MICHIGAN CRIMINAL
CASE LAW UPDATE
December 2016 – November 2017

Prepared by Ron Bretz for the
Wayne County Criminal Advocacy Program
bretzr@cooley.edu

PRETRIAL PROCEEDINGS

Motion to Amend Information

Abuse of discretion to deny amendment

Defendant was charged with larceny by conversion over $20,000, waived his prelim, and was bound over to circuit court. The circuit judge then granted defendant's motion to dismiss, finding that the charge was not viable under the facts or the case law. The prosecutor filed a motion for reconsideration which the circuit court denied. The court did advise the prosecution that it could refile the charges if it came up with new evidence supporting the conversion charge. Five months later, and without new evidence, the prosecution refiled the conversion charge along with two other charges. The district court refused to bind over on the conversion charge out of deference to the circuit court's earlier ruling in the case. The circuit court denied the prosecution's motion to amend the information, again citing the absence of evidence of conversion by defendant. The Court of Appeals reversed. It found sufficient evidence of probable cause that defendant engaged in a larceny by conversion. Therefore, the circuit court abused its discretion denying the motion to amend.

People v. Spencer, ___ Mich App ___ (No. 337045, decided 8/14/17)

TRIAL PROCEDURE

Jury Instructions

Failure to instruct on good character evidence

At his trial for first degree murder, defendant presented evidence of his good character. The Court of Appeals reversed defendant's conviction because of the importance of the character evidence to his defense (it was his only defense). The Supreme Court reversed. The majority held that the Court of Appeals used the wrong standard in determining harmless error. The focus should not be on the defense case but on the reliability of the verdict and whether the instruction would have made a difference. The majority finds the error harmless considering the strong evidence of defendant's guilt and the "minimal" nature of the character evidence.

People v. Lyles, ___ Mich ___ (No. 153185, decided 8/1/17)

Possession as a lesser included offense of possession with intent to deliver

The prosecutor appealed a trial court's pretrial ruling that it would instruct the jury on the lesser offense of possession of a controlled substance where defendant was charged with possession with intent to deliver. All the elements of the former offense are subsumed within the greater offense. The trial court's ruling was not error.

People v. Robar, ___ Mich App ___ (No. 335377, decided 8/24/17)

Failure to Produce Endorsed Witnesses

Good cause shown

At the close of proofs, the prosecution advised the court that it would not be producing an endorsed witness, defendant's girlfriend. The defense objected and demanded that the witness be produced or that the court give the missing witness instruction. M. Crim. J.I. 5.12. The trial court granted the prosecutors' motion. The Court of Appeals agreed with defendant that the witness had been endorsed and that the trial court's failure to find or even consider whether there was good cause for the removal of the witness from the list was error. The Court held the error harmless. On appeal the prosecutor presented sufficient evidence of good cause for removal of the witness and defendant failed to show sufficient prejudice to warrant reversal.

People v. Everett, 318 Mich App 511 (2017)

Trial Court's Commentary on Evidence

Advising jury that it had found D's confession admissible as having complied with *Miranda*

During the prosecutor's re-direct exam of a police officer regarding the circumstances of defendant's statements, the trial court interrupted and told the jury that it had already found at a pretrial hearing that defendant had been advised of his rights and that the statements were admissible. Lead opinion finds error but harmless; second opinion concurs in result only; third opinion would find no error.

People v. Pierson, ___ Mich App ___ (No. 332500, decided 9/12/17)

EVIDENCE

Conflict between MCR 6.110(C) and MCL 766.11b(1)

Statute wins

At defendant's preliminary exam for felony OWI among other charges, the district court permitted the prosecutor to introduce the lab report on defendant's intoxication level without presenting the analyst. Following bind over, defendant successfully argued in circuit court that under MCR 6.110(C) which explicitly applies the hearsay rules to district court, the admission of the report was hearsay. The circuit judge granted a remand for continuation of the prelim. The Court of Appeals reversed. MCL 766.11b(1) permits the prosecutor to introduce the lab report in lieu of calling the lab analyst at the prelim. Noting that the statute and court rule were irreconcilably in conflict, the Court held that the statute applied. Consistent with earlier decisions of the Supreme Court, statutes which control the introduction of evidence are substantive not procedural and, therefore, within the ambit of the Legislature.

People v. Parker, 319 Mich App 664 (2017)

MRE 403

Photos of complainant's bruised face and neck brace admissible

At defendant's trial for aggravated domestic assault and AWIGBH, the trial court did not err in permitting the introduction of photos of the complainant in her hospital bed wearing a neck brace and with visible bruising on her face. The evidence was both relevant and admissible on the question of whether the complainant suffered serious bodily injury and whether defendant acted with an intent to inflict great bodily harm. Considering this strong relevance, it was not substantially outweighed by the danger of unfair prejudice.

People v. Davis, ___ Mich App ___ (No. 332081, Decided 7/13/17)

MRE 404

Prosecution's use of CSC complainant's prior sexual history

Before defendant's trial on charges of first, third, and fourth degree CSC, the prosecutor moved to introduce evidence of the complainant's pregnancy, abortion, and lack of any other sexual partners. The trial court ruled that the pregnancy was admissible but excluded both the abortion and lack of other sex partners. On appeal by both the prosecutor and the defense, the Court of Appeals held that the trial court did not err in ruling to admit the pregnancy evidence but erred in excluding the prosecutor's other proffered evidence. Despite the absence of DNA or other forensic evidence, the pregnancy was admissible under MRE 404(a)(3) as evidence of past sexual conduct with defendant to show the source of pregnancy. Evidence of the abortion and lack of other sexual partners was admissible because it was relevant and not explicitly barred by MRE 404 or any other rule. NOTE: leave granted.

People v. Sharpe, 319 Mich App 153 (2017); (lv. gt'd., Nos. 155747-8, 10/20/17)

MRE 404(b)

Abuse of discretion

The trial court abused its discretion in denying the prosecutor's motion to admit eight prior sexual assaults allegedly committed by defendant in four different states. Defendant was neither charged nor convicted on any of these prior allegations. The trial court here ruled that if the prior events were not criminal, they would not be "of any use" in this case. This was error. The court failed to consider the proper purpose of the other acts evidence and failed to assess its relevancy for that purpose. The mere fact that these acts did not result in convictions did not render them inadmissible. The Court of Appeals also noted that in all the earlier incidents as well as the present CSC charges, defendant did not deny penetration but instead claimed consent. Thus, the evidence could have been relevant to show a scheme or plan to make it appear that his sexual assault victims consented.

People v. Kelly, 317 Mich App 637 (2016)

Abuse of discretion

The trial court abused its discretion in permitting the prosecutor at defendant's AWIGBH trial to impeach defendant's self-defense claim with evidence of defendant's 2002 conviction for AWIGBH. The instant assault charge was based on the assault of a 17-year-old boy whom defendant found in his 15-year-old daughter's bedroom. Both teens were partially undressed. Defendant claimed self-defense. The prior assault was not at all related to self-defense and presented a very different factual scenario. The majority held that absent similarity between the prior and instant offenses, the admission of the prior was not relevant but merely tended to prove that defendant had bad character and was acting in conformity with that character. This was error and was not harmless where the "impermissible propensity inference prohibited by MRE 404(b), which the prosecution repeatedly made to the jury, convinces us that the jury 'could not escape[ ]' the impermissible inference invited by this evidence and that the prejudice defendant suffered as a result was severe enough to entitle him to relief."

People v. Denson, 500 Mich 385 (2017)

Evidence of other misconduct properly admitted

At defendant's trial on a first-degree murder charge (for stabbing her boyfriend to death), the trial court did not abuse its discretion in admitting evidence that the day after the killing, defendant attended a baby shower and made attempts to keep the victim's daughter from gaining custody of her half-sister. This evidence was relevant to show defendant's state of mind at the time of the killing. Defendant's attempts to keep her daughter from associating with the victim's family the day after the killing contradicted the testimony of defendant's friends and family that defendant was "shocked and emotional" regarding the victim's death. The evidence was also not substantially more prejudicial than probative.

People v. Dixon-Bey, ___ Mich App___ (No. 331499, decided 9/26/17)

MRE 702

Police detective as homicide expert

The trial court qualified a police detective as an expert in homicide scenes and the interpretation of evidence found at these scenes. While the detective could properly be qualified as an expert in homicide crime scenes, the court's "rather 'broad' qualification" led the detective to testify that, in his opinion, defendant did not act like a person who had killed someone in self-defense and that her claim of self-defense was unfounded. This was error. The detective lacked the requisite training in behavioral sciences and nothing else in the record established that his knowledge, skill, experience, training, and education supplied this expertise. The error was harmless considering the other evidence undermining defendant's self-defense claim.

People v. Dixon-Bey, ___ Mich App___ (No. 331499, decided 9/26/17)

Admission of DNA results without statistical analysis

At defendant's trial for aggravated domestic violence and felonious assault among other charges, the prosecutor introduced evidence from a forensic analyst that DNA matching the defendant was found on a blood-stained pillow case as well as on the bedroom door of the room where the assault allegedly took place. The analyst did not give any statistics to support the match. In *People v. Coy*, 243 Mich App 283 (2000), the Court required that evidence of a match alone is inadmissible absent "some qualitative or quantitative interpretation." Although no statistical evidence of the match was admitted here, this was not error. The analyst had given a report to both parties and that report contained her methodology, the interpretation of the data, and her conclusions. Finally, the analyst concluded that the DNA on the pillow and door were from defendant to a reasonable degree of scientific certainty. The Court held that this conclusion satisfied the *Coy* requirement of qualitative or quantitative interpretation.

People v. Urban, ___ Mich App ___ (No. 332734, decided 7/18/17)

MRE 804

Unavailable witness and use of prelim testimony

The trial court did not abuse its discretion in finding two sisters unavailable for trial and permitting the prosecutor to introduce the witnesses' preliminary exam testimony under MRE 804. The witnesses were both juveniles and although their father brought them to court in response to a subpoena, he made it clear that they would not be testifying as they had been threatened. A police detective advised the court that he had seen one of the girls' Facebook page. It contained a photo of the girl testifying at the prelim with the caption, "that bitch should die." Both girls were unavailable under MRE 804. Although their father's refusal to permit them to testify is not explicitly listed in the rule as an example of unavailability, "it is of the same character as other situations outlined in the rule." Plus, the fact that the girls appeared in response to a subpoena but then left the courthouse and refused to return shows a refusal to testify despite a court order to do so. Finally, the ruling permitting the prosecutor to use the preliminary exam testimony was justified considering the witnesses' unavailability and the fact that defense counsel had both the motive and opportunity to cross examine both witnesses at the prelim.

People v. Garay, 320 Mich App 29 (2017)

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 must 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." NOTE: The Supreme Court agreed that the trial court abused its discretion in denying the expert but reversed the new trial order. The Court instead remanded for appointment of a defense expert and a hearing to determine if his opinion would have been different and if defendant was prejudiced.

People v. Agar, 214 Mich App 636 (2016), rev'd in part and remanded, ___ Mich ___ (No. 153435, order issued 11/23/16)

PLEA PROCEDURE

Advice of Rights

Failure to advise of maximum sentence

Defendant pled guilty to eight different offenses including felon in possession of a firearm. The court failed to advise defendant of the maximum sentence for the felon in possession charge. The trial court then denied defendant's post-conviction motion to withdraw his plea. This was an abuse of discretion. Because he was not advised of the maximum, the Court of Appeals found that defendant's plea was not knowingly entered and remanded all the convictions to permit defendant to withdraw his pleas.

People v. Pointer-Bey, ___ Mich App ___ (No. 333234, decided 10/10/17)

Failure to advise of the correct maximum sentence

Even though both sides agreed that the trial court misstated the potential maximum sentence for defendant's plea to attempted arson, Defendant was not prejudiced by the error. The court advised defendant that he could be sentenced to a maximum of 20 years on his convictions for attempted arson and 3rd habitual offender. In fact, the maximum was only 10 years and the court properly sentenced defendant to a term of two years, ten months to ten years on that offense. Considering these facts, defendant cannot show any prejudice and plea withdrawal was properly denied.

People v. Winters, ___ Mich App ___ (No. 333009, decided 7/18/17)

Factual Basis

Personal use exemption does not apply to manufacturing meth by "making" or "cooking" it.

While MCL 333.7106(3)(a) does contain an exemption for those who manufacture controlled substances for their personal use, by the language of the statute, that exemption only applies to the "preparation or compounding of a controlled substance." The statute contains six different ways to manufacture a controlled substance and the exemption only covers two of them: preparation or compounding. Here defendant admitted at the plea proceeding that he made or cooked the methamphetamine in his car. That behavior goes beyond mere preparation or compounding. The trial court did not err by failing to inquire of defendant during the plea proceeding whether he was making meth for his own personal use.

People v. Baham, ___ Mich App___ (No 331787, decided 9/19/17)

Plea Agreements

Conditions violate separation of powers

Defendant, a sitting state senator, agreed to plead guilty to one count in exchange for the prosecution's dismissal of three other charges. Defendant also agreed to give up his senate seat and to not hold any public office during his 5-year probationary period. At the subsequent plea proceeding, the court vacated the conditions that defendant resign and not hold public office as a violation of separation of powers. The court found the rest of the plea bargain valid, accepted defendant's plea, and sentenced him according to the terms of the bargain. The prosecutor later moved to vacate the plea and the trial court denied the motion. The Court of Appeals affirmed. It held that the trial court was correct in its ruling that the plea bargain violated the constitution. The Court also acknowledged that the prosecutor has a right to move to withdraw a plea if the people do not receive the agreed upon bargain. However, in this case the trial court did not abuse its discretion because the prosecutor should have been aware of the unconstitutionality of the bargain. To accept the prosecutor's argument "would … sen[d] a permissive instruction to the prosecution that making such an [unconstitutional] agreement only carries the risk of having to start negotiations over".

People v. Smith, ___ Mich App ___ (No. 332288, decided 8/22/17)

POST-CONVICTION & MISCELLANEOUS

Order to Pay Attorney Fees

Not permitted when charges dismissed

Following his conviction for CSC, defendant appealed and was awarded a new trial. The prosecutor voluntarily dismissed all charges and filed a "final nolle prosequi." Defendant moved to vacate the trial court order that he reimburse the county for attorney fees. The Court denied the motion. This was error. MCL 768.34 provides that a person who has been acquitted or otherwise had charges dismissed cannot be liable for any costs or fees. The order requiring attorney fees must be vacated.

People v. Jose, ___ Mich App ___ (No. 328603, decided 12/13/16)

Motion for Relief from Judgment

Successive motions – exceptions

Defendant appealed his convictions and sentence by right to the Court of Appeals. That court affirmed the convictions but remanded for resentencing. Defendant then filed a timely application for leave to appeal to the Supreme Court. While that application was pending, the trial court resentenced defendant to the same term stating reasons for the departure. Defendant then filed a Motion for Relief from Judgment which was denied. Applications for leave to appeal that denial were also denied. Subsequently, defendant filed a second Motion for Relief from Judgment arguing that the trial court lacked jurisdiction to resentence him while his application for leave to appeal to the Supreme Court was pending. The trial court granted the motion and the prosecutor appealed. The Court of Appeals agreed with the prosecutor that this case did not fit one of the two exceptions for permitting a subsequent Motion for Relief from Judgment but affirmed the trial court. The trial court lacked jurisdiction to resentence defendant while the timely application was pending. Thus, the sentence was a nullity. The trial court has inherent power to correct jurisdictional issues. Even though this issue was raised in the context of a Motion for Relief from Judgment, the court did not err in ordering a resentencing.

People v. Washington, ___ Mich App ___ (No. 336050, decided 7/13/17; publication ordered 9/12/17)

CRIMES

Child Abuse 2d Degree

Reckless act

Defendant was convicted of 2d degree child abuse after her daughter swallowed a morphine pill found n defendant's house. The prosecutor's theory was that because the home was "filthy" and because defendant and her husband did not take proper steps to assure that the morphine had been removed from the house after defendant's mother (for whom the morphine had been prescribed) died, defendant committed a reckless act required for conviction of 2d degree child abuse. The Court of Appeals disagreed. While the statute, MCL 750.136b(3) authorizes conviction of 2d degree child abuse if the defendant's reckless omission *or* reckless act causes serious injury to a child, the prosecutor here proceeded only on the "reckless act' theory and the court instructed the jury only on that theory. Because there was no evidence of a reckless act by defendant that caused serious injury to her child, the court vacated her conviction.

People v. Murphy, ___ Mich App ___ (No. 331620, decided 9/19/17)

Illegal Transportation of Marijuana

Immunity from prosecution under the MMMA

A person who has a medical marijuana card and is in compliance with the MMMA is immune from prosecution for transporting marijuana in a vehicle. There is an irreconcilable conflict between the MMMA and the illegal transport statutes. A "compliant medical marijuana patient, cannot be prosecuted for violating [the illegal transport] law."

People v. Latz, ___ Mich App ___ (No. 328274, decided 12/20/16)

Felony Firearm

Third offender

Defendant had only two prior felony convictions and both arose out of the same transaction. Relying on *People v. Stewart*, 441 Mich 89 (1992), the court of appeals reversed defendant's current conviction for felony firearm, third offender and remanded for resentencing as a second offender. The Supreme Court unanimously reversed. The Court held that nothing in the plain language of the statute, MCL 750.227b(1), justifies the *Stewart* decision. The trial court is required under the statute to simply count the number of prior convictions for FFA. The trial court in the instant case did just that. *People v. Stewart*, supra, is overruled.

People v. Wilson, 500 Mich 521 (2017)

First Degree Murder

Insufficient evidence of premeditation and deliberation

Defendant was convicted of first degree murder on two theories: premeditated murder and felony murder. The Court of Appeals reversed defendant's conviction under the first theory because of insufficient evidence of premeditation and deliberation. There was no relationship between the victim and the defendant; there was no evidence of planning either in defendant's pre-homicide or post homicide conduct; and even though the victim receiver over 20 stab wounds, there was no evidence that defendant had time for a second look during the stabbing. The court reversed the felony murder conviction because the trial court instructed the jury that it could find defendant guilty of first degree murder if the murder was committed during either a larceny from the person or false pretenses with intent to defraud. Since the latter cannot be a predicate felony for felony murder, defendant was deprived of his right to a properly instructed jury. NOTE: Regarding the first issue, the court in a footnote acknowledged that the sufficiency of evidence of premeditation and deliberation is challenging and that the bench and bar might benefit from clarification from the Supreme Court. That Court took up the invitation and on October 5, 2017, on the prosecutor's application for leave, ordered briefing and oral argument on whether leave should be granted. ___ Mich ___ (No. 156241, order issued 10/5/17).

People v. Oros, 320 Mich App 146 (2017)

Larceny by Conversion

Crime against possession not title

The circuit court abused its discretion when it denied the prosecutor's motion to amend the information to reinstate a count of larceny by conversion. Evidence at the preliminary exam established that defendant received a loan from complainant for the limited purpose of purchasing and rehabilitating six specific properties. Evidence further showed that defendant took at least $20,000 of the money and used it for personal items and purchases not part of his agreement with complainant. This evidence, if believed by a jury, would establish the crime of larceny by conversion. The crime occurs when a defendant receives another's property lawfully but then converts it to his own use.

People v. Spencer, ___ Mich App ___ (No. 337045, decided 8/14/17)

Making False Statements to Police

Deliberately withholding material information

The district court did not abuse its discretion in ordering defendant bound over on the charge of knowingly and willfully making a statement to a peace office that the person knows is false or misleading regarding a material fact in a criminal investigation. Police questioned defendant while investigating the murder of his pregnant girlfriend. Defendant told police that he was driving around with friends the night of the killing. He told the police where he had been prior to returning to the apartment and finding his girlfriend's body. He never told the police that he had been at the apartment earlier in the evening but was never directly asked that question. Subsequently the police confronted defendant with evidence that his car had been seen in front of the apartment several hours before he reported finding the body. Defendant then admitted that he had neglected to tell the police about this stop. The omission and later admission by defendant was sufficient to support the bindover. Notably, defendant was asked if had made any other stops the night of the killing and he replied, "No." The Court of Appeals held that since this was a false statement, it came within the statute. Also, defendant's failure to tell the police about the earlier stop at the apartment can be viewed as a misleading statement under the statute.

People v. Williams, 318 Mich App 232 (2016)

Medical Marijuana Act

Reliance on caregiver license following unrelated felony conviction

Defendants were medical marijuana cardholders and licensed caregivers. Both had been convicted of felonies before their arrests in this case. The trial court dismissed the charges even though the statute prohibits those who have any illegal drug convictions or felony convictions within the last ten years from holding caregiver licenses. The trial court held that it was incumbent on the Secretary of State to revoke the licenses once the defendants had been convicted. Because the SOS failed to do so, defendants' licenses were still valid. This was error. Once a licensed caregiver is convicted of a felony, the license is no longer valid.

People v. Tackman, 319 Mich App 460 (2017)

Usable marijuana

Defendant was a medical marijuana cardholder and a registered caregiver for five patients. Police executed a search warrant at his home and seized 71 marijuana plants or approximately 1,068 to 1,195 grams. Per the MMMA, defendant could possess up to 72 plants or 452.24 grams in usable marijuana. While he was within the plant limit, the charges were based on defendant allegedly exceeding the weight limit. The trial court held that defendant was entitled to immunity under §4 of the MMMA. The 1,068 to 1,195 grams measurement was based on drying marijuana found in tins. The trial court held since it was still drying, it was not usable marijuana and could not be counted under the MMMA. The Court of Appeals agreed and affirmed the dismissal.

People v. Manuel, 319 Mich App 291 (2017)

Enclosed, locked facility

Defendant met the requirement that he keep his medical marijuana in an enclosed, locked facility. When police arrived at defendant's house, they found defendant and another man standing outside the attached garage and 12 clone plants sitting on a freezer inside the garage. The trial court accepted defendant's testimony that he had just received the clones from the other man and was in the process of moving them to his basement. In the basement, the police found a locked grow room but the key was in the lock. The trial court accepted defendant's testimony that the key ring also contained his house and car keys and that they were in the lock because he was getting ready to move the clones found in the garage into the locked grow room. The Court of Appeals agreed with the trial court that this was sufficient to find that defendant complied with the enclosed and locked facility requirement of the MMMA.

People v. Manuel, 319 Mich App 291 (2017)

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 dismissed the charge finding that a home's driveway is not open to the general public and the Court of Appeals upheld that ruling. *People v. Rea*, 315 Mich App 151 (2016). The Supreme Court reversed. Defendant's intoxicated driving did occur in a place "generally accessible" to the public. The majority reads the statute to apply to any place motor vehicles can access without regard to whether the driver of the vehicle has permission or whether it is generally used by the public.

People v. Rea, 500 Mich 422 (2017)

Owning a Dangerous Animal Causing Personal Injury

Insufficient evidence of animal's dangerousness or owner's knowledge

Defendants owned a dog that attacked and caused serious injury to another. In a motion to quash, defendants argued that the prosecutor failed to present evidence at the prelim that the dog was a dangerous animal within the meaning of the statute or that the defendants were aware of the dog's dangerousness. The Court of Appeals agreed. The evidence only showed that the dog had barked a lot and bit tires on lawn tractors. This was insufficient to meet the requirements of the statute. The circuit court abused its discretion in denying defendants' motion to quash.

People v. Ridge, 319 Mich App 393 (2017)

Tobacco Products Tax Act

Mixing tobacco is manufacturing

Defendant was licensed under the Tobacco Products Tax Act as a "secondary wholesaler and an unclassified acquirer of tobacco products." Evidence that he legally acquired various tobacco varieties, mixed them together, and sold them in blended form was sufficient to make him a manufacturer of tobacco. Thus, the district court did not abuse its discretion in binding defendant over on a charge of manufacturing tobacco products without a license. NOTE: On defendant's application for leave to appeal, the Supreme Court ordered briefing and oral argument on whether leave should be granted. 500 Mich 1017 (2017)

People v. Shami, 318 Mich App 316 (2016)

Willful Neglect of Public Trust

Duty enjoined by law

Defendant was president of a construction company hired by Wayne County to act as project manager for the Wayne County Jail construction. The project was never completed and defendant was indicted by a grand jury and charged with willful neglect of duty by a person holding a public trust. The district court dismissed the charge, the circuit court reinstated it, and the Court of Appeals reversed. Defendant was an independent contractor and not a public official. More importantly, he was not "enjoined by law" to perform a specific duty. The prosecutor's only argument in this regard is that defendant was enjoined by the contract he signed to complete the jail. The Court of Appeals rejected this argument as too broad: it would subject every contractor who breaches a contract with the government to criminal charges.

People v. Parlovecchio, 319 Mich App 237 (2017)

CONSTITUTIONAL ISSUES

Confessions

Custody for *Miranda* purposes

The police told defendant that they needed to speak to him, they took him to the sheriff's department in the back seat of a police car, they never told him he was not under arrest, interrogated him for 90 minutes, and after the interview, put defendant in handcuffs and transported him to another police department. The police officers accused defendant of lying when he denied any role in the offense and asked for a lawyer. When he again asked for an attorney, the police brought another officer with a police dog into the room and that officer told defendant that the dog would "blow you right off your feet if I send him." The Court of Appeals held that defendant was in custody and failure to give defendant *Miranda* warnings and obtain a valid waiver made his subsequent confession inadmissible. *People v. Barritt*, 318 Mich App 662 (2017). The Supreme Court reversed this finding and remanded the case to the trial court to determine (1) whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave; and (2) whether the environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.

People v. Barritt, ___ Mich ___ (No. 155607, order issued 9/29/17)

Due Process

Brady Violation

Following defendant's conviction for first-degree murder and first-degree child abuse, defendant sought and obtained a hearing on his claim of ineffective assistance of counsel. At that hearing, the prosecutor revealed that the prosecution's trial expert, the medical examiner, failed to provide either the prosecution or the defense with 33 photographs. Following briefing and argument on the issue of whether the failure to provide the photos to the defense or the defense expert violated the *Brady* rule, the trial court found a *Brady* violation and granted defendant's motion for new trial. The Court of appeals affirmed. Under the medical examiner statute, MCL 52.201, *et seq*, "evidence under the control of a county medical examiner constitutes evidence within the control of the government for *Brady* purposes in Michigan." The Court also found that the withheld photos were potentially favorable to defendant and material in this case as the photos could have provided a basis for impeachment of the prosecutor's medical examiner.

People v. DiMambro, 318 Mich App 204 (2016)

Search and Seizure

Standing

Police lawfully stopped a car for expired plates. Police obtained the driver's consent to search and ordered the passenger, defendant, and the driver out of the car. Police then searched a backpack that defendant had been holding in his lap but left in the car when he exited. The Court of Appeals held that, as a mere passenger, defendant lacked standing to challenge the search. Even if defendant had standing to challenge the search of his personal items (the backpack), the Supreme Court has held that once the police have a legal justification to search a car (the driver's consent) they may search all unlocked containers found in the car. *People v. Labelle*, 478 Mich 891 (2007).

People v. Mead, ___ Mich App ___ (No. 327881, decided 8/8/17)

No probable cause to search car

Police stopped defendant for speeding. The officer saw several empty pill bottles and containers of what looked like "whippets" or nitrous oxide in the car. The officer asked defendant when he had last used the nitrous oxide and defendant responded, "four days ago". After unsuccessfully trying to obtain consent to search the car, the officer ordered defendant out of the car and conducted a search of the car and defendant, finding several containers of codeine with the names removed. The circuit court suppressed the evidence and the Court of Appeals agreed. The only possible justification for the car search in this case was probable cause that there was evidence of a crime and the only basis for this claim was the empty pill bottles and whippets in plain view. The officer lacked probable cause in this case. The law does not prohibit the possession of whippet containers only their misuse. The officer testified that he did not believe the defendant was under the influence at the time. Similarly, the possession of empty pill bottles is not a crime.

People v. Wood, ___ Mich ___ (No. 331462, decided 9/19/17)

Continued detention

Police stopped defendant for an improperly affixed license plate and failure to signal when exiting the freeway. When the officer asked for defendant's registration, defendant responded that he did not have one yet as he had recently purchased the car. The officer then told defendant to get out of the car and follow him. The two sat in the police car while the officer ran computer checks. The officer quickly learned that defendant owned the car and had no outstanding warrants. The officer told defendant that he would give him a warning on the traffic violations but wanted consent to search the car. Defendant refused so the officer ordered defendant to remain while he called in a drug dog. The dog arrived 15 minutes later and alerted to marijuana in the trunk. The Court of Appeals held that the evidence was illegally seized. The officer violated defendant's 4th Amendment rights by continuing the detention without reasonable suspicion of criminal activity.

People v. Kavanaugh, ___ Mich ___ (No. 330359, decided 7/6/17)

Blood draw

Defendant was arrested and charged with OWI. Police took him to the station and asked for consent for a blood draw. Defendant gave his consent. After the blood was drawn but before it was analyzed, defendant withdrew his consent. Defendant argued that the blood analysis should have been suppressed as there was no longer valid consent. While a defendant may withdraw consent before the search is conducted, Defendant's withdrawal of consent here was too late. A blood draw is indeed a search, but analysis of blood obtained through valid consent is not a separate search. The blood analysis results were admissible.

People v. Woodard, ___ Mich App ___ (No. 336512, decided 9/19/17)

Illegal arrest

A Grand Rapids police officer attempted to arrest defendant for trespassing based on the act of walking through a parking lot of a commercial establishment open for business. The officer followed defendant out of the lot and ordered him to stop. While the officer was attempting to put handcuffs on him, defendant fled and allegedly dropped a container of controlled substances. The trial court suppressed the evidence and the Court of Appeals agreed. The first question is whether the officer had probable cause. The Court found no probable cause to arrest defendant for trespassing. The prosecutor argued that the officer had probable cause to arrest defendant for a violation of the city ordinance that prohibits "unlawfully remain[ing]" on land "to the annoyance or disturbance of the lawful occupants." Defendant was on land owned by a business that was open to the public and only remained for a short time. There was no evidence that he annoyed or disturbed anyone. Finally, even though the two businesses involved in this case had signed a letter authorizing the GR police to ask occupants to leave the parking lot, this does not establish an element of trespassing. The arrest and subsequent search were illegal.

People v. Maggit, 319 Mich App 675 (2017)

Consent following illegal police trespass

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 Supreme Court reversed. The majority held that the officers committed a trespass when they performed a pre-dawn knock on defendants' doors. The early hours took this case out of the implied license police have to conduct knock and talks and made their action unreasonable. The subsequent consent to search was tainted by the illegal trespass and required suppression of all evidence.

People v. Frederick, 500 Mich 228 (2017)

Franks hearing

A defendant who wishes to challenge the veracity or accuracy of an affidavit in support of a search warrant must be granted a hearing under *Franks v. Delaware*, 438 US 154 (1978), when the defendant "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and ... the allegedly false statement is necessary to the finding of probable cause…". In this case, the trial court granted defendant a *Franks* hearing and ultimately suppressed the evidence even though defendant did not make a "substantial preliminary showing". The Court of Appeals reversed, holding that the defendant failed to meet the preliminary *Franks* burden and that the trial court abused its discretion by permitting the hearing in this case. The Supreme Court reversed the Court of Appeals. While the substantial preliminary showing *mandates* a Franks hearing, the trial judge still retains broad discretion to hold a hearing. That discretion was not abused in this case.

People v. Franklin, 500 Mich 92 (2017)

Exclusionary Rule Exceptions

Good faith and attenuation not applicable

A police officer relied in a city trespassing ordinance in arresting defendant. After holding that defendant did not violate the trespassing ordinance and that the arrest was illegal, the Court of Appeals addressed the prosecutor's argument that the officer's mistake was reasonable. The Court rejected that argument and found that the officer's mistake as to this unambiguous statute was objectively unreasonable. The Court also rejected prosecutor's attenuation argument. Even though the police officer determined that there was a valid arrest warrant for defendant, this discovery occurred after the illegal arrest and the search which resulted in incriminating evidence. Thus, the existence of the valid warrant did not "break the causal chain" between the illegal action of the police and the discovery of the evidence.

People v. Maggit, 319 Mich App 675 (2017)

Right to Counsel

Denial of counsel at preliminary exam subject to harmless error standard

Defendant's right to counsel was violated when the district court judge forced defendant to represent himself at the prelim over defendant's objection. The Court of Appeals reversed finding that such an error is structural. The Supreme Court reversed and held that the proper analysis in these cases is the harmless error test. Remanded for the Court of Appeals to assess whether the error was harmless. NITE: The Court of Appeals affirmed defendant's conviction on remand finding harmless error. *People v. Lewis*, ___ Mich App ___ (No. 325782, decided 11/2/17).

People v. Lewis, ___ Mich ___ (No. 154396, decided 7/31/17)

Double Jeopardy

Possession and delivery of same heroin

Convictions of possession of heroin and delivery of heroin based on the same transaction do not violate the constitutional ban on double jeopardy. The two are not the same offense as each has an element that is not shared by the other. Delivery requires delivery of the drug while possession does not; possession requires possession either actual or constructive, while delivery does not.

People v. Dickinson, ___ Mich App___ (No. 332653, decided 8/15/17)

Manufacturing and possession of methamphetamine

Convictions of manufacturing and possession of methamphetamine do not violate double jeopardy. The two are not the same offense as each has an element that is not shared by the other. Manufacturing requires proof that defendant manufacture the drug while possession does not; possession requires possession either actual or constructive, while manufacturing does not.

People v. Baham, ___ Mich App ___ (No. 331787, decided 9/19/17)

Void for Vagueness

Third-degree child abuse

The third-degree child abuse statute is not unconstitutionally vague. Defendant argued statutory definition of physical harm: "any injury to a child's physical condition," MCL 750.136b(1)(e). The Court held that any physical injury will suffice and that a person of ordinary intelligence would understand this.

People v. Lawhorn, ___ Mich App ___ (No. 330878, decided 6/15/17)