MICHIGAN CRIMINAL
CASE LAW UPDATE
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PRETRIAL PROCEEDINGS

One-Man Grand Jury

Does not violate right to counsel or to confront witnesses

Defendant was indicted by a one-man grand jury based on the testimony of two witnesses who both testified at defendant's trial. This procedure did not violate defendant's 6th amendment rights, as those rights do not attach until after indictment.

People v. Green, ___ Mich ___ (No. 334889, decided 1/23/18)

Venue

Venue not proper for delivery causing death

Defendant sold heroin laced with Fentanyl to a third party who then delivered it to the victim. All of these acts occurred in Wayne County. The victim then went to his home in Monroe County, used the drug, and overdosed and died. The Monroe County Circuit Court erred when it found that Monroe County had venue in this case. The elements of the offense, knowing delivery of a controlled substance, occurred in Wayne County. The fact that the ultimate purchase of the heroin died is only a sentence enhancement not an element.

People v. McBurrows, ___ Mich App ___ (No. 338552, decided 12/19/17)

Preliminary Examination

Magistrate's duty to consider credibility of witnesses

At a preliminary exam, the magistrate must consider all the evidence including the credibility of witnesses, in deciding whether to bind over. In this case, the magistrate refused the bindover because she found that the only witness presented by the prosecution was not credible. The unanimous court held that the magistrate had the duty to consider the witness's credibility as part of the statutory duty to consider all the evidence and determine whether there was probable cause that defendant committed the crime. The court also held that the magistrate did not abuse her discretion in rejecting the bindover.

People v. Anderson, 501 Mich 175 (2018)

Mere suspicion is not probable cause

Defendant, a well-known graffiti artist, was bound over on three counts of malicious destruction of property based solely on evidence that illegal graffiti and posters were found on Detroit buildings and rail bridges, the "taggings" contained images associated with defendant, and defendant statement in an interview that he would "do stuff without permission" while he was in Detroit. This was an abuse of discretion. There was no evidence to identify defendant as the perpetrator other than his vague boasts about doing something while in Detroit. This was mere suspicion not probable cause.

People v. Frairey, ___ Mich App ___ (No. 333805, decided 8/28/18)

TRIAL PROCEDURE

Emotional Support Dog

Error to permit the use of a support dog for competent adult complainant

The prosecutor asked for the trial court's permission to allow Preston, a support dog, to be in the courtroom during the complainant's testimony. The prosecutor argued that complainant, a fully able adult, was "more comfortable" with the dog in the courtroom and that it "was something she wanted." Over defense objection, the court permitted both Preston and his handler to be present. This was error. There is no authority for permitting a support animal during the testimony of a competent adult complainant. Even there was such authority, it would not extend to the reasons offered in this case. The case was a credibility contest between defendant and complainant. The presence of the dog could have convinced the jury that complainant was traumatized by the event. Thus, the error was harmful enough to require a new trial.

People v. Shorter, 324 Mich App 528 (2018)

Jury Instructions

Failure to instruct on all elements cured by supplemental instructions

Defendant was charged with three counts of AWIM, and one count each of carrying a weapon with unlawful intent and felony-firearm. Before jury instructions, both the prosecutor and defense counsel approved the instructions. Shortly after deliberations had begun, the jury called the court's attention to the fact that it had only been instructed on the three assault charges. The court then gave supplemental instructions on the two firearm charges. The jury convicted defendant on two lesser assault charges and both firearm charges. The Court of Appeals held that the trial court did not err in giving the supplemental instructions. In fact, in doing so, the court "averted" structural error. Also, the prosecutor did not waive the right to encourage the court to give supplemental instructions by approving the original instructions. MCR 2.512(C) only applies to appeals and does not prohibit a party from altering its position on instructions during trial.

People v. Craft, ___ Mich App ___ (No. 337754, decided 8/16/18)

EVIDENCE

MRE 401, 403

Repulsive photos more probative than prejudicial

Evidence is not inadmissible merely because it is repulsive, indecent, or obscene. Photographs found on defendant's phone of the complainant in this CSC case were properly admitted even though they showed the then 12-year-old complainant naked. The complainant testified that defendant took all four photographs. The evidence was relevant to corroborate the complainant's testimony that defendant sexually assaulted her. The photos demonstrated that defendant had a sexual interest in the complainant.

People v. Brown, ___ Mich App ___ (No. 339318, decided 10/23/18)

MRE 402, 403

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. The Supreme Court agreed with the result but on different grounds. The Court of Appeals had held that evidence of the pregnancy and abortion was subject to the rape-shield law but admissible as an exception. 319 Mich App 153 (2017). The Supreme Court held that none of the evidence was within the rape-shield law and admissible under the Rules of Evidence. Even though pregnancy and abortion are evidence that intercourse has taken place, neither are specific instances of complainant's sexual conduct. Likewise, the absence of other sexual partners is not a specific instance. Finally, all of the evidence was relevant under MRE 402 and not substantially more prejudicial than probative. MRE 403

People v. Sharpe, 502 Mich 313 (2018)

Expert testimony invading the province of the jury

At defendant's trial for first-degree child abuse, a pediatric child abuse physician testified for the prosecution that the child's injuries were the result of "definite pediatric physical abuse." The doctor's opinion that the child was subject to child abuse was irrelevant and inadmissible as a matter of law. In light of the other evidence, the error was harmless.

People v. McFarlane, ___ Mich App ___ (No. 336187, decided 6/19/18)

MRE 404b

Admissible to show intent

Defendant was charged with armed robbery based on evidence that he stole a video game and cell phones from the two complainants and then pointed a gun at them as he ran away. Defendant claimed that his interaction with the complainants was innocent in that he did not take any of their property. At trial, the prosecutor introduced evidence pursuant to MRE 404b that six years earlier, defendant had assaulted another teenager while stealing an mp3 player and headphones. The Court of Appeals initially affirmed the conviction in an unpublished opinion. The Supreme Court then remanded to that court to determine whether the other act was relevant to show intent or merely evidence of propensity. The Court of Appeals again affirmed. The evidence was relevant to intent particularly in light of defendant's claim that his actions and intent were innocent. Even if the probative value was not that strong, the probative value was not substantially outweighed by the danger of unfair prejudice.

People v. Crawford (on remand), ___ Mich App ___ (No. 330215, decided 6/26/18

Prior bad act not relevant to a proper purpose

At defendant's CCW trial, the defendant's wife testified for the defense that to her knowledge, defendant did not have a gun when he left the house the day of his arrest and that he did not own any guns. On cross exam, the trial court permitted the prosecutor to impeach the witness with defendant's prior weapons offense convictions. This was error. The admission of this evidence is not governed by MRE 609 because it was not impeachment with the witness's own convictions. Nor does MRE 608 control because it did not involve specific conduct or reputation of the witness. Since the evidence concerned defendant's prior bad acts, the Court evaluated it under MRE 404b and held that the evidence was not relevant to a proper purpose under the rule. The court remanded to the Court of Appeals whether the error was harmless.

People v. Wilder, 502 Mich 57 (2018)

Prior acts procedurally and substantively inadmissible

At defendant's trial on charges of possession with intent to deliver, the trial court allowed the prosecutor to present evidence from two witnesses regarding prior drug transactions involving defendant. The prosecutor violated the 14-day notice requirement of MRE 404(b)(2) by giving notice of the two witnesses twelve and four days before trial. The trial court's finding that the late notice was excused by good faith was an abuse of discretion. The Court of Appeals also held that the prior bad act evidence was substantively inadmissible because the prosecution did not meet its burden of establishing a non-propensity purpose. In fact, the prosecutor argued to the jury that it could find defendant guilty because he had sold drugs in the past. The Court found that the errors were not harmless and required reversal.

People v. Felton, ___ Mich App ___ (No. 339589, decided 10/2/18, approved for publication 11/20/18)

MCL 767.27b & MRE 404

Abuse of discretion

At defendant's trial for AWIM and Domestic Assault against his ex-wife, the trial court permitted the prosecutor to introduce evidence that 16 years earlier, defendant assaulted his earlier spouse. This evidence was not admissible under either the statute or the evidence rule. MCL767.27b limits the use of prior acts to those which occurred less than 10 years from the charged offense unless the judge finds admission is in the interest of justice. The trial court found that the prosecutor's use of the prior act was in the interests of justice. The Court of Appeals disagreed. The only basis for the admission was that the prior act was probative of the defendant's behavior in this case. Such a rationale renders the statutory exception meaningless. To get beyond the 10-year rule, the prosecutor must show that the "evidence is uniquely probative or that without its admission, the jury is likely to be misled." Similarly, the evidence was not admissible under MRE 404b because it only proved propensity. However, considering overwhelming evidence of guilt, the Court finds the errors harmless.

People v. Rosa, 322 Mich App726 (2018)

MRE 613

Use of prelim transcript to impeach witness at bench trial

The trial court as fact-finder did not err in reading the preliminary exam transcript for the sole purpose of following along as the prosecutor impeached a witness. The testimony the court read was admitted for impeachment purposes as provided by MRE 613. The trial court did not consider evidence not admitted at trial.

People v. Pennington, 323 Mich App 452 (2018)

MRE 702

Qualification of automotive brake expert

The trial court did not abuse its discretion in permitting the prosecutor to use the owner of a local automotive repair facility to testify as an expert on brake mechanics. Defendant testified that he was unable to stop his car before it entered the intersection, killing one and injuring others. He claimed that his brakes failed. The prosecutor's expert rebutted this claim, testifying that he found no defects in the brakes. The expert also testified that he had extensive experience in brake analysis and repair, held a college certification in auto technology, a state certification in brake repair, and had repaired hundreds of brakes.

People v. Carll, 322 Mich App 690 (2018)

Qualification of non-certified nurse as sexual assault trauma expert

The trial court did not abuse its discretion in permitting a nurse to testify as an expert in sexual assault trauma even though she was not certified by the state as a Sexual Assault Nurse Examiner (SANE). MRE 702 does not require certification. It only requires that the witness be qualified by "knowledge, skill, experience, training, or education." The trial court correctly found that the witness's training and experience qualified her as an expert.

People v. Brown, ___ Mich App ___ (No. 339318, decided 10/23/18)

Results of DNA typing and STRmix statistical interpretation admissible

While fleeing a robbery, the perpetrator lost a shoe. Police recovered the shoe and had the insole tested for DNA. The testing resulted in "low-level" and "degraded" DNA from four different persons. The analyst then referred the results to another expert who utilized STRmix software to compute the probability that defendant was one of the sources of the shoe DNA. That "probabilistic genotyping" led to a one in one hundred billion chance that someone other than defendant was the source of the DNA. Following a *Daubert* hearing, the trial court admitted the evidence. The Court of Appeals affirmed. The trial court's findings that the *Daubert* factors supported admission of the evidence were not clearly erroneous.

People v. Muhammad, ___ Mich App ___ (No. 338300, decided 10/2/18)

Right to court-appointed DNA expert

MCL 775.15 does not apply to the appointment of an expert to assist the defense. Such a request must be evaluated under the due process analysis of *Ake v. Oklahoma*, 470 U.S. 68 (1985). In order to obtain an expert witness, "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." Remanded to the Court of Appeals for reconsideration.

People v. Kennedy, 502 Mich 206 (2018)

Qualifications of expert

The trial court did not abuse its discretion in permitting a cardiothoracic and trauma surgeon who treated the victim to testify to his opinion that the victim had been stabbed. The doctor was qualified by virtue of his training in surgery and particularly trauma. It was not necessary for the doctor to be a medical examiner to give his opinion on the nature of the wound.

People v. McKewen, ___ Mich App ___ (No. 339068, decided 10/25/18)

The trial court did not abuse its discretion in qualifying a nurse as a sexual assault nurse examiner (SANE) even though she was not certified by the state as a SANE. The witness was a licensed nurse, had received sexual assault examiner training through an on-line course, and had performed approximately 30 examinations of sexual assault victims. To require state certification as a prerequisite for qualification as an expert "would cause not only absurd results, but mandate the creation of new certifications any time a novel or rare issue were before a trial court."

People v. Brown, ___ Mich App ___ (No. 339318, decided 10/23/18)

PLEA PROCEDURE

Plea Agreements

Condition violates public policy

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, holding that both plea bargain conditions violated separation of powers and that the prosecutor could not move to withdraw the plea. *People v. Smith*, 321 Mich App 80 (2017). The Supreme Court held that the challenge to the condition that defendant resign was moot as defendant had already resigned. The Court upheld defendant's challenge to the ban on holding elective office on the grounds that it violated public policy. "The practical effect of enforcing a bar on a willing individual's ability to run is 'a limitation on the fundamental right to vote ....' ". Finally, the Court remanded to permit the prosecutor to move to withdraw the plea. The trial court cannot seek to enforce a plea bargain while rejecting one of its provisions.

People v. Smith, 502 Mich 624 (2018)

Preservation of Appellate Issues

§8 defense under the MMMA waived by non-conditional guilty plea

Defendant was charged with operating while intoxicated and possession of marijuana. She filed a pretrial motion for an evidentiary hearing on a proposed defense under §8 of the Medical Marihuana Act. The trial court denied the motion with respect to the operating charge because the MMMA explicitly does not provide a defense the charge of operating while intoxicated. Subsequently amended the first charge to operating a car with the presence of a controlled substance in her body. Defendant again moved for a hearing on her proposed §8 defense, which the court again denied. The court agreed with the prosecutor that the decision in *People v. Koon,* 494 Mich 1 (2013), did not apply because defendant was not a valid cardholder. The Court of Appeals affirmed. Because defendant did not enter a conditional plea, she cannot raise the issue of the trial court's denial of a §8 hearing. The provision is an affirmative, factual defense and does not challenge the state's authority to proceed. The court distinguishes a §8 defense from a §4 immunity claim.

People v. Cook, 323 Mich App 435 (2018)

Advice of Rights

Failure to advise of the correct maximum sentence

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. The Court of Appeals held that defendant was not prejudiced by the court's error and affirmed. *People v. Winters*, 320 Mich App 506 (2017). The Supreme Court affirmed because on these facts defendant could not show prejudice but vacated language in the Court of Appeals' decision that a defendant can never show prejudice in this situation.

People v. Winters, ___ Mich ___ (No. 156388, decided 5/18/18)

Plea Withdrawal

Making or copying child sexually abusive activity

The trial court did not abuse its discretion in denying defendant's motion for plea withdrawal. Defendant pled guilty to child sexually abusive activity based on the police finding sexual photos of children on defendant's computer and cell phone. Defendant pled to MCL 750.145c(2), which prohibits production of child sexually abusive activity. In support of his motion to withdraw his plea, defendant argued that he could only be convicted of the lesser offense of possession. MCL750.145c(2). The Court disagreed. The statute was amended effective 2013 to define make or copy very broadly. Although simply viewing an image on a computer would not violate the greater statute, defendant's actions here of downloading the images and putting them in folders on his various devices constituted "making."

People v. Seadorf, 322 Mich App105 (2017)

POST-CONVICTION & MISCELLANEOUS

Appeals

Newly discovered evidence

The trial court abused its discretion in denying defendants' motions for new trial based on newly discovered evidence. At a hearing, defendants presented the testimony of the homicide victim's son who was 8 years old at the time of his mother's shooting in 1999. He testified that he saw the killer and could identify him. He also testified that neither defendant was the shooter. The only issue before the Court was whether the newly discovered evidence would have made a different result probable on retrial. The trial court denied the motions for new trial primarily because it found that the victim's son lacked credibility. But, as the Supreme Court pointed out, the trial court's conclusion was not based on any evidence. The Court held that a jury could have found the witness credible and that alone could have led to a different result.

People v. Johnson, 502 Mich 541 (2018)

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 that 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. NOTE: On the prosecutor's application for leave to appeal, the Supreme Court ordered briefing and oral argument on whether leave should be granted. ___ Mich ___ (No. 156648, order issued 1/24/18).

People v. Washington, 321 Mich App 276 (2017)

CRIMES

Assault with intent to murder and felonious assault

Sufficient evidence but mutually exclusive

Evidence at trial established that defendant and the victim had a physical altercation, the victim fell to the ground, and when he stood up, the victim was bleeding from the chest. Witnesses never saw a knife but defendant kept his right hand hidden after the victim fell. Finally, an emergency room physician testifies that the victim had a wound consistent with having been stabbed. This evidence was sufficient to submit both AWIM and felonious assault to the jury. However, conviction on both offenses was prohibited. Although not double jeopardy, convictions of both AWIM and felonious assault for the same act violate legislative intent and are mutually exclusive.

People v. McKewen, ___ Mich App ___ (No. 339068, decided 10/25/18)

Child Sexually Abusive Activity

Sufficient evidence

The 52-year-old defendant showed a 16-year-old neighbor a video on his cell phone of two men having anal intercourse. Defendant then offered the boy money if he would perform certain sexual acts with Defendant. This was sufficient evidence that defendant engaged in child sexually abusive activity. The statute expressly punishes those who "…arrange for ... or ... attempt or prepare or conspire to arrange for ... any child sexually abusive activity or child sexually abusive material[.]" Apparently, by offering the boy money to engage in a sexual act, a reasonable trier of fact could find that defendant was attempting or preparing for sexually abusive activity. The prosecutor was not required to prove that defendant intended to produce sexually abusive material. **Note**: The Supreme Court ordered briefing and oral argument on whether leave should be granted. ___ Mich ___ (No. 157465, order issued 12/19/18).

People v. Willis, 322 Mich App 579 (2018)

Child Abuse First Degree

Sufficient evidence

Testimony that a five-year-old child witnessed defendant shaking the nine-week-old victim and medical testimony that the victim had injuries consistent with being violently shaken was sufficient to support the conviction for first-degree child abuse.

People v. McFarlane, ___ Mich App ___ (No. 336187, decided 6/19/18)

Conducting an Unlicensed Gambling Operation

General intent crime

Defendants were charged with conducting an unlicensed gambling operation based on evidence that customers at their bars could open accounts to wager on online games including slot and lottery-type games. Although the statute is silent on the *mens rea* requirement, the Court rejected both the prosecutor's strict liability argument and the defendant's specific intent argument. Instead the Court interpreted the statute to require general intent to conduct the operation. As a result, the Court rejected defendant's mistake of law defense as that would only apply to a specific intent crime where the mistake is reasonable and negates the specific intent.

People v. Zitka, ___ Mich App ___ (Nos. 338064,5, decided 6/26/18)

Criminal Sexual Conduct

Statute of limitations

Defendant was charged in 2015 for a CSCI with a minor based on an incident that occurred in 1983. At the time of the offense, the statute of limitations for the charge was 6 years. In 1987, the Legislature amended the statute of limitations to be 6 years from the date of the offense *or* until the victim's 21st birthday. In 2001, the Legislature again amended the statute, eliminating the statute of limitations entirely for CSC-I offenses involving a minor victim. Defendant left Michigan in 1989 or 1990 and returned in 2005. The Court held that the defendant could not raise a statute of limitations defense because when he left the state before the victim turned 21 (in 1991), the statute was tolled. When he returned, the statute of limitations defense for his charge had been eliminated. "Because the period of limitations had not yet expired in light of the tolling, the 2001 amendment became applicable to the case, extending indefinitely the period of limitations on a charge of CSC—I."

People v. Kasben, 324 Mich App 1 (2018)

Defendant, and Alaska resident, was extradited to Michigan in 2015 and charged with multiple counts of CSC-III for acts that allegedly occurred while he was visiting Michigan in 1996-7. The statute of limitations in effect at the time of the offenses would have expired in 2006-7. The Court held that defendant could not raise a SOL defense because the 10-year period was tolled while he resided outside of Michigan. The Court also held that application of the tolling requirement to defendant did not violate equal protection or his constitutional right to travel.

People v. James, ___ Mich App ___ (No. 342504, decided 10/11/18)

Election Forgery

Non-existent crime

Defendant was convicted of election forgery under the election law statute. MCL §168.937. The Supreme Court reversed the Court of Appeals and vacated defendant's convictions. §937 of the Election Law by its plain language does not establish a chargeable offense. Instead it is an "inoperable penalty provision" for a substantive crime that does not exist.

People v. Pinkney, 501 Mich 259 (2018)

Felony Firearm

Maintaining a drug house is a felony

Although the Legislature labeled maintaining or keeping a drug house a misdemeanor, it is a felony and can be used as a predicate for felony firearm. Pursuant to the Penal Code, any crime that is punishable by imprisonment in a state prison is a felony. Maintaining a drug house, MCL§33.7406 provides that the punishment for one who knowingly keeps or maintains a drug house is "imprisonment for not more than two years." Accordingly, it is a felony.

People v. Washington, 501 Mich 342 (2018)

Felony Murder

Duress not a defense to the underlying felony

In a question of first impression, the Court of Appeals held that a defendant may not raise duress as a defense to felony murder even when the duress claim relates to the underlying felony. The public policy of this state is to disallow duress as a defense to murder. Even when the claim of duress relates only to the underlying felony, "to allow the duress defense in this context would, in fact, allow it to be used as a defense to murder."

People v. Reichard, 323 Mich App 613 (2018)

First-Degree Premeditated Murder

Second look

The evidence at defendant's trial, viewed in a light most favorable to the prosecution, showed that defendant gained entry to the victim's apartment by a subterfuge, struck her over the head with a coffee mug, punched her in the face, "gained control of a kitchen knife," and stabbed her 29 times. This was sufficient to support defendant's conviction for first-degree murder. While the Court was "incapable of pinpointing the exact moment defendant thought about killing the victim and measured and evaluated his choices," it could have occurred between any of the above events.

People v. Oros, 502 Mich 299 (2018)

Jury Tampering

Applicable to all summoned for jury duty

Defendant stood outside the courthouse and passed out flyers to people who had been summoned for jury duty. The flyers, downloaded from the Fully Informed Jury Association website, informed potential jurors that they had a duty to follow their conscience, that they did not have to follow the juror's oath, and that they had the right to "hang" the jury if they did not agree with the other jurors. The Court of Appeals held that the term juror in the tampering statute applies to both sworn jury member and those summoned for jury duty.

People v. Wood, ___ Mich App ___ (No. 342424, decided 12/11/18)

Larceny

TITO ticket left in slot machine is property of another

The prosecutor established sufficient evidence that defendant took the personal property of another where defendant took a "Ticket In Ticket Out" (TITO) card another gambler briefly left in the adjoining slot machine. The complainant got up to go to the rest room and when she realized she did not have her TITO card, she returned to the slot machine within 4 minutes to search for it. This was sufficient to show that the card had not been abandoned and was property of another (when defendant grabbed it and put it in her pocket).

People v. Thorne, 322 Mich App 340 (2017)

Larceny in a Building and Larceny From a Person

Sufficient evidence but mutually exclusive

Defendant was convicted of both larceny in a building and larceny from a person for the single act of taking a $100 ticket from the deck of a slot machine. The ticket had been placed on the machine by a police decoy who then sat a foot away with her back to the machine. The Court found the evidence sufficient to support both convictions but vacated larceny in a building. The two convictions were mutually exclusive. "The fact that the victim of a larceny from the person is in a building at the time of the larceny is not sufficient to convict of larceny in a building."

People v. Williams, 323 Mich App 202 (2018)

Making a False Report of Felony Child Abuse

Not limited to mandatory reporters

Defendant convinced her minor daughter to falsely tell a teacher that her father had abused her. Defendant argued that since she was not a mandatory reporter under the child abuse reporting act, she could not be prosecuted. The Court disagreed. The act was not limited to mandatory reporters. It is also not a defense that defendant did not actually make the false report. She used her daughter, the teacher, and the principal as innocent agents in her scheme.

People v. Mullins, 322 Mich App 151 (2017)

Medical Marijuana Act

Usable vs. unusable marihuana

By her own admission, defendant possessed 550 grams of marihuana that was in various stages of drying. Because it was drying, it was not "usable" as defined by the MMMA. The act only provides immunity for the possession of usable marihuana. Relying on *People v. Carruthers*, 301 Mich App 590 (2013), the Court held that defendant could not claim immunity with regard to the unusable marihuana.

People v. Mansour, ___ Mich App ___ (No. 342316, decided 7/19/18)

Moving Violation Causing Serious Bodily Impairment

Violation must cause impairment

The trial court erred in instructing the jury that it had to find beyond a reasonable doubt that defendant committed a moving violation and as a result of his operation of the vehicle, caused the victim's injuries. Although the trial court used the language of M. Crim. JI 15.19, the model instruction incorrectly states the law. The victim's injuries have to be a *result of the moving violation* not merely from the operation of the car. The Court of Appeals reversed the conviction because the incorrect instructions on the law denied defendant a fair trial.

People v. Czuprynski, ___ Mich ___ (No. 336883, decided 8/2/18)

Reckless Driving Causing Death/Serious Bodily Injury

Sufficient evidence of willful or wanton disregard for the safety of persons or property

There was sufficient evidence to uphold defendant's convictions for reckless driving causing death and reckless driving causing serious bodily injury. The crash occurred in an intersection and there was evidence that defendant was driving too fast for the conditions, did not stop at the intersection stop sign, and may have even accelerated into the intersection.

People v. Carll, ___ Mich App ___ (No. 336272, decided 1/23/18)

Operating While Visibly Impaired

Ability to drive must be visibly impaired

It is not necessary for the prosecution to prove that a person's driving was visibly impaired in order to convict under this statute. As long as the *ability to drive* is visibly impaired, a conviction is proper. In this case, the arresting officer testified that he did not see any problems with defendant's driving; he stopped defendant because of an obscured license plate. The officer's observations after the stop (defendant's glassy, bloodshot eyes, the odor of alcohol), defendant's admission that he drank "two or three beers, and the results of the roadside sobriety tests were sufficient to establish that defendant's ability to operate his car was visibly impaired.

People v. Mikulen, 324 Mich App 14 (2108)

Perjury

No legislative immunity

Defendant, a member of the state Legislature, was charged with perjury based in his false testimony before a House Select Committee investigating claims of misconduct by defendant and another member of the House. Defendant filed a motion to dismiss arguing that he had legislative immunity under the Speech and Debate clause of the Michigan Constitution. The trial court denied the motion and the Court of Appeals affirmed. Defendant could not claim legislative immunity because his testimony was not related to legislative matters but to his personal qualifications to serve.

People v. Courser, ___ Mich App ___ (No. 341817, decided 10/23/18)

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." The circuit court dismissed the charge of violating this statute but the Court of Appeals reinstated it. *People v. Shami*, 318 Mich App 316 (2016). The Supreme Court unanimously affirmed in part and reversed in part. Evidence that defendant legally acquired various tobacco varieties, mixed them together, and sold them in blended form was sufficient to establish that he was manufacturing or producing tobacco in violation of the act. However, evidence that defendant also bought bulk tobacco and simply put that tobacco in individual tins for resale did not violate the act.

People v. Shami, 501 Mich 243 (2018)

Unauthorized Practice of a Health Profession

Unlicensed veterinarian cannot claim delegation defense

Defendant, a formerly licensed veterinarian whose license had been revoked, was charged with unauthorized practice for performing "spay and neuter" surgeries without a license. Before trial, defendant moved to quash the information arguing that evidence from the prelim established that a licensed veterinarian had lawfully delegated to defendant the right to perform the surgeries. The trial court denied the motion to quash but also denied the prosecutor's motion to bar the delegation defense at trial. Following a prosecutorial appeal, the Court of Appeals reversed. A delegation was unavailable to defendant was a matter of law. The statute permits delegation of certain duties by a licensed health care professions but not where the delegation "under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of [a] licensee ...." MCL 333.16215(1). Because he was unlicensed and because his license had been suspended for "providing substandard care to animals upon which he performed spay and neuter procedures" defendant did not meet the statutory requirement of having the skill and judgment of a licensee.

People v. Langlois, ___ Mich App ___ (No. 340477, decided 7/12/18)

CONSTITUTIONAL ISSUES

Confessions

Custody for *Miranda* purposes

The trial court suppressed defendant's confession finding that he was in custody and interrogated without *Miranda* warnings and the Court of Appeals affirmed. *People v. Barritt*, 318 Mich App 662 (2017). The Supreme Court found that the trial court used the wrong standard in finding that defendant was in custody and remanded to the trial court for a re-determination of the custody analysis. 501 Mich 872 (2017). On remand, the trial court again found that Defendant was in custody at the time of the questioning and the Court of Appeals again affirmed. In evaluating the totality of the circumstances, the Court held that "the trial court did not clearly err in finding that a reasonable person in defendant's position would have felt that he was not at liberty to terminate the interrogation and leave, and the environment presented the same coercive pressures as the type of station house questioning in Miranda." The police told defendant that they needed to speak to him about his girlfriend's killing, 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." Failure to give defendant *Miranda* warnings and obtain a valid waiver made his subsequent confession inadmissible.

People v. Barritt, ___ Mich App___ (No. 341984, decided 8/9/18)

Inadequate *Miranda* warnings

Defendant argued that the police interrogator violated Miranda by failing to advise her the she could cut off questioning whenever she wanted and by failing to advise defendant that her right to an attorney during police questioning. The trial court suppressed the confession based on the second argument and the Court of Appeals affirmed. The *Miranda* doctrine does not require police to advise a suspect of the right to stop answering questions and end the interrogation. However, in this case during two interrogations, the police only told defendant that she had a right to an attorney and that one would be appointed if she could not afford to hire one. She was never told that the right applied during police questioning. The Court acknowledged a split of authority on whether the advice has to include such a warning and concluded that it does: "we conclude that the essential information required by *Miranda* includes a temporally-related warning regarding the right to consult an attorney and to have an attorney present during the interrogation, not merely general information regarding the 'right to an attorney.'"

People v. Matthews, 342 Mich App 416 (2018)

Search and Seizure

Reasonable suspicion

Police stopped defendant's car because of a LIEN notice from the Secretary of State that indicated that the car was not insured. The trial court granted a motion to suppress finding that the police lacked reasonable suspicion because the SOS information is not necessarily reliable as it is only updated twice a month. The trial court also held that the providing of insurance information by the SOS to the police violated the confidentiality requirements of MCL 257.227(4) and MCL 500.3101a(3). As to the latter issue, the Court of Appeals held that even if the SOS violated the statutes, suppression is not available as a remedy. The Court also held that the stop was supported by reasonable suspicion. The LIEN information can form the basis for a stop even if it is, at most, 16 days old. Combined with the officers' unrefuted testimony that the insurance info on the LIEN was extremely accurate, the officers were justified in stopping defendant's car.

People v Mazzie, ___ Mich App ___ (No. 343380, decide 10/23/18)

Right to Counsel

Ineffective assistance of counsel – failure to file motion to suppress

Police officers pulled their car next to a parked car that had its lights on and motor running. Defendant was a passenger in the car. Police shined their flashlights on the car and observed defendant reaching behind him and then lean forward "as if he were attempting to place something on the floor under his seat." The officers approached the car and defendant "jumped out" holding a handful of money. One officer then shined his light into the passenger side and saw a gun protruding from under the seat. Defense counsel was not ineffective for failing to challenge the initial act of pulling up next to the car and shining a flashlight on defendant and his companion. None of these activities implicated the fourth amendment. The defendant lacked a reasonable expectation of in the car parked on a public road. His suspicious movements were within the open view of the officers. The use of a flashlight does not change the open view determination.

People v. Anderson, ___ Mich App ___ (No. 334219, decided 1/16/18)

Failure to engage in plea negotiations and to generally advise defendant

Following a *Ginther* hearing, the Court of Appeals upheld the trial court's ruling that defendant failed to establish ineffective assistance of counsel. Defendant testified at the hearing that his counsel never discussed a plea bargain and failed to advise him on the strength of the prosecutor's case and the consequences of going to trial or pleading guilty. Defense counsel testified that he met with defendant five or six times and discussed all of these matters. Counsel testified that defendant insisted that he was going to trial and claim self-defense. Counsel also discussed with defendant the burden of proof, the legal issues in the case, and the difficulty of establishing self-defense. The trial court evaluated the conflicting testimony and found defendant's testimony not credible. The Court of Appeals affirmed as the trial court's findings were not clear error.

People v. Pennington, 323 Mich App 452 (2018)

Confrontation

Use of redacted testimony of absent witness

Defendant and co-defendant were tried together for first-degree murder. Over objection the prosecutor was permitted to use the testimony from co-defendant's preliminary exam that implicated defendant in the shooting. Although the statement was redacted to replace defendant's name with "Blank" and the jury was instructed to consider the evidence only in reaching a verdict for co-defendant, the use of this evidence violated defendant's right of confrontation. The witness's "prior testimony was, of course, testimonial" and defendant never had an opportunity to cross-examine the witness. Neither the redaction nor a limiting instruction cured the constitutional violation. While redaction can be used to avoid confrontation problems, it must "eliminate not only the defendant's name, but any reference to his or her existence." The redaction failed to do that in this case. The danger that the jury would not follow the limiting instruction under these circumstances was too great. Remanded to the Court of Appeals to determine if the preserved constitutional error was harmless beyond a reasonable doubt.

People v. Bruner, 5012 Mich 220 (2018)

Free Speech

Conviction for jury tampering did not violate First Amendment

Defendant stood outside the courthouse and passed out flyers to people who had been summoned for jury duty. The flyers, downloaded from the Fully Informed Jury Association website, informed potential jurors that they had a duty to follow their conscience, that they did not have to follow the juror's oath, and that they had the right to "hang" the jury if they did not agree with the other jurors. Defendant's jury tampering conviction for this activity did not violate his First Amendment rights. Using a strict scrutiny analysis, the Court held that the state has a compelling interest in protecting the sanctity of the jury process and that the statute, as applied to defendant, was a "narrowly tailored means of achieving that interest.

People v. Wood, ___ Mich App ___ (No. 342424, decided 12/11/18)

Due Process

Delay in arrest and charges

The prosecutor initially charged defendant with CSC against three victims in 1997. When one of the alleged victims did no appear at either the first preliminary exam or the rescheduled one, the court dismissed the case without prejudice. Defendant pled guilty to CSC charges involving the other two victims and was sentenced to concurrent terms. One year after defendant's 2015 release from prison, the prosecutor obtained DNA evidence implicating defendant in the dismissed CSC and re-filed those charges. The trial court granted defendant's motion to dismiss finding that the delay in charging prejudice defendant. The Court of Appeals reversed. The prejudice found by the trial court was either speculative (defendant "might have had an alibi witness") or misplaced. The trial curt noted that if the charges had been timely brought, defendant would have likely served the sentence concurrently with the other two cases. By bringing the charges so late, defendant will effectively have to serve a consecutive sentence. The court's concern was not relevant. In order for there to be a due process violation, the court must find that the delay prejudiced defendant's right to a fair trial.

People v. Scott, 342 Mich App 459 (2018)