

**MICHIGAN CRIMINAL
CASE LAW UPDATE
November 2015 – October 2016**

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PRETRIAL PROCEDURE

Remand for Continuation of Preliminary Exam

Abuse of discretion

In denying defendant's motion to quash, the circuit court found that there was probable cause to support the bindover decision. However, the court did grant defendants' motion to remand for a continuation of the prelim based on evidence that was not available during the original exam. The circuit court's announced purpose for the remand was to permit defendants "an opportunity to engage in 'meaningful cross-examination' at the preliminary examination in the event that witnesses became unavailable at trial." This was an abuse of discretion. The circuit court's power to remand for a preliminary exam is limited to: 1) where the court determines that probable cause was not established and remands to give the prosecutor an opportunity to "remedy the shortcomings", 2) where defendant has waived the prelim and the court determines that there was a defect in the waiver, and 3) where the prosecutor seeks to add a charge in circuit court on which the defendant did not have a preliminary exam.

People v. Taylor, ___ Mich App ___ (Nos. 330497, 330499, decided 6/21/16)

Jury Selection

Batson challenge

During jury selection, defense counsel raised a *Batson* challenge when the prosecutor peremptorily excused two African-American jurors. The prosecutor responded that he excused the jurors because of their "demeanor." The trial court accepted the prosecutor's response without further inquiry. This was error. The court failed to comply with the two of the *Batson* requirements: the court did not give the defense an opportunity to rebut the prosecutor's reason for the peremptory challenges and the court failed to conduct a hearing and make factual findings on the legitimacy of the prosecutor's stated reasons. Remanded for an evidentiary hearing for the court to conduct the complete *Batson* analysis.

People v. Tennille, ___ Mich App ___ (Nos. 323059, 323314, decided 4/14/16)

Discovery

In-camera review of complainant's counseling records

The trial court abused its discretion in ordering in-camera review of the CSC complainant's counseling records. Defendant argued that since complainant had been the victim of a CSC by someone else three years earlier and said that the alleged abuse in this case occurred like it did "the last time," her "counseling records likely contained material necessary to his defense." This was an insufficient basis for the in-camera review and amounted to nothing more than a prohibited fishing expedition.

People v. Davis-Christian, ___ Mich App ___ (No. 329924, decided 6/30/16)

Amendment of Information

No abuse of discretion

The trial court did not abuse its discretion in permitting the prosecutor to amend the information on the second day of trial. The prosecutor announced the morning before trial started that she intended to add another charge if the evidence at trial supported it. The defense was made aware of the possible new charge in advance of trial so it was not a surprise. Also, contrary to defendant's argument, the added charge was not based on prosecutorial vindictiveness.

People v. Perry, ___ Mich App ___ (No. 328409, decided 10/27/16)

TRIAL PROCEDURE

Jury Instructions

First-degree home invasion – special instruction

Before trial on defendant’s charge of first-degree home invasion, the prosecutor requested a special instruction for the situation where a defendant lawfully gains access to a home but then uses force to enter a room within the home. The court agreed to give the following instruction: “Where a[d]efendant [g]ains access to a building without breaking, but has no right to enter an inner portion of that building, the defendant’s use of force to gain entry into that inner portion is a breaking.” The Court of Appeals granted defendant’s interlocutory appeal and reversed the trial court. The requested instruction covers a situation not included in the CJI2d and “such a fact pattern does not fall within proscribed conduct under the plain language of MCL 750.110a(2).”

People v. Bush, ___ Mich App ___ (No. 326658, decided 4/21/16)

Second and third-degree home invasion

The trial court erred in instructing the jury on third-degree home invasion as a lesser offense of second-degree home invasion. Third-degree home invasion is a necessarily included offense of second-degree home invasion when, as in this case, the latter is charged with larceny as its predicate offense. However, there was no evidence to support the instruction in this case as defendant’s only purpose in the home invasion was to commit larceny. The error did not require reversal. Defense counsel requested that the lesser offense instruction be given and the error did not affect defendant’s substantial rights. The Court finds that the erroneous instruction “...aided defendant by allowing him a chance to be convicted of a lesser offense based on a predicate offense that would have supported a higher charge.”

People v. Jackson (On Reconsideration), 313 Mich App 409 (2015)

Written instead of oral instructions on the elements of the offense

The trial court erred requiring reversal when it gave the jury a written instruction on the elements of the offense but never read the elements aloud. While the court rules do not explicitly require the court to instruct on the elements aloud, the rules contemplate that written instructions alone are insufficient. “Read in context, a trial court may not simply skip the reading-aloud step by merely handing the jurors a document listing the elements of the charged crimes.” The Court also found reversal required because the trial court’s written instruction on felony firearm were inaccurate and failed to give the proper elements.

People v. Traver, ___ Mich App ___ (No. 325883, decided 8/2/16)

Witnesses

Use of support animal

In a question of first impression in Michigan, the Court of Appeals approved of the use of support animals in the courtroom. Michigan statutes only allow the use of a support person in the courtroom, MCL 600.2163a(4), and the Court conceded that the dog, Mr. Weebers, was not a person. However, the trial court has broad discretion to control its courtroom and the manner in which witnesses are interrogated. The use of a support animal to assist a youthful victim in a difficult situation is within that discretion. Although it would be good practice for the trial court to give reasons on the record for allowing the use of a support animal, the failure of the court to do so here was harmless as the youthfulness of the 6-year-old complainant was certainly a sufficient reason.

People v. Johnson, ___ Mich App ___ (No. 325857, decided 4/19/16)

Prosecutorial Misconduct (or Error)

“Grisly” and “hyperbolic” prosecutor argument

In closing argument, the prosecutor argued that defendant could be convicted as an aider and abettor based on a “team theory” and analogized to a sports team where all the members of the team celebrate a victory. The prosecutor also referred to the homicide victim as having been transformed from a “Wayne State University football player into a piece of meat sitting on a slab.” Finally, the prosecutor used a biblical reference in his closing to portray the victim as someone who was simply trying to make peace the night he was killed. Although the Court characterized the latter two arguments as “grisly” and “hyperbolic”, the prosecutor’s conduct did not deny defendant a fair trial.

People v. Blevins, 314 Mich App 339 (2016)

Denigration of defense counsel

The prosecutor’s argument referring to defense counsel as a “mudslinger” who “pulls things out of people and muddies up the water” was improper. It suggested that defense counsel was trying to distract the jurors from the truth. The issue was not preserved and any prejudice was cured by the trial court’s instruction that the attorneys’ arguments were not evidence.

People v. Schrauben, 314 Mich App 181 (2016)

EVIDENCE

MRE 404(b)

Abuse of discretion

At defendant's trial on charges of first degree murder, mutilation of a human body, and various weapons offenses, the trial court permitted the prosecutor to introduce evidence that 17 years earlier, defendant sexually assaulted and attempted to murder a woman. The trial court abused its discretion in permitting the sexual assault but the attempted murder shared enough similarities to the charged offense that it was properly admitted to show defendant's scheme, plan, or system in committing the charged offenses. Erroneous introduction of the prior sexual assault did not require a new trial as it was not a miscarriage of justice.

People v. Bass, ___ Mich App ___ (No. 327358, decided 9/13/16)

MRE 702

Police officer as expert

The trial court abused its discretion by allowing a police officer to give an opinion that a person in a surveillance video was defendant. The officer's testimony was lay opinion testimony which improperly invaded the province of the jury. But in this case, the identity of the assailants was not in question and defendant confessed to his participation. The error was harmless.

People v. Perkins, 314 Mich App 140 (2016)

MRE 801

Impeachment with extrinsic evidence

The trial court erred in permitting the prosecutor to impeach a witness's testimony that he did not recall making a statement to the police with extrinsic evidence of the substance of the statement. If a witness does not remember or denies making a statement, the witness may be impeached with the time, place, circumstances, and subject matter of the statement but not its contents. The substance of the statement as recounted by a police officer witness was inadmissible hearsay. The error was not harmless as the hearsay statement buttressed the complainant's testimony.

People v. Shaw, ___ Mich App ___ (No. 313786, 6/14/16)

Appointment of Defense Expert

Abuse of discretion to deny computer expert

The prosecutor in defendant's child porn case relied on an expert at the preliminary exam to obtain a bindover. Prior to trial, defense counsel requested the court to appoint Larry Dalman to investigate defendant's claim that the child porn found on his computer had been inadvertently downloaded. Counsel advised the court that he was not sophisticated in computer technology and needed the expert's assistance to prepare for trial and effectively rebut the prosecutor's expert. The court denied the motion finding an insufficient connection between the specifics of defendant's case and the need for an expert. The Court of Appeals held that the denial was an abuse of discretion. The defense established a sufficient nexus to justify the need for an expert. In response to the prosecutor's argument that defendant has to show that his expert's conclusions would be different from the prosecutor's expert, the Court responded: "We are troubled with the logic that a defendant who admits technical ignorance and who has no resources from which to acquire technical resources is asked to present evidence of what evidence an expert would offer in order to garner public funds to hire the expert."

People v. Agar, ___ Mich App ___ (No. 321243, 2/2/16, approved for publication 3/22/16)

MCL 257.625a – PBT Results

Admissible in non-drunk driving cases

The trial court erred in suppressing the PBT results at defendant’s trial for possession of a weapon under the influence. The statutory limitation on admissibility of PBT results only applies to drunk driving cases.

People v. Booker, 314 Mich App 416 (2016)

MCL 768.27a

Application of MRE 403

At defendant’s trial for sexually abusing his three minor nieces, the trial court permitted the prosecutor to introduce evidence that defendant had sexually abused his own children. Although the trial court erred in not conducting an analysis under MRE 403 to determine if the evidence was substantially more prejudicial than probative, the error was harmless. Neither trial counsel not appellate counsel identified any unfair prejudice arising from “the indisputably probative evidence.”

People v. Masroor, 313 Mich App 358 (2015); *lv. gt’d*, 499 Mich. 934 (2016)

Disclosures by Law Enforcement Officers Act

False statements to internal affairs investigation

Under the DLEOA, a police officer’s false statements during an internal affairs investigation cannot be used against the officer at a subsequent criminal proceeding. The plain language of the statute establishes a legislative intent to prohibit at a criminal trial the use of all statements made in response to an internal affairs investigation whether true or not. The trial court’s dismissal of obstruction of justice charges against three police officers is affirmed.

People v. Harris, ___ Mich ___ (Nos. 149872, 149873, 150042, decided 6/22/16)

PLEA PROCEDURE

Failure to Fully Advise Defendant of Rights

Mandatory and consecutive nature of FFA sentence

The trial court erred when it failed to advise defendant of the mandatory and consecutive prison sentence of the felony firearm charge to which defendant plead guilty. This was a defect in the plea proceeding. And because defendant moved to withdraw his plea within the time period allowed in MCR 6.310, the trial court did not abuse its discretion in permitting defendant to withdraw his plea. In a related question of first impression, the Court held that the trial court did not abuse its discretion in permitting defendant to withdraw his plea to felony firearm as well as armed robbery and assault with intent to do great bodily harm less than murder. The Court found the plea to be a “package deal” and that both the prosecutor and defendant treated it as indivisible.

People v. Blanton, ___ Mich App ___ (No. 328690, decided 8/30/16)

Factual Basis for First-Degree Child Abuse

Insufficient – a fetus is not a child

Defendant pled guilty to first-degree child abuse. During the plea, defendant admitted that she had used methamphetamine up to five days before the birth of her baby. Based on that admission, the trial court accepted her plea. The Court of appeals reversed the plea-based conviction: “because a fetus is not a “child” for purposes of the first-degree child abuse statute, defendant cannot be guilty of first-degree child abuse based solely on the fact that she used methamphetamine while she was pregnant, and the trial court erred by accepting her guilty plea”. Finally, even though defendant did not preserve this error in the trial court, it affected defendant’s substantial rights because it resulted in a conviction for a crime for which she was factually innocent.

People v. Jones, ___ Mich App ___ (No. 332018, decided 9/29/16)

POST-CONVICTION & MISCELLANEOUS

Secretary of State Driving Records

Court cannot order change in driving record following dismissal of OUIL

Defendant pled guilty to OUIL and was given a delayed sentence. The court sent an abstract of the plea to the SOS. Subsequently, defendant withdrew his plea and the charge was dismissed. The court sent an amended abstract to the SOS but the now-dismissed OUIL conviction remained on defendant's driving record. The court then ordered the SOS to remove the OUIL from the record. The Court of Appeals reversed the order. The trial court has no power to order the SOS to change its records. "Although a trial judge has discretion to delay sentencing or otherwise exercise leniency following a guilty plea, see MCL 771.1, the Vehicle Code regards the plea at issue as a conviction. MCL 257.8a."

In re McCann Driving Record (People v. McCann), ___ Mich App ___ (No. 325281, decided 3/22/16)

Destruction of Arrest Records and Biometric Data

Motion erroneously granted

After the district court granted the prosecutor's request for an order of *nolle prosequi* of defendant's two counts of CSC, defendant requested destruction of his fingerprints and return of his arrest card pursuant to MCL 28.243(8). The district court denied the request finding that under the amended version of the statute, it had no authority to grant the request. On appeal to circuit court, that court granted defendant's motion. The court found that even though the amended statute appeared to prohibit such destruction and return whenever a defendant is arraigned for a CSC charge, the Legislature intended that the prohibition only apply to those defendants who were arraigned in the circuit court. The circuit court's interpretation was consistent with the earlier version of the statute. The Court of Appeals reversed. That court held that the plain language of the current statute prohibits destruction or return of any arrest of biometric data once a defendant has been arraigned on a CSC charge without regard to the court the where arraignment takes place. Because defendant had been arraigned in district court for these offenses, the trial court erred in granting the motion.

People v. Guthrie, ___ Mich App ___ (No. 327385, decided 9/22/16)

CRIMES

Armed Robbery

Representation of possession of a dangerous weapon

Defendant was convicted of armed robbery for demanding money from a Halo Burger employee while his hands were in the pockets of his hoodie, “bulging forward.” Defendant never said he had a weapon and the employee was not sure what was in his pockets but she “wasn’t taking any chances” so she gave him money. This evidence was sufficient to support an armed robbery conviction. The Court of Appeals rejected defendant’s argument that the victim never had a reasonable belief that defendant had a weapon. The statute does not require that defendant in fact possess a weapon. Nor does it require that a victim reasonably believe there is a weapon. Defendant here satisfied the statutory requirement that he “represented orally *or otherwise* that he or she was in possession of a dangerous weapon.”

People v. Henry, ___ Mich App ___ (No. 325144, decided 4/19/16)

Self-defense

The common-law defense of self-defense is available to a defendant charged with CCW when the defendant conceals an instrument that becomes a dangerous weapon only when it is used as a weapon. Defendant here pulled out a utility knife and used it to defend himself from a physical attack. The trial court instructed the jury that self-defense only applied to defendant’s felonious assault charge and not his CCW charge. The jury acquitted defendant of FA but convicted on the CCW. The Supreme Court reversed and remanded the CCW conviction.

People v. Triplett, 499 Mich 52 (2016)

Conspiracy to Commit a Legal Act in an Illegal Manner

Sufficient evidence to bind over

Defendant was charged with conspiring with another to commit a legal act in an illegal manner. The co-conspirators worked for Congressman McCotter and were responsible for filing McCotter's petitions for re-election. When they discovered at the last minute that the actual circulators had not signed the petitions as required, the defendants agreed to falsely sign their own names as circulators. They did so and filed the petitions with the State Board of Canvassers. The trial court granted defendant's motion to quash finding that the defendants did not agree to commit a *legal* act because the act, filing false petitions, was an illegal act. The Court of Appeals agreed but the Supreme Court reversed. Defendant here in fact agreed to commit a legal act – filing re-election petitions – in an illegal manner – by falsely signing them. Remanded for reinstatement of the district court's bindover decision.

People v. Seewald, 499 Mich 111 (2016)

Criminal Contempt

Valid for violation of bond condition

Defendant was convicted of criminal attempt for violating a condition of his bond for an OUIL arrest that prohibited him from using alcohol. He argued on appeal that he could not be convicted of contempt for violating a bond condition because it is not an order of the court as required by the contempt statute. The Court of Appeals rejected that argument and affirmed defendant's contempt conviction.

People v. Mysliwiew, ___ Mich App ___ (No. 326423, decided 5/24/16)

Criminal Sexual Conduct – CSC1

Penetration

There was sufficient evidence of penetration where the 9-year-old complainant testified that defendant “put his peebug in [complainant’s] butt,” the sexual assault nurse found anal tearing in complainant’s anus consistent with penetrations, and DNA consistent with defendant’s was found on complainant’s blanket.

People v. Solloway, ___ Mich App ___ (No. 324559, decided 6/30/16)

CSC3

Position of authority

Defendant, a CPS worker, was convicted of three counts of CSC3 and one count of CSC4 involving force or coercion for engaging in sexual penetration and contact with two women while defendant was investigating allegations of abuse or neglect against both women. D argued that he did not engage in any act that would constitute force or coercion under the statute. The Court agreed that there is no statutory language explicitly covering a CPS worker who uses his position to coerce sex. However, the examples of force or coercion listed in the statute are not exhaustive and can encompass any act that “induces a victim to reasonably believe that the victim has no practical choice.” The complainants here were in a vulnerable position with respect to defendant and his conduct was “unprofessional, irresponsible, and an abuse of authority.”

People v. Green, 313 Mich App 526 (2015)

Failure to Pay Child Support

Impermissible collateral attack

Attacks on the amount of child support ordered and the determination of defendant's income cannot be raised as defenses to failure to pay child support. Defendant's argument here that his veteran's disability benefits were not income and should not have been considered in setting the child support, were impermissible collateral attacks on the child support order.

People v. Ianucci, ___ Mich App ___ (No. 323604, decided 1/19/16, approved for publication 3/8/16)

Felony Murder

Aiding and abetting

There was sufficient evidence to support defendant's conviction for felony murder. The evidence established that defendant held the victim during a robbery attempt while a co-defendant shot the victim. Defendant then ran away after which the victim was shot two more times. Defendant argued that he left the scene and reached a point of safety before the fatal shots were fired. The Court rejected this argument for two reasons. It was not clear which shot caused the victim's death so it could have been the first shot while defendant was holding the victim. Even if the first shot did not cause death, based on the evidence that defendant was a willing participant in the armed robbery, he is responsible for the natural and probable consequences even if he is no longer present.

People v. Perkins, 314 Mich App 140 (2016)

Forgery

Falsely signing nominating petitions

Defendant was charged with forgery under the Michigan Election Law for signing false signatures on a nominating petition. MCL 168.937. The forgery provision of the election law is a felony with a 5-year maximum. Defendant argued successfully in the trial court that he could only have been charged with the misdemeanor of “signing names other than his... own.” MCL 168.544c. The Court of Appeals affirmed on the prosecutor’s interlocutory appeal but the Supreme Court reversed and remanded for trial on the felony charge. Contrary to the lower court rulings, there is no inherent conflict between the two provisions. Defendant’s acts violated both statutes and the prosecutor has discretion to charge either.

People v. Hall, ___ Mich ___ (No. 150677, decided 6/29/16)

Election Forgery

General forgery statute

Defendant was convicted of election forgery under a general forgery statute. MCL 168.937. The Court rejected defendant’s argument that the general forgery statute did not create the substantive crime of election forgery. The Court found that “a variety of statutory-construction rules” required rejection of defendant’s argument. Most significantly, the perjury statute defendant was convicted of violating is within the Michigan election law. MCL 168.1 et. seq. Since the purpose of the election laws is to insure the purity of elections, it is reasonable to conclude that the forgery penalty provision prohibits election forgery.

People v. Pinkney, ___ Mich App ___ (No. 325856, decided 7/26/16)

Larceny

Removal of fixtures from home during redemption period

Defendant's father owned a home for which he granted defendant full power of attorney after the father went into assisted living. Defendant and his father stopped paying on the mortgage causing the lender to foreclose. Another person purchased the home at a sheriff's sale. On the date of the sale, a statutory 6-month redemption period began giving defendant or his father the right to void the sale if they paid the purchase price to the buyer. They failed to redeem the property. The day after the redemption period ended, the purchaser inspected the house and found that many of the fixtures including the furnace, air conditioner, and duct work had been removed. Police eventually determined that defendant had gone into the house during the redemption period and taken the fixtures. The Supreme Court held that defendant cannot be charged with larceny for his act of taking the fixtures. At common law and under Michigan's statute, to be guilty of larceny, defendant must take the property of another. "Another" must be someone who has the right to possess the property to the exclusion of the defendant. That element was not met in this cases as defendant had a right to possess the property during the redemption period while the purchaser's right to possession of the property did not vest until the end of the redemption period.

People v. March, 499 Mich 389 (2016)

Medical Marijuana Act

§8 defense for non-registered caregiver or patient

A defendant who is not formally connected with a caregiver or patient under the registration process, can raise a §8 defense if he proves that he is a patient or primary caregiver as defined by the MMA. No patient may have more than one caregiver and no caregiver can have more than five patients. Also, the MMA does not permit a caregiver to provide or cultivate marijuana for another caregiver's patient. Defendants in this combined appeal may not raise §8 defenses as neither of them can satisfy the above requirements.

People v. Bylsma, ___ Mich App ___ (Nos. 317904, 321556, decided 5/17/16)

Private place

Defendant, a licensed medical marijuana user, was charged with possession for smoking a joint in his parked car at the Soaring Eagle Casino. The trial court dismissed the charge finding that defendant was immune from prosecution because he was in a “private place” in his parked car. Court of Appeals reversed. The parking lot is a public place even if the defendant is inside a private car. The use of a private car does not transform the public lot into a private place.

People v. Carlton, 313 Mich App 339 (2015)

Definition of marijuana plant

The MMMA allows a caregiver to possess up to 12 plants for each patient. Defendant as both a patient and a caregiver for one other person was allowed to possess up to 24 plants. The police found defendant in possession of 21 plants plus 22 clones or cuttings from mature plants. The Court rejected defendant’s argument that the clones did not count as plants. The MMMA does not define “plant” so the Court looked to other courts for guidance and concluded that a clone becomes a plant when it has a visible root structure. Since the trial court found that all of defendant’s 22 clones had visible root structures, they were plants for which defendant could be prosecuted.

People v. Ventura, ___ Mich App ___ (No 327289, decided 8/16/16)

OWI

Highway or other place open to the general public or generally accessible to motor vehicles

Defendant was arrested for OWI for backing out of his garage and stopping in his driveway while still in his back or side yard. The trial court correctly dismissed the charge. Defendant drove while intoxicated but only in a private place not open to the general public.

People v. Rea, ___ Mich App ___ (No. 324728, decided 4/19/16)

Possession with Intent to Deliver Drugs on or Within 1,000 Feet of School Property

Insufficient evidence

Defendants in these joined cases were both arrested at their homes after searches of those homes resulted in the discovery of controlled substances, scales, and sandwich bags. Even though the homes were within 1,000 feet of a school, there was no evidence that the defendants intended to deliver the drugs within the school zone. Since the statute explicitly prohibits possession with *intent to deliver within the school zone*, the prosecutor failed to present sufficient evidence of the specific intent.

People v. English, ___ Mich App ___ (Nos. 330389-90, decided 10/27/16)

Resisting and Obstructing

Reserve officer

Defendant allegedly refused the command of a reserve police officer which resulted in a charge of resisting and obstructing a police officer. The trial court dismissed the charge and the Court of Appeals affirmed. The Supreme Court reversed and remanded to the Court of Appeals for consideration of other issues. Both lower courts erred in concluding that the R&O statute did not apply to reserve officers. Read broadly, the statute prohibits resisting or obstructing any officer “(1) trained and (2) entrusted by a government to (3) maintain public peace and order, enforce laws, and prevent and detect crime.” A reserve police officer meets that definition.

People v. Feeley, 499 Mich 429 (2016)

CONSTITUTIONAL ISSUES

Due Process

Prosecutor's use of perjured testimony

At a motion for new trial, the defense established that the prosecution's complaining witness likely committed perjury at trial. The trial court found no evidence that the prosecutor was aware of the perjury during trial. The Court of Appeals did not disturb this finding but held that "the focus 'must be on the fairness of the trial, not on the prosecutor's or the court's culpability'." Although the evidence presented at the motion hearing "cast doubt" on the witness's trial testimony, it was not enough to warrant a new trial considering the other evidence of defendant's guilt.

People v. Schrauben, 314 Mich App 181 (2016)

Suggestive identification procedures

The witnesses' identifications of defendant were not the product of unduly suggestive procedures. The out-of-court identifications were based on a pretrial photo lineup where defendant's picture was placed first in the array. The Court could find "no reason" why placing defendant's photo first in the array was suggestive. The Court also rejected defendant's argument that the photo ID was unduly suggestive because the police did not use a "double blind" method.

People v. Blevins, 314 Mich App 339 (2016)

Failure to appoint a defense expert

Defendant was denied due process when the trial court denied his request for an appointed expert witness. The trial court's refusal to appoint a computer expert for the defense prevented the defense from challenging the conclusions reached by the prosecutor's expert and hindered the defense cross-examination. The result was an impairment of the defense that violated due process.

People v. Agar, ___ Mich App ___ (No. 321243, 2/2/16, approved for publication 3/22/16)

Search and Seizure

Knock and talk

Seven police officers went to the two defendants' homes at 4 a.m. and 5:30 a.m. respectively to conduct a "knock and talk" and try to obtain consent to search. The officers obtained consent and searched both homes resulting in the seizure of marijuana butter used to charge the defendants with controlled substance offenses. The trial court denied the motion to suppress, finding that the officers did not conduct searches of the homes until after they obtained voluntary consent. Following defendants' guilty pleas, the Court of Appeals denied leave to appeal. The Supreme Court remanded back to the Court of Appeals for a determination of whether the officers violated the 4th Amendment under *Florida v. Jardines*, 133 S.Ct. 1409 (2013). The Court of Appeals affirmed. The majority said that the only issue under *Jardines* is whether the knock and talk procedures amounted a search. The Court then held: 1) the officers' actions were not searches because their purpose was to just talk with the suspects to obtain consent and, 2) conducting the operation in the early morning hours was not unreasonable under the 4th Amendment.

People v. Frederick, 313 Mich App 457 (2015); oral argument ordered on defendant's application for leave to appeal, ___ Mich ___ (Nos. 153115, 153117, order issued 6/10/16)

Traffic stop

Police pulled over defendant because they believed he was in violation of MCL 257.225(2) which requires that the vehicle's license plate be “clearly visible” and “maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition.” The stop led to the discovery of contraband in defendant’s truck. In fact, the only thing that partially obstructed the officers’ view of the license plate was the towing ball attached to the rear of the car. In 2014, the Court of Appeals reversed the trial court’s denial of defendant’s motion to suppress, holding that defendant’s towing ball did not violate the statute and the officers had no reason to believe that defendant was in violation of that statute or any other traffic law. The Supreme Court reversed the Court of Appeals. The placement of the towing ball in relation to the plate rendered the plate not “clearly visible” as required by the statute. The Court noted that its decision might lead to “harsh consequences” for “Michiganders [whose] vehicles commonly have items such as trailer hitches and bicycle racks attached to them.” But this fact does not permit the court to interpret the statute contrary to its clear language.

People v. Dunbar, 499 Mich 60 (2016)

Illegal search and seizure

The police violated defendant’s 4th Amendment rights when, without a warrant, they seized defendant’s cellphone, wallet, and keys and searched defendant’s cellphone. Police initially spoke to defendant’s mother who confirmed it was her apartment. She gave police consent to enter the apartment and search for drugs. The police found no drugs in the apartment but did find the cellphone, wallet, and keys. The prosecution used evidence derived from those items to convict defendant. The Court of Appeals held that 1) defendant had standing to challenge the search because he lived there; 2) defendant’s mother’s consent to search the apartment for drugs did not extend to defendant’s personal items; 3) the plain view exception did not apply because while the items were indeed visible, their incriminating nature was not immediately apparent; 4) defendant’s status as a probationer did not permit the search because there was no evidence that submitting to a search was a condition of defendant’s probation; and 5) the evidence would not have been inevitably discovered. Finally, the court held that introduction of the evidence was not harmless error.

People v. Mahdi, ___ Mich App ___ (No. 327767, decided 10/11/16)

Confessions

Voluntariness

During custodial interrogation, the interrogating officer told defendant at the beginning that he would never lie to him and then lied to defendant, telling him that the police had “video, DNA, and fingerprint evidence” implicating defendant in the murder. Defendant then gave an inculpatory statement. Considering the totality of the circumstances, the statement was not involuntary. Police deception does not alone render a confession involuntary.

People v. Perkins, 314 Mich App 140 (2016)

Ineffective Assistance of Counsel

Failure to call expert on ID testimony

Trial counsel was not ineffective for failing to present an expert witness on the problems with identification evidence where this case hinged solely on ID testimony. Counsel’s strategy was to cross-examine the eyewitnesses to show that defendant had been merely present. While an ID expert may have been helpful, “the facts that counsel could conceivably have done more or that a particular trial strategy failed do not mean counsel’s performance was deficient.”

People v. Blevins, 314 Mich App 339 (2016)

Failure to object to multiple hearsay statements and failure to discover and present evidence favorable to the defense

Trial counsel was ineffective for failing to object to multiple hearsay statements in which the complainant was the declarant. Counsel also failed to discover and present evidence that would have undermined the prosecutor's case. The 23-year-old complainant alleged that defendant, her stepfather, had sexually molested her when she was between the ages of 8 to 16. The complainant's out of court statements, which the prosecutor on appeal conceded were hearsay, bolstered the complainant's testimony in what was essentially a one-on-one credibility contest. The evidence defense counsel failed to present evidence would have provided an alternative explanation for the medical testimony regarding complainant's hymenal changes and anal fissures.

People v. Shaw, ___ Mich App ___ (No. 313786, 6/14/16)

Right to Counsel

Reasonable attorney fees for appointed appellate counsel

The trial court abused its discretion in denying appointed counsel's motion for extraordinary fees. Counsel was paid only \$642 for preparing and filing a delayed application for leave to appeal and a motion for leave to file a motion to correct an invalid sentence. The trial court denied counsel's motion for additional fees because the application for leave to appeal was denied for lack of merit in the grounds presented and since the court resided in a "poor county," it could not afford to award fees when attorneys "file stuff that doesn't have a basis of merit to it." The court also confirmed that its policy was to deny fees in all such cases. In effect, the trial court's policy made reasonable compensation for appointed attorneys dependent upon the outcome. This results in a contingency compensation system and it is unethical for criminal defense attorneys to enter into contingency fee arrangements. Also, the trial court misconstrued the language of the order denying leave to appeal. As the United States Supreme Court stated in *Halbert v. Michigan*, 545 U.S. 605, 610 (2005), such stock language is not a final disposition on the merits. Remanded for consideration of the motion before a different judge.

In re Foster (People v. Boudrie), ___ Mich App ___ (No. 327707, decided 9/22/16)

Right of Self-Representation

Untimely requests can be denied without further inquiry

Defendant, a prison inmate, was convicted of assault of a prison employee. Throughout the pretrial proceedings, defendant filed a number of motions *in pro per* and asked the court twice to appoint new counsel. The court on at least two occasions asked defendant if he wanted to represent himself and defendant declined, saying that he was only seeking an “effective” attorney. The court appointed a third attorney and the case was set for trial. After jury selection, defendant requested that he be allowed to represent himself. The court declined the motion as untimely but did not otherwise conduct an inquiry to determine whether the request was unequivocal and to advise defendant of the dangers of self-representation. This was not error. If the court finds that the request is untimely, the court can deny the motion without conducting any further inquiry. And while the courts have never set a clear rule on whether a request is timely, certainly a request after the trial begins can be properly viewed as untimely.

People v. Richards, ___ Mich App ___ (No. 325192, decided 4/26/16, approved for publication 6/7/16)

Double Jeopardy

Multiple convictions for one act

Defendant’s convictions for two counts of passing counterfeit notes did not violate double jeopardy. The charges were based on defendant’s act of using multiple counterfeit bills to purchase a car. On appeal, defendant argued that the unit of prosecution was the number of transactions and not the number of bills used. Despite the prosecution’s confession of error, the Court of Appeals disagreed with both parties and held that that the unit of prosecution or single transaction tests were not relevant to a double jeopardy analysis. Looking at legislative intent, the Court held that the language of the statute punishes the use of “*any* such false, altered, forged or counterfeit *note*.” Thus, the legislature clearly intended separate punishments for each counterfeit note used by the defendant.

People v. Perry, ___ Mich App ___ (No. 328409, decided 10/27/16)

Right of Confrontation

Use of complainant's prelim testimony

Defendant was charged with child sexually abusive activity and CSC2 for acts involving his minor daughter. Although the child, then 7 years-old, testified at the preliminary exam, she claimed at trial to have no memory of the events. The prosecutor unsuccessfully attempted to refresh her recollection as the complainant was “adamant that she could not remember the events giving rise to the charges.” The trial court ruled that the child was unavailable due to her lack of memory and permitted the prosecutor to use her prelim testimony as substantive evidence. The Court of Appeals held that this procedure did not violate defendant's right of confrontation. The child's claimed lack of memory rendered her unavailable per MRE 804(a)(2), (3), and/or (4) and the defendant had a full and fair opportunity to cross-examine the child at the prelim. That cross-examination, while limited, was “not significantly limited in scope or duration” so as to cause confrontation problems. Finally, the fact that the child was never sworn in by oath or affirmation at the prelim did not require reversal. While there was no formal oath administered, the child on a number of occasions promised to tell the truth and the defense never objected to the failure to administer the oath. Any error was forfeited and did not affect defendant's substantial rights.

People v. Sardy, 313 Mich App 679 (2015); *vacated and remanded* to Court of Appeals to consider whether the complainant was unavailable for Confrontation Clause purposes and whether the trial court's limitation on cross exam denied defendant's right to confront the witness, ___ Mich ___ (No. 153222, order issued 11/4/16)

Vagueness

Child sexually abusive activity

The term masturbation in the CSAA statute is not unconstitutionally vague. The term is very clearly defined in the statute “and gives fair notice as to the illegal nature of the proscribed conduct in the context of a CSAA prosecution.”

People v. Sardy, 313 Mich App 679 (2015), remanded on other grds., ___ Mich ___ (No. 153222, order issued 11/4/16)

Grand Rapids noise ordinance

Defendants, owners and employees of the Tip Top Deluxe Bar in Grand Rapids, were charged with violation of the noise ordinance following neighborhood complaints about live music at the bar. The ordinance prohibits any person from using property under their care or control to “destroy the peace and tranquility of the surrounding neighborhood.” The Court of Appeals held that the ordinance was unconstitutionally vague. It failed to provide sufficient notice of what conduct was proscribed and encouraged arbitrary and discriminatory enforcement.

People of the City of Grand Rapids v. Gasper, ___ Mich App ___
(Nos. 324150, 324152, 328165, decided 3/8/16)

Resisting and obstructing

The resisting and obstructing statute is neither unconstitutionally overbroad nor vague. The failure of the statute to define the terms “resisted”, “obstructed”, or “opposed” is not fatal. The Supreme Court defined the terms in *People v. Vasquez*, 465 Mich. 83 (2001). The Court adopted those definitions and held that the statute “is designed to protect persons in the identified occupations * * * who are lawfully engaged in conducting the duties of their occupations, from physical interference, or the threat of physical interference.” The statute is not vague because “a person of ordinary intelligence would know that an individual using some form of force to prevent a police officer from performing an official and lawful duty is in violation...”

People v. Morris, 314 Mich App 399 (2016)