly understands the significance and consequence associated with self-representation, and (3) whether self-representation would unduly inconvenience or burden the court. The trial court denied defendant's request on the basis that he lacked proper legal ability without first making a meaningful inquiry into the other factors. The Court of Appeals held that this denial was a structural error that required remand for a new trial.

People v Brooks, 293 Mich App 525 (2011), *vacated in part on different grounds, aff'd in part*, 490 Mich 993 (2012).

Double Jeopardy

Same-elements test

Defendant pled nolo contendere to aggravated indecent exposure and indecent exposure. The defendant argued that his convictions violated double jeopardy. The court used the same-elements test and determined that aggravated indecent exposure contains all the same elements as indecent exposure rendering it the same offense for double jeopardy purposes. The appropriate remedy in a double jeopardy situation is to vacate the lesser crime and affirm the greater. Thus, the court vacated the indecent exposure charge and affirmed the aggravated indecent exposure charge.

People v Franklin, ___ Mich App ___ (No. 296591, decided 7/3/12)

Directed verdict based on error of law

The trial court granted defendant's motion for directed verdict on a charge of burning real property because the prosecutor failed to prove that the building burned was not a dwelling. The motion was granted in error. The crime charged does not require as an element that the burned building was not a dwelling. The majority acknowledged that double jeopardy normally prevents a retrial even where a directed verdict is erroneously granted. But the majority also held that the double jeopardy bar does not apply unless the directed verdict resolves a factual element of the offense in defendant's favor. Since "non-dwelling" was not an element of the charged offense, the trial court's ruling was not a resolution of a factual element. Double jeopardy does not bar a retrial of this defendant. Note: the US Supreme Court has granted certiorari to the defendant.

People v Evans, 491 Mich 1 (2012), *cert. gt'd*, 132 S Ct 2753 (2012)

Ex Post Facto

Retroactivity of Crime Victim's Rights Assessment fee

The trial court did not violate the *Ex Post Facto* clause, which prohibits inflicting greater punishment for crimes committed prior to the statute's effective date, in requiring defendant to pay the statutorily increased crime victim's rights assessment (CVRA) fee of $130 instead of the previous $60 fee. The court held that the CVRA is not intended as restitution, nor is it intended to be punitive and thus not subject to the Ex Post Facto clause prohibition on retroactivity. Overrules prior unpublished holdings that the CVRA was classified as restitution or punitive in nature.

People v Earl, ___ Mich App ___ (No. 302945, decided 6/19/12)

Void for Vagueness

Copying audio or video recordings for gain

Defendant was charged with copying video recordings for gain. The statute provides that "a person shall not . . . sell, rent, distribute, transport, or possess for the purpose of selling, renting, distributing, or transporting, or any combination thereof, a recording with knowledge that the recording" does not "contain in a prominent place on its cover, box, jacket, or label the true name and address of the manufacturer." Defendant argued that the "prominent place" language was unconstitutionally vague. The Court of Appeals disagreed. In order to mount such a challenge, the defendant must first point to facts that establish that he attempted to comply with the statute. Because the DVDs in defendant's possession did not contain the names and addresses of the manufacturers in any way, he cannot claim the statute was vague.

People v Douglas, 295 Mich App 129 (2011)

Driving with an Obstructed View

Statute not vague

Police stopped defendant's car because the officer observed an air freshener hanging from defendant's rear view mirror and believed that it obstructed defendant's vision in violation of MCL 257.709 ("[a] person shall not drive a motor vehicle with any of the following: (c) [a] dangling ornament or other suspended object that obstructs the vision of the driver of the vehicle, except as authorized by law"). The trial court held the statute was unconstitutionally vague and therefore the stop was illegal. The court suppressed the heroin and dismissed the case. The Court of Appeals reversed. The statue is not void for vagueness. The language of the statute is "clear enough to permit a citizen of ordinary intelligence a reasonable opportunity to know what the Legislature intended to prohibit and also not so indefinite that unlimited discretion is conferred on police officers to determine whether an offense has occurred."

People v Dillon, ___ Mich App ___ (No. 303083, decided 5/15/12)

Ordinance overly broad

An ordinance which prohibits individuals "disrupting" the "normal activities" of individuals working for Michigan State University is overly broad and could criminalize protected speech. *People v. Rapp,* 429 Mich 67, (2012).

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