OUTLINE FOR SEARCH AND SEIZURE SEMINAR
(CAP PRESENTATION ON 2/8/19)

SECTION III

MICHIGAN JURISPRUDENCE

TABLE OF CONTENTS

III. MICHIGAN JURISPRUDENCE

A. RECENT MICHIGAN SUPREME COURT DECISIONS

1. Search and Seizure Cases[1]

***People v Mead*, --- Mich ---; --- NW2d ---; No. 156376, 2019 WL 1769597 (April 22, 2019)**

Search & Seizure --- Auto Stops and Searches --- Expectation of privacy --- Search of a Vehicle Passenger's Backpack --- Standing --- Apparent Common Authority --- Use of Backpack --- Determination of Ownership --- Consent Search--- Scope of Consent --- Warrant Exceptions --- Other Grounds for Search--- Exclusionary Rule

Held: Defendant had a legitimate expectation of privacy in his backpack and the warrantless search of the backpack violated the Fourth Amendment. *People v Labelle* overruled. Because the driver did not have apparent common authority over the backpack, the search of it was not based on valid consent and was *per se* unreasonable absent another, applicable exception to the warrant requirement. Moreover, "we agree with the Court of Appeals that none of the other exceptions to the warrant requirement has been satisfied."[2]

Facts/Summary/Reasoning: Police officers stopped a car for an expired license plate. One officer noticed that the front seat passenger (defendant Larry Mead) was clutching a backpack on his lap, leading the officer to believe that it belonged to defendant. After deciding not to arrest the driver, the officers discussed with each other their concerns about how defendant was holding the backpack and they decided to ask the driver for consent to conduct a search of the car.

Out of defendant's presence, the officers spoke to the driver and obtained her consent. When asked by the officers to step out of the car, defendant did so, leaving the backpack on the passenger seat floorboard. Without asking defendant for consent to search the backpack, the officers searched it and found methamphetamine.

---

[1] Many of the summaries for the published and unpublished Michigan cases are modified from the SBM case summaries; available at: https://www.michbar.org/opinions/opinionSearch

[2] ***People v Mead*, 320 Mich App 613; 908 NW2d 555 (2017) [rev'd and remanded on other grounds --- Mich ---; --- NW2d ---; No. 156376, 2019 WL 1769597 (April 22, 2019)]** provides a recent analysis of many of the exceptions to the warrant requirement, and why the requirements were not satisfied, including:

- abandoned property / possessory interest
- protective / *Terry* search
- search incident to arrest
- probable cause that vehicle/container 'contains articles that officers are entitled to seize'
- inventory search
- inevitable-discovery

The Court overruled *LaBelle*, which had concluded that "[b]ecause the stop of the vehicle was legal, the defendant, a passenger, lacked standing to challenge the subsequent search of the vehicle." Rather, the Court reaffirmed that "a person—whether she is a passenger in a vehicle, or a pedestrian, or a homeowner, or a hotel guest—may challenge an alleged Fourth Amendment violation if she can show under the totality of the circumstances that she had a legitimate expectation of privacy in the area searched and that her expectation of privacy was one that society is prepared to recognize as reasonable."

In the usual case, a passenger will not have a legitimate expectation of privacy in someone else's car. As *Rakas* explained, "a passenger qua passenger simply would not normally have a legitimate expectation of privacy" in areas like the glove compartment or trunk. *Rakas*, 439 U.S. at 148-149, 99 S.Ct. 421. However, "*Rakas* did *not* hold that passengers cannot have an expectation of privacy in automobiles." *Byrd v. United States*, 584 U.S. ——, ——, 138 S.Ct. 1518, 1528, 200 L.Ed.2d 805 (2018) (emphasis added). In short, the usual case is not every case; normally does not mean never.

A defendant had a legitimate expectation of privacy in his backpack. This case differed from *Rakas* in one important way – defendant challenged "the search of a personal effect—his backpack." And the record established that he "asserted a clear possessory interest in his backpack by clutching it in his lap." Officer B believed that it belonged to him because of the way he was holding it.

Although "defendant had no (and claimed no) legitimate expectation of privacy in the interior of [the driver, T's] vehicle, he had a legitimate expectation of privacy in his backpack that society is willing to recognize as reasonable." For Fourth Amendment purposes, a passenger's personal property is not subsumed by the vehicle that carries it. A person can get in a car without leaving his Fourth Amendment rights at the curb.

The Court next decided whether the search was lawful. In dispute was whether an objectively reasonable officer would conclude that T had apparent common authority over defendant's backpack, and whether the backpack was within the scope of her consent to search the car.

The court again broke with *LaBelle*. It instead reaffirmed that "an officer must obtain consent from someone with the actual or apparent authority to give it, . . . that the scope of any consent search is defined by the consenting party, and that '[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness . . . .'"

That the search took place in a car is one fact that may inform whether, based on the totality of the circumstances, a defendant had a legitimate expectation of privacy in the place searched. The law recognizes that expectations of privacy are diminished in an automobile when compared, for example, to a home. *Byrd*, 138 S.Ct. at 1526.

Once a court has determined that the defendant had a legitimate expectation of privacy in the place searched, however, there is no "automobile exception" to the requirements for a consent search. The same law governs consent searches whether the place to be searched is a person's pocket, car, or home. Thus we need not "extend" Rodriguez to the specific context of automobiles; it is already the rule from *Rodriguez*. See *Rodriguez*, 497 U.S. at 188-189, 110 S.Ct. 2793.

***People v Wood*, --- Mich ---; 923 NW2d 884 (2019) (mem), rev'ing and remanding 321 Mich App 415; 910 NW2d 364 (2017)**

Auto searches --- Automobile Exception --- Defendant's Admission --- Plain View --- Probable Cause

Held: [W]arrantless search of the defendant's vehicle was properly executed pursuant to the automobile exception. Based on the defendant's admission of criminal activity and the presence of nitrous oxide canisters in the Trooper's plain view, the Trooper had probable cause to believe that the defendant had committed a crime and that evidence of that crime was located within the vehicle. See *People v Kazmierczak*, 461 Mich 411, 418–419 (2000).

2. <u>Select Other Issues</u>

***People v Parkmallory*, --- Mich App ----; --- NW2d ---; No. 342546; 2019 WL 2146352 (May 16, 2019)**

IAC --- New Trial ---- Stipulations --- Firearm Ineligibility --- Specified and Non-Specified Felony --- Felon in Possession --- Felony Firearm --- Restoration of Gun Rights Under State Law, MCL 28.424(1); ---- Prosecution of Firearms Offense, MCL 776.20 --- Successfully & Perfectly Defined --- Probation

Held: In an issue of first impression, the court adopted a definition of "successfully" for purposes of MCL 750.224f(1)(c)**.** Defendant's lawyer provided ineffective assistance when he stipulated that defendant was ineligible to possess a firearm because of his prior conviction [an unspecified felony]. But for this deficient performance, there was a reasonable probability that the trial's outcome would have been different. Reversed the convictions of FIP and felony-firearm.

Summary: Counsel "provided constitutionally ineffective assistance when he failed to present existing evidence supporting a finding that Parkmallory's right to possess a firearm was automatically restored under MCL 750.224f(1) [for a non-specified felony]."[3]

The prosecution claimed that because his probation was closed without improvement, he "did not 'successfully complete[] all conditions of probation or parole imposed for the violation.'" The court disagreed. Although this issue had not been

---

[3] MCL 750.224f(1) provides that gun rights are restored under state law, for non specified felonies, three years after all conditions of probation or parole are 'successfully' completed.

MCL 750.224f(2) prides the mechanism to restore state gun rights for specified felonies, including an application to circuit court five years after all conditions of probation or parole are 'successfully' completed.

Note: Notwithstanding the above statutory provisions, even if a person's gun rights are restored under state law, they are still prohibited under federal law from possessing a firearm, although there may be possible as applied challenges to the federal Gun Control Act, to restore federal gun rights under certain conditions, i.e., non-violent crime, e.g., tax evasion.

addressed by the court or by the Supreme Court in binding precedent, it found persuasive Justice Kelly's reasoning as to the meaning of "successfully" in *Sessions* and adopted it as its own.

In this case, "like the defendant in *Sessions*, Parkmallory achieved a favorable termination of his probation; he was unconditionally discharged, free from supervision, and had no lingering probation requirements to complete." While the order provided that his "probation was 'closed w/o Improvement,' that notation has no bearing on whether he successfully completed all conditions of probation." Further, as Justice Kelly recognized, "the Legislature chose to use 'successfully,' not 'perfectly.'"

To the extent that he "did not perfectly complete all conditions of his probation—as evidenced by multiple probation violation hearings — that failure has no bearing on whether he was nevertheless successful in completing all conditions of probation by virtue of the fact that, after the discharge was entered by the trial court, no conditions of probation remained for him to complete."

***People v Anderson*, 501 Mich 175; 912 NW2d 503 (2018)**

Magistrate's Duty--- Witness Credibility --- Preliminary Examination --- Standards for Evaluating Claims --- Preliminary Examination --- New Trial

Held: (1) a magistrate's duty at a preliminary examination is to consider all the evidence, including the credibility of witnesses;

(2) the standard for evaluating evidence on a motion for a new trial does not apply to a preliminary examination; and

(3) conclusion that complainant's testimony was not credible and dismissal of complaint were not abuses of discretion.

***People v Cook*, 323 Mich App 435; 918 NW2d 536, app den --- Mich ---; 920 NW2d 126 (2018)**

MMMA --- Defenses --- Waiver ---Unconditional Guilty Plea

Held: Affirmative defense under Medical Marihuana Act for unregistered medical use is not a jurisdictional defense, and is thus waived by an unconditional guilty plea or a plea of nolo contendere.

***People v Randolph*, 502 Mich 1; 917 NW2d 249 (2018)**

Standards--- Trial Court Errors --- Plain-Error --- Ineffective-Assistance --- Strickland Standards

Held: Defendant's failure to satisfy the plain-error test as to a trial court error, by itself, does not preclude an ineffective assistance of counsel claim related to the same error. The Court of Appeals "impermissibly conflated the plain-error and ineffective-assistance standards" in analyzing the claims and thus, failed to properly apply *Strickland* to his ineffective-assistance claims.

See: *People v Randolph* (on remand), No. 321551 [2019 WL 286678(Mich Ct App, Jan 22, 2019)] (finding no IAC for failure, inter alia, to file motion to suppress evidence).

B. RECENT COURT OF APPEALS PUBLISHED SEARCH AND SEIZURE CASES

***People v Anthony*, ---Mich App ---; --- NW2d --- (2019); COA No. 337793; 2019 WL 290026 (Jan 22, 2019) [2-1 opinion, Gleicher, J, dissenting]**

Search & Seizure --- Timing - When & How Seizure Occurred --- Timing of Officers' Decision to Investigate Truck --- Terry Stop ---Timing of Officers Arrival in Police Car --- Location Where Vehicle Parked --- Officers' Approach on Foot --- Removal of Defendant from Car --- MMMA --- Smell of Burned Marijuana

Held: The search complied with the Fourth Amendment and was supported by probable cause. The appeals court reversed the trial court's order suppressing the firearm, vacated the order dismissing the case, and remanded.

Summary/Facts/Reasoning: After a search of his truck in which police found a .45 caliber semi-automatic pistol. The trial court held an evidentiary hearing to determine whether the police constitutionally searched defendant Robert Anthony's vehicle. One witness testified: Detroit Police Officer Richard Billingslea. Billingslea insisted that he initiated a Terry stop of Anthony's parked pickup truck because it was impeding traffic. A video recording made by Anthony's neighbor showed a legally parked truck.

"The trial court's analysis that officers violated the Fourth Amendment hinged entirely on what it called 'pretext' and was premised on the trial court's finding that no traffic offense had occurred." The crucial issue was when and how that seizure occurred. There were three possible alternatives: when the officers drove to investigate the truck, when they arrived at the location where it was parked, and when they got out of the car and removed defendant from his vehicle. The trial court never explicitly reached a conclusion on this issue, "referring only to 'pretext' for 'the stop,' stating that '[t]here was not a reasonable suspicion to approach the vehicle.'"

The appeals court held that none of the three possibilities "would support a finding that the officers' actions were anything other than the consensual approach of officers to an individual in a public place." The trial court erroneously disregarded the fact that their approach did not implicate the Fourth Amendment, and erroneously disregarded the basis that Officer B "gave for conducting the actual search of the vehicle, which was the evidence of marijuana emanating from defendant's vehicle." Their subjective reasons for stopping alongside the truck were "irrelevant because regardless of intent, the police could do so in the manner in which they did without offending the Fourth Amendment.

Further, while at that lawful vantage point, the officer smelled marijuana—all before any seizure occurred—which gave the officers probable cause to search" the truck without a warrant. Thus, the "trial court erred when it excluded the evidence seized during the search on the basis that the officers needed to have a valid justification to stop next to defendant's vehicle on a public street."

Defendant's claim that in light of the MMMA the smell of burned marijuana could not justify criminal investigation was not persuasive. The appeals court has held that "a person using marijuana in a parked car in a parking lot open to the public is in a 'public place' within the meaning of the MMMA. Accordingly, if the MMMA does not apply to a parked vehicle in a parking lot open to the public, then it likewise could not apply to a parked vehicle on a public street." As he was using marijuana in his truck on a public street, the MMMA's protections did not apply.

Geicher, J (dissenting), *id*, at *9-10: The trial court believed what it saw in the recording, not Billingslea. It ruled the seizure pretextual and the search unconstitutional.

The majority holds that the police actually seized the truck based on Billingslea's back-up explanation that he smelled "burning marijuana" emanating from the vehicle. This was just a routine, "consensual" street encounter, the majority maintains, until the marijuana odor transformed it into a police investigation. I respectfully disagree for three reasons.

First, Billingslea repeatedly reaffirmed that he detained the truck because it was impeding traffic. The trial court did not believe that the truck was illegally parked and found that Billingslea restrained Anthony's freedom of movement without reasonable suspicion that a traffic offense had been committed. Read fairly and in context, the trial court ruled that the marijuana smell entered into the equation only after the seizure had been accomplished. The court suppressed evidence of the weapon found in the vehicle because the officers had neither reasonable suspicion nor probable cause to seize and then search Anthony or his truck.

Second, the majority ignores the trial court's factual finding that Anthony's vehicle was seized when the officers pulled alongside to investigate the "impeding" violation. The court did not clearly or legally err in finding that the officers' conduct would have communicated to a reasonable person that he was constrained from leaving at that point. The majority holds that Anthony was seized at a different time. But the majority's version of what happened cannot be reconciled with the testimony or the factual determinations actually made by the trial court.

Third, if the trial court omitted a necessary finding concerning exactly when Billingslea smelled the marijuana—before or after seizing Anthony and the truck—a remand is required. Fact finding is solely the province of the trial court, and Billingslea's credibility is at the center of this case. Rather than crediting one version of Billingslea's testimony, I would remand to allow the court to perform its fact-finding function.

***

The majority compounds its improper usurpation of the trial court's role by likening the officers' conduct to a simple visit made in passing on a public street. The officers were neither on foot nor simply passing by when the events at issue occurred. Rather, Billingslea and his partner deliberately pulled up closely alongside Anthony's pickup truck, impeding the truck's ability to move. First, there was a garbage can behind the truck, as the video depicts. Second, Billingslea testified that the officers were there to investigate an infraction. Third, Billingslea admitted that Anthony was not free to leave when he approached the vehicle. It borders on ludicrous to conclude that Anthony could have driven away when the police vehicle pulled up next to him and two uniformed officers got out. Given that Billingslea had decided that the truck was illegally blocking traffic, that he exited his marked car to investigate the "impeding," and that the officers had positioned the car as shown in the video, what is the likelihood that the officers would have permitted Anthony to turn on his ignition, wave goodbye, and leave the scene?

***People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018); [Jansen, J. concurred in result only]**

Reasonable Expectation of Privacy --- Movements In Car Parked on Public Street --- Trespass --- Use of Flashlights --- Open View --- Plain View --- IAC --- Failure to File Pre-Trial Motion

Held: Defendant had no reasonable expectation of privacy as to his movements in a car parked on a public street and that officers did not trespass when they pulled up behind the car and looked inside with trespass.

Summary/Facts/Reasoning: Shortly after midnight, police officers on routine patrol in a marked cruiser observed a parked car with its engine running and headlights on, and the officers pulled alongside the driver's side of the vehicle. The officers shined their flashlights at the car, observing that a female was behind the wheel and that defendant was sitting in the front passenger seat.

There was police testimony that defendant looked shocked and leaned back in his seat, appearing to pull something out from his waist area with his right hand, followed by defendant leaning forward as if he were attempting to place something on the floor under his seat. The officers found the movements suspicious, leading them to believe that defendant may be armed. When one of the officers exited the police cruiser, defendant jumped out of the passenger seat and car, holding a stack of money.

Upon defendant being detained, an officer went to the passenger side of the car, shined his flashlight inside the vehicle at the floorboard, and observed the back of a gun handle partly under the seat, giving rise to an inference, considering defendant's movements, that he had put the firearm in that spot in a frantic attempt to conceal it under the seat. The gun was seized, and defendant was arrested.

At the bench trial, defense counsel attempted to argue that evidence of the gun should be suppressed, considering that the officers lacked probable cause to stop and search the vehicle; however, the trial court refused to consider the argument, as counsel had failed to challenge the search and seizure in a pretrial motion. Defendant testified that he had no knowledge that the gun was in the car, that he had never possessed the weapon on his person, that he did not see the gun in the vehicle, and that he did not own the firearm. On appeal, he argued that defense counsel was ineffective for failing to move to suppress the gun.

The plain view doctrine was not technically applicable to his specific argument, which was "more akin to cases involving whether the police can gather incriminating information from a particular vantage point to then justify a search or search warrant based on the information, or whether police conduct at that vantage point in gathering the information is itself a search implicating Fourth Amendment protections."

His argument fell under the open view doctrine, which the Michigan Supreme Court recently noted in *Frederick*. The issue was whether "defendant's movements inside the car were in 'open view.'" This analysis required the appeals court to determine whether he "had a reasonable expectation of privacy or whether the officers' conduct constituted a trespass for purposes of information gathering." It concluded that the answer was no and thus, the "Fourth Amendment was not implicated and there was no search at the point in time when the police pulled alongside the parked car and observed" his movements inside.

There was no trespass, and he did not claim a trespass. Rather, defendant contended "that he and his female companion had a reasonable expectation of privacy. "They had no reasonable or legitimate expectation of privacy in a car parked on a public street. The officers' use of flashlights made no difference. Since filing a pretrial motion to suppress would have been futile, defense counsel was not ineffective.

***People v Mazzie*, --- Mich App ---; --- N.W.2d --- (2018); No. 343380; 2018 WL 5275321 (Oct 23, 2018)**

Traffic Stop --- Reasonable Suspicion --- Reliance on LEIN Information ---Vehicle Insurance --- Confidentiality Requirements of statutes---Exclusionary Rule ---Reasonableness of a Seizure--- Brief Detention --- Investigatory Stop

Held: (1) even if Secretary of State violated confidentiality requirements of statutes requiring automobiles to have insurance by sending information regarding whether vehicles were insured to a law enforcement information system, evidence from traffic stop of vehicle that did not have insurance could not be suppressed, and

(2) even if information in law enforcement information system indicating that vehicle was uninsured was only updated twice per month, it provided officers with reasonable suspicion that vehicle was uninsured, to support stopping vehicle.

Summary/Facts/Reasoning: Defendant was a passenger in the vehicle when it was pulled over and searched by police. The trial court gave two reasons for granting his motion to suppress – (1) the SOS's insurance information given "to the LEIN system is not up-to-date, i.e., it is only provided twice a month, so police lacked reasonable suspicion" to stop the vehicle and (2) the SOS was not allowed by statute "to provide the information to the LEIN system."

Taking the second rationale first, the appeals court found that nothing in MCL 257.227 and 500.3101a indicated "a legislative intent that the drastic remedy of the exclusion of evidence should be applied for violations of these statutes. Neither statute indicates that, should the confidential information be shared in a manner other than specifically permitted, the exclusionary rule" applies.

Further, the "purpose of the exclusionary rule, 'to sanction police misconduct as a means of deterrence,' would not be served" as it was the SOS that committed any statutory violation, not the officers who stopped the vehicle. The purpose of the statutes is to ensure confidentiality of information, not to deter police conduct.

As to the reliability of the information and reasonable suspicion, the court concluded that the delayed reporting time frame did not make an officer's reliance on the information to stop the vehicle "unconstitutionally unreasonable." Several cases from other jurisdictions courts have uniformly found "that vehicle-related information older than two weeks is a proper basis to establish reasonable suspicion to pull over a vehicle."

***People v Czuprynski*, 325 Mich App 449; 926 NW2d 282 (2018), app den No. 158416, 2019 WL 2317164 (Mich, May 29, 2019)**

Incorrect Jury Instruction --- Statutory Interpretation --- Moving Violation Operation Of A Motor Vehicle --- Serious Impairment of a Body Function ---- Proximate Cause --- Mens Rea --- Criminal Culpability --- Harmless Error Analysis --- Affidavit --- Search Warrant Validity --- Blood Draw ---- Probable Cause --- Officer's Reasonable Reliance on Issuing Judge's Findings

Held: (1) statute on moving violation causing serious impairment of body function required that a moving violation together with the operation of a motor vehicle cause the serious impairment of a body function;

(2) giving incorrect jury instruction on offense of moving violation causing death or serious impairment of body function, which relieved prosecution of burden of proving that moving violation caused serious injury, was not harmless error;

(3) affidavit in support of search warrant for defendant's blood draw provided probable cause to believe that sample would contain evidence of intoxicants; and
(4) police officer's reliance on issuing judge's finding of probable cause to conduct blood draw was objectively reasonable.

Summary/Facts/Reasoning: A search warrant to perform chemical testing should not be invalidated unless "material misstatements or omissions *necessary to the finding of probable cause* have been made." A search warrant remains valid even if it contains some incorrect information, or fails to include exculpatory information, if the incorrect or omitted information does not negate a finding of probable cause.

"Reliance on a warrant is reasonable even if the warrant is later invalidated for lack of probable cause, except under three circumstances: (1) if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his reckless disregard of the truth; (2) where the issuing judge or magistrate wholly abandons his judicial role; or (3) where an officer relies on a warrant based on a 'bare bones' affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

C. RECENT COURT OF APPEALS UNPUBLISHED[45] SEARCH AND SEIZURE CASES

1. Warrants - Search and Arrest - 2018 unpublished (alpha sort)

***People v Coleman*, No. 336663; 2018 WL 6815123 (Mich Ct App, December 27, 2018)**

Evidentiary/ Franks Hearing --- Offer of Proof --- Search Warrant ---Overbroad --- IAC --- Riley Doctrine --- Plain error

Ruling/Holding: The trial court did not abuse its discretion in denying defendant's motion for a *Franks* hearing, there was no plain error requiring reversal as to the scope of the search warrant, and defense counsel was not ineffective.

Summary/Facts/Reasoning: Defendant "failed to make the substantial preliminary showing required under *Franks*. Defendant did not make any offer of proof to support his allegations that the affidavit contained falsehoods." The affidavit "could have been more precise in describing" the officer's actions and observations, "as well as the facts on which he relied to establish probable cause. However, '[a]llegations of negligence or innocent mistake are insufficient' to warrant a *Franks* hearing."

He also argued that the "warrant was invalid because it contained overly broad language authorizing the search of any digital or electronic device, including cell phones." But he only cited the second of the two paragraphs describing the property to be seized. He ignored "the effect of reading the language in the first paragraph in conjunction with that of the second paragraph. The first paragraph describes, as items to be searched for and seized, 'any records *pertaining to the receipt, possession and sale or distribution of controlled substances* including *but not limited to* documents, video tapes, computer disks, computer hard drives, and computer peripherals[.]'"

Citing *Riley*, the language plainly contemplated "the inclusion of cell phones." The first paragraph "appropriately limited the description of items to be seized to devices, including cell phones, that *pertained to the distribution of controlled substances* this is the very limitation" defendant asserted it should have included. The fact that it "was not limited to particular applications on electronic devices did not make it overbroad."

***People v Easterwood*, No. 339395; 2019 WL 208022 (Mich Ct App, January 15, 2019)**

Search Warrant --- Cell Phone --- Scope --- Plain-View Exception --- IAC

Ruling/Holding: "The police acted reasonably within the scope of the search warrant" for defendant's cell phone in searching "the Internet history, at least cursorily, because the Internet history could reasonably be expected to contain information sought to be seized." Affirmed convictions of CSC I and accosting a child for an immoral purpose.

Summary/Facts/Reasoning: The search warrant described the "person, place, or thing to be searched" as defendant's "I phone 4." It authorized police to search his "entire phone for evidence of communications with or about" the victim (DP), his need for a

---

[4] The correct citation format in Michigan for unpublished opinions is: *A v B*, unpublished opinion per curiam of the Court of Appeals, issued [month, day, year] (Docket No. ___), p ___.

[5]

babysitter (she was babysitting his infant child when the charged incidents occurred), "and any type of contact with DP.

Defendant's text messages and his Internet browsing history" were two areas within his phone "where police could likely expect to find the evidence described in the search warrant." Given that the seizure of the evidence did not fall outside the scope of the warrant, defense counsel was also not ineffective for failing to move to suppress it.

***People v Gilliam*, No. 335533, 2018 WL 2223095 (2018), app den No. 158290 (Mich, Feb 4, 2019)**

Standard 4 Brief --- Search Warrant --- Standing --- Cell Phone

Ruling/Holding: Because the cell phone at issue was not cell phone from the vehicle, whether defendant has standing to challenge the search and whether officers acted reasonably under the circumstances is irrelevant.

Summary/Facts/Reasoning: Defendant, was a passenger in the backseat of the SUV. Richardson was driving a burgundy car with his passenger Johnson. Richardson stopped and the SUV turned in front of the car. Defendant fired several shots from the backseat of SUV at the burgundy car. Richardson was hit in his back and was paralyzed from the waist down. Johnson identified defendant as the shooter from a photograph, but was too frightened to identify him in court. Defendant testified at trial and maintained that an individual in the car fired first and defendant only shot back in self-defense.

In his Standard 4 Brief, defendant argues that the search of his uncle's vehicle and subsequent seizure of the cell phone violated his Fourth Amendment rights because the vehicle was not one of the items identified in the search warrant. Quite apart from whether defendant even has standing to contest the search, the claims of error are disposed of because he proceeds with a false premise. Defendant argues that evidence from the phone seized from his uncle's vehicle should have been suppressed but there is nothing in the record to support his claim that the phone was, in fact, in the vehicle. The testimony was clear that the phone was taken from the bedroom marked "BB."

***People v Goodwin*, No. 337329, 2018 WL 3039903 (Mich Ct App, June 19, 2018)**

Search Warrant --- Affidavits --- Franks Hearing --- Purpose Of Hearing --- Preliminary Showing --- Offer of Proof --- False Statements --- IAC --- Veracity of Affiant --- Informant Credibility

Ruling/Holding: The failure to establish grounds for a *Franks* hearing negates both prongs of the test for ineffective assistance of counsel. "Failing to advance a meritless argument . . . does not constitute ineffective assistance of counsel."

Summary/Facts/Reasoning: Defendant argues that Detective Sean Street's affidavit was deficient because it failed to address the informant's veracity or reliability. In fact, the affidavit states, "Affiant certifies that the CI is credible and reliable accredited to the below listed facts gathered by Affiant ...."

Moreover, the affidavit states that the informant's information regarding defendant's narcotics dealings at the Sigler Road residence was corroborated by an anonymous source. Defendant notes that the informant was compensated for participating in the controlled buy, which defendant argues likely affected his credibility. However, the purpose of a *Franks* hearing is to address the veracity of the affiant, not an informant. See *Franklin*, 500 Mich. at 102 ; *Martin*, 271 Mich. App. at 311-312,.

Defendant raises disparities between Street's trial testimony and the affidavit, but none of these rises to the level of a material discrepancy. At most, defendant has shown some minor discrepancies that do not rise to the level of a deliberate falsehood or reckless disregard of the truth. *Franks*, 438 U.S. at 471-472, 98 S.Ct. 2864. Defendant has failed to make a sufficient preliminary showing warranting a *Franks* hearing.

***People v Hale*, No. 335396, 2018 WL 1734240 (Apr 10, 2018), app den 917 NW2d 681 (Mich, 2018)**

Search Warrant --- Blood Draw Results --- Affidavit Sufficiency --- Evidentiary Hearing --- Exclusion --- Purpose --- Good-Faith Reliance

Ruling/Holding: Exclusion of the blood test results would not serve the purpose of deterring police misconduct, where Deputy S "acted in haste, but not in bad faith." Further, the admission of 404(b) evidence was harmless error since substantial other evidence supported defendant's convictions.

Summary/Facts/Reasoning: Defendant argued that the trial court erred when it denied his motion to suppress the results of his blood draw because the affidavit for the search warrant was insufficient.

The court held that "the search warrant was factually unsupported on the element of 'under the influence.'" There was "a wholesale absence of factual support" for this element in the affidavit. However, there was "no allegation that the police did not act 'within the scope of, and in objective, good-faith reliance' on" the search warrant.

Further, defendant "based his suppression argument on a claim that the search warrant was insufficient because some of the statements included therein were inaccurate and misleading." The trial court characterized S's "actions as 'hasty,' but not knowingly false or in reckless disregard of the truth." The appeals court agreed. The evidence did not show that S included "a deliberate falsehood in the affidavit or acted in reckless disregard for the truth." Because there was "no evidence of deliberate falsehood or reckless disregard for the truth, the trial court did not err in finding that the exclusionary rule applied to permit admission of defendant's blood test results, despite the affidavit's failure to establish probable cause related to the intoxication elements of defendant's charged offenses."

***People v Hughes*, No. 338030, 2018 WL 4603864 (Mich Ct App, September 25, 2018)**

Search Warrant --- Execution --- Earlier Search Warrant (Unrelated Case) --- Cell Phone Data --- Reasonable Expectation of Privacy

Ruling/Holding: Defendant had no REP related to cell phone data after the execution of the earlier search warrant on an unrelated case. *Riley* inapplicable because cell phone had already been seized.

Summary/Facts/Reasoning: Armed robbery at victim's residence. Cell phone evidence linked defendant to crime. A search warrant for defendant's phones in an unrelated case involving drug-trafficking was issued and subsequently executed. It authorized seizure of any cell phones found and permitted a forensic or manual search, with any data retrieved to be preserved and recorded.

The phone data already had been lawfully extracted from defendant's phone pursuant to the earlier search warrant. The fact that the search warrant was for an

unrelated case is not relevant. What is relevant is that defendant's privacy rights were protected and any invasion into his privacy was authorized by a valid search warrant.

***People v Jamison*, No. 336124; 2018 WL 1972659 (April 26, 2018), app den 921 NW2d 333 (Mich, 2019)**

Search Warrant --- Probable Cause --- Officer Training and Experience --- Affiant's Personal Experience --- Hearsay --- Confidential Informants --- CI Knowledge --- Staleness --- Statutory Requirements --- Franks Hearing

Ruling/Holding: Affidavit for the search warrant was sufficient on its face to establish probable cause for the warrant; the trial court erred in quashing the warrant and dismissing the charges. Defendants were not entitled to a *Franks* hearing.

Summary/Facts/Reasoning: While the trial court noted that the confidential informant (CI) did not specify when the observations were made, the CI's "statement that the seller had been trafficking drugs from this location 'for a while now' indicates that it had happened in the past, and it was currently ongoing. The informant's assertion that the seller 'only *sells* to people that he know[s]' also indicates that the seller was currently engaged in drug trafficking.

A plain reading of this sentence does not indicate that the informant's information is too stale for a finding probable cause." Further, the affiant "personally confirmed that activities were *presently* ongoing that significantly corroborated the informant's observations and that the drug trafficking was presently ongoing."

Several of the reasons given by the trial court in ruling that probable cause was not shown related to failing to meet the requirements for a CI in MCL 780.653(b). However, the CI had personal knowledge in light of the statements that he or she personally observed narcotics being sold at the house. Further, Officer M conducted "surveillance of the house on three separate days.

Although each surveillance was only for 30 to 60 minutes, within each short period of time," he saw several people arrive at the house, "enter through the same side door, and leave shortly after." The affidavit recited his law enforcement training and experience, "specifically in the area of narcotics trafficking." His personal experience was relevant, and his "observations, especially filtered through his experience, corroborated the reliability of" the CI's knowledge.

***People v Johnson*, No. 329742, 2018 WL 4577295 (Mich Ct App, September 13, 2018)**

Search Warrant --- Validity --- Affidavit---Officer Observations --- Open View --- Marijuana --- MMMA Provisions--- Controlled Substance Act [CSA] Violations ---Reasonable Mistake of Officer

Ruling/Holding: The affidavit provided a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place . . . and for inferring that defendant was not in compliance with the MMMA.

Summary/Facts/Reasoning: Defendant became a patient under the MMMA in 2009 and a caregiver in 2010. He resides on the second floor of a building that formerly functioned as a motel. His son resides in a converted room on the first floor of the same motel. Defendant's main "grow operation" is in a greenhouse behind the building. He also grows plants in two of the old motel rooms and maintains a "cloner" in his son's room.

Defendant leased a mobile home on the property to Michael Lehto, who is also a medical marijuana caregiver. The mobile home bears its own address, but it appears that Lehto does not live there. Rather, he grew marijuana plants in and behind the mobile home. Defendant and Lehto helped one another with each other's grow operations.

On August 20, 2014, Michigan State Police Detective Sleeter, a member of the Upper Peninsula Substance Enforcement Team, and a "Detective Sergeant Koski" were conducting "Medical Marijuana grow checks." The detectives stopped at defendant's residence. Detective Sleeter testified that, from the roadway, he was able to view marijuana plants behind what "looked like an old motel." The detectives made contact with defendant, who denied them access to the property without a search warrant. Sleeter said that defendant presented to him an expired medical marijuana patient card and separate caregiver cards for two of defendant's patients.

In an affidavit submitted requesting a search warrant, Sleeter stated in part that he had observed marijuana plants growing on the property, that defendant had stated that he was a medical marijuana caregiver who had a "secure facility," and that defendant had presented to him an expired card. Sleeter averred that there was reason to believe that a search would reveal violations of the Controlled Substance Act and the MMMA.

Defendant filed a motion in the trial court to quash the search warrant and dismiss the information. He argued that Sleeter's affidavit was insufficient to establish probable cause for a search warrant. Specifically, Sleeter's observation that there was marijuana growing on the property did not establish probable cause for the search. Further, Sleeter's averment that defendant had presented an expired card did not support a finding of probable cause.

Defendant also asserted that he had presented a valid patient card and that it was the caregiver cards that were expired. After a hearing at which defendant presented a patient card that was valid on the subject date, the trial court denied defendant's motion. The court reasoned that, pursuant to *People v. Brown*, 297 Mich. App. 670; 825 N.W.2d 91 (2012), Detective Sleeter's affidavit only needed to establish probable cause that contraband would be found on the property.

Defendant subsequently filed a motion to dismiss the charge based on Section 4 immunity under the MMMA. He also moved for an evidentiary hearing, asserting a Section 8 defense under the MMMA. The trial court denied defendant's claims of Section 4 immunity and the Section 8 affirmative defense.

The appeals court found that Detective Sleeter did not seek a search warrant on the ground that defendant possessed a registry identification card. Rather, he averred that he could see marijuana plants growing openly from the road and that defendant responded by telling him that he was a medical marijuana cardholder and that he had a "secured facility." Accordingly, the affidavit provided "a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place." *Brown*, 297 Mich. App. at 677.

"While this Court could affirm the trial court's ruling for this reason alone, we also conclude that there was a substantial basis in the affidavit for inferring that defendant was not in compliance with the MMMA." "Marijuana remains a schedule 1 substance in Michigan's Public Health Code, MCL 333.7212(1)(c), and medical use of marijuana is not recognized as a legal activity at the federal level." *People v. Kolanek*, 491 Mich. 382, 394 n 24 (2012).

The MMMA provides that the possession of a registry identification card "shall not constitute probable cause or reasonable suspicion, nor shall it be used to support the

search of the person or property of the person possessing ... the registry identification card ....” MCL 333.26426(g). However, the affidavit was based on the officer’s observations, not because defendant possessed a registry identification card.

Alternatively, defendant argues that he proved that his card was not expired. He presented his registry identification card, which was issued in February 2014 and expired in March 2016. Detective Sleeter maintained that defendant presented a card that expired in 2013. The trial court did not resolve this dispute.

Even if defendant had presented his valid patient card to Sleeter, defendant admittedly presented Sleeter two expired caregiver cards. Likely, the similarity of the cards was the source of confusion. In all likelihood, Sleeter made a reasonable mistake in viewing the cards. Defendant did not show that Sleeter intentionally or recklessly inserted false material into the affidavit. Even if defendant met that burden, Sleeter's observation of the grow operation from the road provided a substantial basis for inferring that both the Controlled Substances Act and the MMMA were being violated. Thus, the statement relating to the expired card was not necessary to establish probable cause.

***People v Kent*, No. 336245, 2018 WL 1733435 (Apr 10, 2018), app den 917 NW2d 638 (Mich, 2018)**

Search Warrant --- Affidavit --- Deference to Magistrate's Findings --- Probable Cause Decision to Issue Warrant --- Circumstantial Evidence ---Reasonable Inferences --- Overnight Guest --- Factors Relevant to Standing --- Expectation of Privacy --- Lack of Evidence at Hearing ---Cell Phone Ping

Held: The trial court should have denied the motion to suppress the evidence obtained through the search warrant because defendant lacked standing. Assuming arguendo, that defendant had standing to challenge the search warrant for Davis's home, he has not shown why the magistrate's finding of probable cause should be disturbed.

Summary/Facts/Reasoning: Over the span of about a week, defendant shot his Williams on two different dates. They had an initial argument in front of defendant’s girlfriend, (Davis). Defendant contended that the trial court erred when it denied his motion to suppress evidence obtained from his girlfriend’s (D) home because the search warrant was based upon an affidavit that failed to supply probable cause. He contended he was an overnight guest at D’s home; thus, he had standing to contest the search.

“While an overnight guest may be entitled to a legitimate expectation of privacy, defendant presented no evidence in support his assertion that he was an overnight guest” in D’s home. During the motion hearing, defense counsel simply asserted that “defendant had standing to contest the search warrant because ‘he may have stayed overnight’” at D’s home. Defense counsel conceded that D was defendant’s “girlfriend,” but did not provide “any evidence that defendant had actually been an overnight guest” in D’s home.

Assuming defendant had standing, he failed to show why the probable cause finding should be disturbed. He asserts that the affidavit in support of the search warrant was deficient in establishing a nexus between defendant, his shooting of Williams, and Davis's home. The affidavit alleged that defendant shot at Williams after defendant exited a Ford Fusion driven by defendant's “girl, ‘Christina,’ ” and subsequently, defendant left the area in that automobile. The affidavit provided that Williams stated that “ ‘Christina’ ” lived in Westland, and a search of “Accurint law enforcement database” revealed that “Christine Davis” was a “known associate” of defendant who lived in Westland and that a license plate for a 2008 Ford Focus was registered in her name.

Moreover, the affidavit alleged that a search warrant had been executed for defendant's cellular phone number, and that on July 14, 2015, Officer Skender reported that a "ping on" defendant's cellular phone placed defendant near Davis's address, and surveillance revealed that Davis's Ford Fusion was "observed" at Davis's home. The affidavit stated Davis provided defendant with transportation before and after he shot at Williams. As such, there was a fair probability that defendant or evidence related to shootings of Williams would be present in her home.

The court also rejected the suggestion that because the supporting affidavit was clearly defective, that no reasonable officer should have relied on the warrant issued by the magistrate in good faith, because defendant has failed to demonstrate the existence of any underlying defect in the affidavit or the search warrant.

***People v Miller*, No. 335888, 2018 WL 2370684 (May 24, 2018), app den 920 NW2d 580 (Mich, 2018)**

IAC --- Search & Seizure --- Warrantless Search of Home --- Probation Exception --- Probable Cause --- Constructive Possession --- MMMA --- § 8 Affirmative Defense --- Standard IV Brief

Held: The probation/police search of his home did not violate the Fourth Amendment because the terms of which allowed the police to search his home without a warrant and without notice. There was no violation of the Administrative Code for Probation Officers. Moreover, if probable cause were required, it existed as defendant's daughter had informed someone at DHHS that guns and marijuana were being kept in defendant's home.

Summary/Facts/Reasoning: Defendant allowed a team (probation department and police officers) to enter his home and conduct a compliance search. The search was prompted by a complaint from the Department of Health and Human Services (DHHS), which advised that defendant's daughter had made some statements indicating that weapons and marijuana were located in defendant's home. Weapons, a gun safe, gun shells and controlled substances were discovered during the search.

Defendant testified that he did not know about the presence of the rifle under his bed. He admitted that he owned the rifle but claimed it had been stored at his former fiancée's parent's home and that it was used by his children for hunting. He also claimed that his former fiancée was a medical marijuana user and that he had given her the gun safe to store her marijuana. He testified that she had the only key to the gun safe but that she had lost it. Although defendant did not present his former fiancée as a witness, he did present the testimony of his friend, Jesse Thwaite, who testified that he had returned the rifle to defendant's home when no one was home and had failed to inform defendant of this fact until after the probation search had occurred.

The prosecution presented two rebuttal witnesses: defendant's sister, Rebecca Nye, and her husband, Douglas Nye. Rebecca testified that she overheard defendant give permission to the police to break into the gun safe. Douglas testified that in late 2015, defendant had brought the rifle to him to have some gunsmithing work done on it. Douglas also testified that shortly after the search, defendant brought him a rifle magazine and .30 caliber ammunition, telling him that since the police had taken the rifle he had no need for the magazine or the ammunition. Finally, Douglas testified that defendant had told him that during a previous search, the police had failed to discover the rifle because it was hidden beneath a couch on the front porch.

Defendant first claims that his counsel was ineffective for failing to object to the police search of his home, which defendant suggests was unconstitutional. He further claims that counsel should have utilized a surveillance video to demonstrate the unconstitutionality of the search. Defendant has not established that such a video even exists or what it depicts (beyond the unsupported claim that it would show the search was illegal). Defendant does not present any argument or analysis to explain why the search was unconstitutional. In short, defendant has failed to adequately present this issue for review. *People v. Kelly*, 231 Mich. App. 627, 640–641; 588 N.W.2d 480 (1998).

Furthermore, the record shows that one of the terms of defendant's probation authorized the police to search defendant's property or premises to ensure compliance with his terms of probation. As such, defendant has failed to show how the search was impermissible, and thus counsel was not ineffective for failing to raise a meritless argument. See *Ericksen*, 288 Mich. App. at 201.

Defendant raises as independent claims each of the claims he has addressed as an example of his trial counsel's alleged ineffectiveness. Unpreserved issues are reviewed for plain error. *Carines*. Defendant first claims that the probation/police search of his home violated the Fourth Amendment. He alleges that a surveillance video would substantiate his claim by showing that no one permitted the probation agent or police to enter his home.

But nothing in the record shows what this video purportedly would reveal. In any event, Simmon testified that she requested entry into the home and that defendant granted the request. Defendant did not contest this claim in his own testimony. Moreover, defendant was on probation; its terms allowed the police to search his home without a warrant and without notice.

Defendant also argues that the Administrative Code requires that agents have probable cause before conducting a search. However, defendant cites Mich. Admin. Code R 791.7735, which applies to parolees, not probationers. One of the terms of defendant's probation order was that he consent to searches of his person and property. Defendant did not dispute this in the trial court, and he has offered nothing on appeal to contradict Simmon's testimony in this regard. Rule 791.9920(1), which applies to probationers, required only that the probation department place the terms and conditions of the probation in the order of probation and inform the probationer of the terms and the consequences for failing to abide by the terms. Moreover, even if probable cause were required, it apparently existed as defendant's daughter had apparently informed someone at DHHS that guns and marijuana were being kept in defendant's home.

***People v Morris*, No. 333468, 2018 WL 3073762 (Mich Ct App, June 21, 2018)**

Jurisdiction --- Warrant Validity --- Warrant Sufficiency --- Arrest Warrant --- Probable Cause --- Remedies

Ruling/Holding: Regardless of the legal sufficiency of the arrest warrants, the trial court was not deprived of subject matter jurisdiction or personal jurisdiction such that defendant's convictions could be considered invalid.

Summary/Facts/Reasoning: Defendant argued that the warrants in both of the underlying cases were invalid because they were not supported by probable cause, were not properly sworn to, and were not supported by affidavits. Further, a proper record was not made of the “swear-tos” that occurred on July 11, 2015 and October 1, 2015, and that

the oral testimony relied on by the magistrate to issue the warrants was therefore not adequately preserved to permit review. Defendant appears to argue that the trial court did not have "jurisdiction" to conduct the proceedings that occurred below.

The invalidity of the arrest warrant did not oust the circuit court of jurisdiction. The sole sanction imposed by the United States Supreme Court for the invalidity of an arrest warrant has been the suppression of evidence obtained from the person following his illegal arrest.

The Court has consistently held that a court's jurisdiction to try an accused person cannot be challenged on the ground that physical custody of the accused was obtained in an unlawful manner. The power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Defendant was convicted after a trial on the merits, for which he was present. He had previously been made aware of the charges against him on numerous occasions throughout the district court and circuit court proceedings. Defendant does not claim that there was any evidence obtained from him as a result of his arrest, and the suppression remedy is therefore inapplicable.

***People v Osborne*, No. 336716, 2018 WL 2422336 (May 29, 2018), app den No. 158127, 2019 WL 447034 (Mich, Feb 4, 2019)**

Blood Draw --- Search Warrant --- Statutory requirements --- Affidavit --- Probable Cause --- Arrest ---Officer Observations --- Officer Knowledge --- Reasonable Suspicion

Ruling/Holding: Arrest was supported by probable cause, and the search warrant authorizing defendant's blood draw was likewise supported by probable cause.

Summary/Facts/Reasoning: Officer Newton had knowledge of the reported erratic driving, he observed what appeared to be fresh damage on defendant's vehicle, and the vehicle was parked in a manner suggesting that someone impaired had been operating it. Moreover, he prudently followed bystander leads that ultimately led him to defendant's apartment, where he observed defendant's level of intoxication. Finally, defendant and his vehicle both matched the descriptions Newton received. Newton's testimony indicates a set of factual circumstances sufficient to create the belief in a person of reasonable caution that defendant had committed the offense of operating while intoxicated. *Champion*, 452 Mich. at 115.

The search warrant authorizing the blood draw was likewise supported by probable cause and comported with MCL 780.653. The affidavit states that Newton believed that defendant was the driver of a motor vehicle involved in a crash.

***People v Pharms*, No. 335439, 2018 WL 384614 (Mich Ct App, January 11, 2018)**

Search Warrant --- Validity --- Affidavit --- Common Sense Reading of Affidavit --- Magistrate's Conclusions --- Officer Testimony --- Parole Exception

Ruling/Holding: The search warrant was valid. Even if the search warrant was invalid, the search of defendant's apartment was consistent with the parole exception.

Because the search did not run afoul of the Fourth Amendment, there was no basis for suppressing the evidence seized from the apartment.

Summary/Facts/Reasoning: Detectives Wills and Terpstra became interested in defendant as a possible drug trafficker after interviewing a suspect, Crysler. She told detectives that she obtained cocaine and heroin from defendant, whom she identified in court, and then sold it.

After speaking with Crysler, Terpstra and Wills went to defendant's apartment, accompanied by Detective Mazarka and Sergeant Leonard and the parole agent. Defendant lived on the third floor of an apartment building. As Terpstra, Mazarka, and the parole agent went to the third floor, Wills and Leonard went through the building on the second floor to an exterior staircase at the back of the building and positioned themselves on a landing between the second and third floors.

Terpstra testified that he looked out a window in the third floor hallway as he approached defendant's apartment, and saw two bags containing a "white substance consistent with cocaine" fly through the air "at a downward angle." Terpstra testified that there were no balconies in the area from which the bags could have been thrown other than the balcony of defendant's apartment. Wills testified that he saw the bags fall past the outside stairs "from above." Immediately after seeing the bags fall, Wills saw defendant standing on the balcony of his apartment. Wills tried to speak with defendant, but he retreated into his apartment.

Leonard saw the bags falling and believed, based on their size, that they each contained an ounce of cocaine; he alerted the other officers to the bags. Leonard opined that the angle of descent meant that they could have only come from defendant's balcony. Terpstra took the items back to the station and prepared an affidavit for a search warrant. The remaining officers secured the scene. Defendant was in his apartment; after initially refusing to come out, defendant - the only occupant - exited the apartment.

The trial court found that there was nothing "obviously untruthful" about Terpstra's averment, and it specifically found that the affidavit was not "untruthful or intentionally or recklessly false in any way." When analyzed out of context, the statement that he "observed some items being thrown" suggests that Terpstra actually saw someone doing the throwing, which would have been false. But courts do not read the statements from an affidavit in isolation and out of context to reach a strained construction; courts read the affidavits in a common sense and realistic manner. *Russo*, 439 Mich. at 604. When given a common sense reading, Terpstra's assertions are consistent with his testimony at the hearing. *** Although he arguably could have used more precise language, there is no evidence that he knowingly, intentionally, or recklessly failed to include a detail that was material to the assessment of probable cause.

The affidavit provided a substantial basis for concluding that defendant had possessed the controlled substances and that he had thrown them from his balcony. The magistrate could conclude that there was a fair probability that additional drugs or evidence of drug trafficking might be found in defendant's apartment.

Defendant was on parole at the time of the search, and parole agent accompanied the officers to the apartment to conduct a search on the basis of evidence that defendant might be violating his parole. Even if the search warrant at issue were invalid, the officers could have lawfully searched defendant's apartment consistent with the requirements of the Fourth Amendment under the parole exception.

***People v Salam*, No. 334875, 2018 WL 340939 (Jan 9, 2018), app den 911 NW2d 708 (Mich, 2018)**

Search Warrant ---- Probable Cause --- Affidavit --- Surveillance --- Officer Knowledge ---- Officer Experience --- Tipster's Information --- Reviewing Courts

Ruling/Holding: Search warrant affidavit contained a description of the exchanges that Hurd observed while performing surveillance on defendant's house. This information was based on facts that were within Officer Hurd's personal knowledge. Hurd conducted his own surveillance and confirmed the tipster's information that defendant's house received a high volume of visitors who appeared to be purchasing narcotics.

Summary/Facts/Reasoning: Search warrant affidavit ase contained a description of the exchanges that Hurd observed while performing surveillance on defendant's house. This information was based on facts that were within Hurd's personal knowledge. Moreover, Hurd described that his experience investigating drug crimes made him aware that the nature of the numerous, brief visits involving hand-to-hand contact between defendant and his visitors was indicative of drug sales.

Based on the alleged facts in the affidavit, the magistrate correctly found that probable cause existed to issue the search warrant. Hurd conducted his own surveillance and confirmed the tipster's information that defendant's house received a high volume of visitors who appeared to be purchasing narcotics. Defendant identified netiher a false statement in the affidavit, not an incorrect statement upon which the magistrate relied in finding probable cause to issue the search warrant.

***People v Van Sabra*, No. 337524; 2018 WL 1403553 (March 20, 2018)**

Search Warrant --- Probable Cause --- Affidavits -----Informant's Personal Knowledge --- Deference - Magistrate's Finding ----- Statutory Requirements - Informants ---- Circumstantial Inferences ----- Officer Training & Experience

Ruling/Holding: 'The specificity of the informant's information as to "the dates and manner of drug transactions, descriptions of the defendant's appearance and the vehicle he used to transport and sell drugs, and his pattern of conducting drug transactions, along with the affiant's corroborating observations, provides sufficient indicia that the informant spoke from personal knowledge." The affidavit was sufficient to establish probable cause and that the trial court erred in suppressing the evidence.

Summary/Facts/Reasoning: The case was dismissed in the trial court after he successfully moved to suppress the evidence seized during the execution of a search warrant for his home. The appeals court reversed and remanded.

The affidavit contained information about three specific instances in" 2015 when the informant reported being "at the target house with unsuspecting buyers, or had very recently been there, and witnessed defendant sell drugs to the buyers." The informant also reported being at the target house several times and witnessing "defendant, whom the informant knew as 'Dre' and who bragged about having served prison time, sell cocaine to buyers. The informant provided a detailed description of defendant" and described his vehicle "as a 'blue older model Mercury station wagon.'" The informant also told the officer that defendant stored "large amounts" of cocaine in the house, and

described his "practice of selling to unfamiliar buyers from his car on the streets rather than at the target location," where he only sold to buyers he knew.

The affidavit also reported the officer's investigation, including his observation of surveillance cameras at the house as well as a vehicle matching the informant's description, and several hand-to-hand transactions by defendant with different people at three different street locations. The content of the affidavit and the officer's corroborating investigation provided sufficient indicia that the unnamed informant "spoke from personal knowledge.

***People v Wodkowski*, No. 335789, 2018 WL 1342467 (Mar 15, 2018), app den 503 Mich 887 (2018)**

Search Warrants --- Validity --- Protective Sweeps --- Exclusion --- Independent Source

Ruling/Holding: Failure to leave a signed copy of the search warrant does not, by itself, render the warrant invalid, or the search unreasonable, nor does it require exclusion of items seized during the search. Only the 2014 protective sweep was valid. However, under the independent source rule, because nothing that the officers saw during the protective sweeps was presented to the magistrate or caused them to secure a warrant, suppression of the evidence would not be required.

Summary/Facts/Reasoning: Michigan State Police received information that defendant and his daughter were manufacturing methamphetamine but failed to leave a signed copy of the search warrant when executing the warrant.

The appeals court held that failure to leave a signed copy of the search warrant does not, by itself, render the warrant invalid, or the search unreasonable, nor does it require exclusion of items seized during the search. Even if there existed no specific and articulable facts that could lead police to suspect that dangerous or armed people were present, nothing that the officers saw during the protective sweeps was presented to the magistrate or caused them to secure a warrant

2014 protective seep: Because this was not an in-home arrest, the protective sweep of the residence and detached garage without a warrant was improper under *Buie*. However, the record reveals that no evidence obtained during this initial entry was presented to or affected the magistrate's decision to issue the warrant. Because a valid search warrant was obtained on information unaffected by the improper protective sweep, the illegal search does not require suppression of the evidence.

2016 search: Officers arrested defendant in the front yard of his residence on Second Street. Officers testified that the reasons behind the protective sweep were make certain there were no dangerous people present. This protective sweep was proper under *Buie*. Furthermore, as in the 2014 search, the search warrant affidavit did not include anything that the officers observed during the protective sweep and nothing was presented to or affected the magistrate's decision to issue the warrant.

2. Warrantless Search and Seizure Cases - 2018 unpublished (alpha sort)

a. Automobile related warrantless searches and seizures

***People v Albarati*, No. 334169; 2018 WL 1072814 (Feb 27, 2018), app den 503 Mich 860; 917 NW2d 72 (2018), recon den No. 157549, --- Mich ---; --- NW2d --- (2019)**

Terry Stop --- Anonymous Tips ---Reasonable Suspicion --- Initial Stop of Vehicle --- Probable Cause --- Arrest ---Vehicle Search --- Inventory Search

Ruling/Holding: Officers' stop, arrest, and search of defendant and his vehicle were justified. The trial court properly denied defendant's motion to suppress.

Summary/Facts/Reasoning: The totality of the circumstances viewed in the light of the information that Officer Janowicz knew at the time he initiated the *Terry* stop demonstrates that he had a reasonable, articulable suspicion that a crime was committed or in progress. Officer Janowicz testified that there were several anonymous calls made about a blue BMW parked at the donut shot with possible narcotics trafficking occurring inside. When Officer Janowicz arrived at the donut shop there was a blue BMW parked in the parking lot, with its engine running. The corroboration of the exact type of car in the exact location provided by the anonymous tip may provide reasonable suspicion that a crime was committed or being committed. Officer Janowicz ran the license-plate number and discovered that the vehicle was registered to defendant and that defendant had two prior drug charges. Moreover, defendant's windows were heavily tinted in violation of a city ordinance. This information was sufficient to warrant a reasonable officer in believing that criminal activity was present and to justify the *Terry* stop.

The totality of the circumstances demonstrates the officers had probable cause to arrest defendant. In performing a justified *Terry* stop of defendant, Officer Janowicz tapped on defendant's car window and asked defendant to roll his window completely down. Defendant refused. Officer Janowicz then asked defendant to exit the vehicle, which defendant also refused to do. Due to defendant's lack of cooperation, Officer Janowicz had to radio for backup. When Officer Bondra and Officer Wood arrived, Officer Janowicz continued to ask defendant to exit the vehicle, and warned him that he would be arrested for obstruction if he did not comply. Defendant still did not exit the vehicle.

Officer Bondra moved around the vehicle for a better view and saw defendant reaching beneath the seat for something. Defendant's lack of cooperation put the officers in fear of their safety, leading to Officer Janowicz shattering the window of defendant's vehicle and removing defendant from the vehicle.

Considering the evidence that defendant refused to obey Officer Janowicz's commands and was observed making a threatening movement, a person of ordinary intelligence would be justified in believing that defendant was obstructing, opposing, or endangering the officers in performing a lawful Terry stop in violation of MCL 750.81d or MCL 750.479. There was probable cause for defendant's arrest without a warrant during the course of the investigatory stop. See *People v. Chapo*, 283 Mich. App. 360, 368; 770 N.W.2d 68 (2009) (defendant's refusal to exit vehicle was probable cause for arrest).

The inventory exception to the warrant requirement for a search allows police to conduct an inventory search of a vehicle that is being impounded subsequent to a valid arrest of the driver. *People v. Toohey*, 438 Mich. 265, 271–272; 475 N.W.2d 16 (1991). To be constitutional, an inventory search must be conducted according to police-department procedures and cannot be a pretext for a criminal investigation. *Id*. at 284.

Defendant does not assert that the inventory search failed to comply with departmental procedures. Officer Janowicz performed the inventory search after defendant was arrested and taken to the police station by Officer Bondra. Because defendant's arrest was valid, the inventory search of defendant's vehicle was appropriate.

***People v Decker*, No. 341261, 2019 WL 286943 (Mich Ct App, January 22, 2019)**

Reasonable Suspicion ---OWI --- Terry Stop --- Custodial Interrogation--- Miranda Warnings

Ruling/Holding: Police officers conducted a lawful *Terry* stop when they questioned defendant; therefore, police were not required to provide defendant with *Miranda* warnings until he was formally arrested.

Summary/Facts/Reasoning: In responding to calls about a suspicious person, and after observing defendant, the officers had reasonable suspicion to believe that defendant had committed a crime. Defendant was visibly intoxicated, he was wandering about in a residential neighborhood, and a vehicle was parked near a vacant home. The officers could have reasonably inferred that he was intoxicated and that he drove to the scene and parked the vehicle near the vacant home. Police therefore had reasonable suspicion that defendant operated the vehicle while intoxicated and had grounds to briefly detain defendant and ask him questions in order to investigate the situation.

The circumstances surrounding the investigatory stop did not amount to custodial interrogation. Defendant was not placed in handcuffs or otherwise restrained in any manner and the questioning was not prolonged.

***People v Ernst*, No. 340861, 2018 WL 6624867 (Mich Ct App, December 18, 2018)**

Trial Court Experiments --- Traffic Stop --- Evidentiary Hearing --- Trial Court Findings --- Officer Testimony ---Expert Testimony --- Credibility Determinations --- Witnesses --- Defendant Statements --- Fruit of the Poisoned Tree --- Harmless Error

Ruling/Holding: The trial court relied on Officer Smith's testimony regarding his personal observation of defendant's near collision with an SUV to uphold the officer's decision to effectuate a traffic stop. The court discounted the defense expert's opinion that the incident could not have occurred as described and therefore rejected that the traffic stop was actually illegal. Further, the court's experiment was not a necessary component of its decision to uphold the charges against defendant. Defendant has failed to establish prejudice to warrant reversal or a new trial.

Summary/Facts/Reasoning: To the extent that the officer's description seemed "dramatic," the trial court determined that Smith estimated based upon his personal observations and that any discrepancies were errors in memory, not lies. "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection." *Heien v. North Carolina*, 135 S.Ct.530, 536 (2014) (cleaned up).

The court's review of the dashboard camera footage supported its determination that Officer Smith was a credible witness. Although the SUV was not visible in the footage, the court rejected defendant's theory that the SUV did not exist. The court noted that the lane to the right of defendant's car was illuminated while the lane to the left was dark. The court discounted Shepardson's opinion that this light was not caused by the SUV's

headlights. Defendant makes much of Officer Smith's "revised" testimony, accusing Officer Smith of changing his testimony to continue supporting a narrative that was contradicted by the video footage. It is just as likely, however, as the trial court noted, that Officer Smith forgot the minutia surrounding this single traffic stop. Viewing the video footage could have refreshed the Officer's memory.

Moreover, the changing details to Officer Smith's version of events were not as essential as defendant now contends. Officer Smith never wavered from claiming that defendant approached the intersection at approximately 35 mph and was required to brake and swerve to the left to avoid a rear-end collision with an SUV stopped at the light. Officer Smith stated from the beginning that he could not remember if his patrol car was stopped or slowing at the intersection. He admitted his mistaken memory about when he merged into the third lane to follow defendant. And Smith was clear from the beginning that his diagram of the scene was "not to scale," requiring him to explain the positions of the various vehicles at the intersection.

Defendant further contends that the trial court improperly relied upon the fruits of the illegal seizure to justify the reason for the seizure. The trial court did note that defendant admitted to nearly colliding with another vehicle when questioned by Officer Smith at the scene. However, this finding was not necessary to the court's determination; the court denied the motion to suppress after finding that Officer Smith credibly testified that he observed defendant commit traffic infractions. Any potential error was harmless.

However, we cannot approve the trial court's decision to undertake private experiments to test the officer's description of the incident and the expert's debunking of the same. *** The trial court's experiment in this case created new evidence regarding a disputed fact. Appellate courts have held that judicial experimentation (as well as reliance on the judge's specialized experience in another field and ex parte judicial investigation of the scene) violates a criminal defendant's right to confront the witnesses against him, pierces the veil of judicial impartiality, and transforms the judge into a witness or advocate for one side in a dispute [citations omitted]. . . . Here, the trial court made sufficient independent findings to support the denial of defendant's motion to suppress without relying upon its improper experiment. . . . "Not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial" or other relief [citations].

***People v Field*, No. 340396, 2018 WL 4926437 (Mich Ct App, October 9, 2018)**

Probable Cause --- Arrest --- Warrantless Vehicle Search --- Traffic stop

Ruling/Holding: Officers had probable cause to arrest defendant and probable cause to perform a warrantless search of the vehicle.

Summary/Facts/Reasoning: At the time of defendant's arrest, the two officers involved in the traffic stop had knowledge that Bartol, a known drug user, had purchased pseudoephedrine, which the officers knew was an ingredient to manufacture methamphetamine. The officers testified that they followed Bartol, who then joined defendant and Barkle in defendant's truck without divesting herself of the pseudoephedrine pills. The officers then learned that defendant had purchased tree spikes, which the officers also knew could be used to manufacture methamphetamine.

These combined facts gave the officers probable cause to believe that at least Bartol and defendant had intended to manufacture methamphetamine with what they had purchased. This provided probable cause to arrest defendant.

Defendant's arrest preceded the discovery of the pills in the envelope. Because the officers also had probable cause at this point to believe that the truck still contained the pills, particularly after seeing the original box in the front area of the truck, the officers would have had sufficient probable cause to believe that the vehicle contained additional evidence of a crime, thereby permitting the warrantless search of the vehicle that led to the discovery of the pills in the envelope.

***People v Hannigan*, No. 339239, 2018 WL 1073204 (Mich Ct App, February 27, 2018)**

RV Traffic Stop --- Continued Detention ---Dog Sniff --- Consent to Search --- Reasonable Suspicion --- Insufficient Factors --- Nervousness --- Extended Stops --- Exclusionary Rule --- Suppression of Evidence --- Review of Video

Ruling/Holding: The officer had reasonable concerns regarding defendant's driving after observing him drive over the gore and taking 1½ miles to pull over after the officer activated his emergency lights. However, we hold that requiring defendant to wait for the dog impermissibly prolonged the traffic stop.

"[W]e cannot conclude that the circumstances cited by the officer supported a finding of reasonable suspicion. Defendant's detention to wait for the dog after the officer ran computer checks and interviewed defendant and his passengers was impermissible under *Rodriquez*. Thus, evidence of the narcotics discovered in the RV was inadmissible."

Summary/Facts/Reasoning: Defendant was driving a rented recreational vehicle (RV) with two passengers northbound on I–196 to attend the Lakes of Fire Art Festival and the Electric Forest Music Festival in Rothbury, Michigan. The police officer initiated the stop after observing defendant drive over the "gore." After a positive indication by a drug-sniffing dog, police officers searched the RV and discovered capsules of methylenedioxymethamphetamine (MDMA) and several small bags of marijuana.

The police officer testified that he was suspicious that defendant was under the influence of drugs or alcohol, that he was driving while distracted, and that the passengers of the RV were concealing contraband because it took 1½ miles for defendant to pull over after he activated his emergency lights. After defendant pulled over, the officer approached the RV, made contact with defendant, and then returned to his patrol car with defendant's paperwork. After running defendant's information through the Law Enforcement Information Network (LEIN), the officer returned to the driver's side of the RV, asked defendant to exit the RV, and asked defendant additional clarifying questions near the rear of the RV.

We find that these actions were permissible. First, there was defendant's act of driving over the gore, followed by his delay in pulling the RV over to the side of the highway. We viewed the video and even if defendant could not see the officer's lights initially, he moved his patrol car completely into the left lane where the RV's side mirror was clearly visible. Therefore, it is somewhat difficult to believe that defendant could not see the emergency lights, but he did pull over promptly after the officer activated his siren. Also, "[i]t is no violation for the Fourth Amendment for an officer to ask reasonable questions in order to obtain additional information about the underlying offense and the circumstances leading to its commission." *Williams*, 472 Mich. at 316, 696 N.W.2d 636. "For example, in addition to asking for the necessary identification and paperwork, an officer may also ask questions relating to the reason for the stop, including questions

about the driver's destination and travel plans." *Id.* Finally, it was not impermissible for the officer to ask defendant to step out of the RV and answer additional questions. See *Penn v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330 (1977) (stating that an "officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both").

While speaking to defendant at the rear of the RV, the officer asked defendant for consent to search the RV, but defendant declined. The officer's testified that another police officer arrived at the scene at this point and indicated that he called the drug-sniffing dog, which was located at the Berrien County Jail, and that the dog and its handler were in route. After the dog was summoned, the officer spoke with the passengers separately. Their stories were consistent with the information defendant provided.

According to the video, the officer finished his questioning of the passengers approximately 15 minutes into the video. The officer testified that he had not entered the passengers' information into the system or decided to give defendant a verbal warning. However, the dog arrived 15 minutes after the officer returned defendant's documents and questioned defendant and his passengers.

"Even if the officer has not yet completed the traffic violation matters, if conducting a canine sniff caused that completion to be delayed, it remains a constitutional violation." *Kavanaugh*, 320 Mich. App. at 301 n. 6. See also *Rodriquez*, —– U.S. ——, 135 S.Ct. at 1616 ("The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket ... but whether conducting the sniff 'prolongs'—i.e., adds time to—'the stop[.]' ").

Moreover, based on the video and the testimony at the suppression hearing, defendant did not consent to wait for the dog. Considering the officer's statements to defendant, it appeared that defendant would not be free to leave unless he either: (1) allowed the officer to search the RV; or (2) waited for the dog to arrive to complete a contraband sniff. As a result, any assumed consent given by defendant was not "freely and voluntarily given." The continued detention of defendant and his passengers after the officer completed the computer checks on defendant's information and questioned defendant and his passengers was unconstitutional unless the stop revealed a set of new circumstances that led to a reasonably articulable suspicion of criminal activity.

The officer cited several factors in support of his conclusion that he had reasonable suspicion to suspect that there were narcotics in the RV: (1) defendant did not pull over right away; (2) defendant's destination; (3) defendant's reaction after the officer asked for his consent to search the RV; (4) defendant met his male passenger online; and (5) the male passenger's nervousness. However, "we cannot conclude that the circumstances cited by the officer supported a finding of reasonable suspicion."

***People v Hastings*, No. 335584, 2018 WL 341051 (Jan 9, 2018), app den 917 NW2d 630 (Mich, 2018)**

Parking Meters --- Reasonable Suspicion --- Officer Knowledge --- GPS tracking --- Delay in search --- Derivate Evidence --- Vehicle Search

Ruling/Holding: Officer had reasonable suspicion to investigate the theft of previously vandalized parking meters. Officer did not rely on any unconstitutionally obtained evidence in forming his reasonable suspicion of defendant's behavior such that the stop was "the fruit of the poisonous tree." . . . **"**We are not left with a definite and firm conviction that the trial court made a mistake in its factual findings, and conclude

that the trial court did not err by holding that the duration of the detention was not unreasonable."

Summary/Facts/Reasoning: The totality of the facts and circumstances supports the conclusion that Gillis had reasonable suspicion that defendant had committed or was currently committing criminal activity related to parking meters when he initiated the investigatory stop. In 2016, defendant was the suspect in several similar parking meter thefts in various counties in southern Michigan. Gillis could have reasonably suspected that defendant was the perpetrator in the instant case when he observed defendant entering, late at night, the same parking lot that contained meters that had been discovered empty by collection workers the previous night.

Further, Gillis testified that an officer surveilling defendant as a suspect in similar crimes in southern Michigan had informed Gillis that he thought defendant was "heading north." Gillis advised patrol officers to be on the lookout for defendant and his truck.

Defendant argues that Gillis's suspicion was not reasonable, because it in part relied on the information about his location from the investigating officer in southern Michigan. But defendant conceded below, and the record reflects, that it was unclear how the downstate officer knew that defendant was heading north. Defendant simply has not established that Gillis relied on any unconstitutionally obtained evidence in forming his reasonable suspicion.

The duration of the seizure while obtaining the search warrant was constitutional. The duration of the stop here was between two and three hours long. Officers suspected that defendant was stealing from parking meters. During the stop, defendant refused to consent to a search of the truck, so the stop was delayed to obtain a search warrant. The ease of exchanging currency gave the officers good reason to believe that, unless detained while the warrant was sought, defendant could conceal evidence of any theft. There is nothing in the record demonstrating that the officers failed to act diligently to confirm their suspicions.

Moreover, the search warrant occurred during the night when judicial officers are not readily available for consideration of warrant requests. See *Segura v. United States*, 468 U.S. 796, 812–813 (1984) (plurality opinion) (19–hour delay - including nighttime hours - reasonable, because judicial officers not readily available at that time).

***People v Johnson*, No. 340843; 2018 WL 5850311 (Mich Ct App, November 8, 2018)**

Vehicle Searches ---Automobile Exception --- Probable Cause --- Exigent Circumstance

Ruling/Holding: Probable cause and an exigent circumstance—the possibility that the Jeep would drive away before a warrant could be obtained—support the application of the automobile exception.

Summary/Facts/Reasoning: Three experienced Detroit police officers described hand-to-hand transactions they believed to be consistent with narcotics trafficking. The transactions were strikingly similar. Vehicles approached the silver Jeep and the drivers handed money to the Jeep's driver. In return, the passengers received something small enough to cup in their hands. While it is possible that the small objects purchased were something other than illegal substances, the surrounding circumstances—evening, six transactions within a short time in a deserted and blighted area, movement of the cars to an even more deserted area in four cases, rapid exchanges of money for goods, the

immediate departure of the buyers—all support a "fair probability" that Johnson was selling contraband from the Jeep. The officers reasonably concluded that they had probable cause to search the Jeep.

***People v Kelel*, No. 336268, 2018 WL 1020610 (Feb. 22, 2018), app den 503 Mich 888; 919 NW2d 253 (2018), recon den No. 157866, 2019 WL 446185 (Mich, Feb. 4, 2019)**

Vehicle Search --- Landscaping Business --- Parking Lot --- Terry Stop --- Standing --- Seizure --- Existence of Intimidating Circumstances

Ruling/Holding: Defendant was subject to a seizure and that the officers' initial contact was a *Terry* stop. Police encounter on closed, landscaping business, situated on private property with gate, was not in "public place." Defendant had standing even though incident occurred on someone else's private property. Officers had proper grounds to conduct a *Terry* stop , where defendant was driving unusually slowly in an isolated area and then entered into a closed and gated business in the early morning hours.

Summary/Facts/Reasoning: Police Officer Jacob was patrolling an industrial part of the town in an unmarked vehicle on a dirt road when he observed defendant's vehicle, driving 25 to 30 miles below the speed limit, turning into a closed landscaping business. Officer Jacob called for backup, and approximately 10 minutes later, a uniformed officer arrived in a marked police car. The two officers entered the landscaping business and found defendant standing outside his vehicle in the parking lot. As the officers approached, defendant told them that they were on private property, that he was an employee of the business, and asked them to leave. When the officers approached him, he showed them an identification card indicating that he was an employee of the business, and explained that he was picking up some equipment for the morning.

However, while engaging in this interaction, Officer Jacob noticed that defendant was speaking slowly, almost slurring his words, and was visibly shaking. The officer concluded that defendant was under the influence of drugs or alcohol. After defendant failed several of the standard sobriety tests, he was placed under arrest for impaired driving. His car was searched thereafter, and approximately 12 hydrocodone tablets were found in a prescription bottle in defendant's vehicle.

Defendant then moved to suppress all evidence stemming from his arrest on the grounds that the evidence was obtained during an unconstitutional search and seizure. After an evidentiary hearing the trial court granted the motion to suppress and dismissed the charges. The prosecution raised three issues on appeal. First, that the defendant was not subject to a seizure and that the officers' initial contact with the defendant did not rise to the level of a *Terry* stop. Second, that defendant lacks standing to raise the Fourth Amendment because it occurred on someone else's private property. Third, that the officers had proper grounds to conduct a *Terry* stop. We reject the prosecution's first two arguments, but agree that there were sufficient grounds for a *Terry* stop, and so reverse.

Intimidating circumstances existed that would have led a reasonable person to believe he was not free to leave, where the officers did not comply with defendant's request to leave the premises and where he would have to maneuver his vehicle around several police to leave.

The officers approached defendant, it was after midnight and the property was dark and unlit. The officers, who outnumbered defendant, approached with flashlights

aimed at defendant, and with badges visible. Moreover, the backup officer approached in full police uniform from a marked police car. In fact, Officer Jacob testified that he called for backup because he wanted an "obvious uniformed presence," which he admitted at the evidentiary hearing created a "show of police authority." Further, Officer Jacob admitted that in order for defendant to leave the encounter, defendant would have had to enter his vehicle, maneuver around vehicles on either side of him, maneuver around Officer Jacob and the backup officer behind him, and finally, drive around both of the officers' vehicles. Considering the totality of the circumstances, a reasonable person in defendant's position would not have felt free to leave, and accordingly, this police encounter constituted a seizure.

The prosecution's second argument conflates the "search" of *property* in which an individual *may* have a reasonable expectation of privacy with the "seizure" of a *person* without reasonable suspicion or probable cause. . . . In this case, defendant might not have had a reasonable expectation of privacy in the object of the parking lot itself, but the same does not dispense with defendant's right to be free from unreasonable seizures of his person. Therefore, we reject this argument.

However, given the facts of this case, driving unusually slowly in an isolated area and then entering into a closed and gated business in the early morning hours was sufficient to reasonably suspect that defendant might be engaged in criminal activity and to conduct a brief investigatory stop. The totality of the circumstances supports the conclusion that the police officers were not merely acting on a hunch or an inchoate suspicion. Rather, they had an articulable and reasonable suspicion that defendant had been or was about to be engaged in criminal activity.

***People v Kennedy*, No. 340539, 2018 WL 6070671 (Mich Ct App, November 20, 2018)**

Vehicle Search and Seizure --- Impound --- Inventory searches -- Mead/Slaughter analysis --- Reasonableness of Search

Ruling/Holding: *Gant* does not apply to inventory searches; the *Mead/Slaughter* test applies. Remanded for assessment of reasonableness of impound and inventory.

Test: Trial court must analyze whether the "search [was] conducted reasonably [and] in good faith." *Mead*, 320 Mich. App. at 626, citing *Colorado v. Bertine*, 479 U.S. 367, 374 (1987). The search must also be conducted "pursuant to standardized police procedures 'designed to produce an inventory,' including procedures that 'regulate the opening of containers found during inventory searches.' " *Mead*, 320 Mich. App. at 626, citing *Florida v. Wells*, 495 U.S. 1, 4 (1990).

Even after *Gant*, police and other individuals responsible for "community caretaking" are still not required to use the "least intrusive means" available to them under the circumstances. *Slaughter*, 489 Mich. at 321, citing *Cady*, 413 U.S. 447. Police are not required to be "perfect" in executing an inventory search; rather the police's actions must simply be reasonable under the totality of all the circumstances. *Slaughter*, 489 Mich. at 321.

Summary/Facts/Reasoning: The charges arose from the discovery of a gun during an inventory search performed after defendant was arrested and taken into custody for driving with a suspended license. police officers impounded and inventoried defendant's car pursuant to their own procedures. The trial court held that *Gant*, applies to inventory searches and invalidated this search, leading to dismissal of the case. The

prosecutor argued that *Gant* is inapplicable to this case and that *South Dakota v. Opperman* controls.

The Court of Appeals foud that the decisions in *Opperman*, *Lafayette*, and *Toohey*, combined with the language in *Gant* and other precedential and persuasive cases, show that, as a matter of law, inventory searches are legally distinct from searches incident to arrest. It is clear that the trial court erred in its determination that *Gant* overruled *Opperman* and applied to inventory searches as well as searches incident to arrest.

These cases address separate, distinct exceptions to the warrant requirement that have separate, distinct foundations and serve separate, distinct purposes. The test for one exception does not apply to the other. Evidence collected during the search should not have been suppressed under the trial court's legal reliance on *Gant*. As the court applied the same erroneous legal reasoning to the motion to quash, the trial court also abused its discretion in granting defendant's motion to quash.

***People v McEwen*, No. 338100, 2018 WL 2269746 (Mich Ct App, May 17, 2018)**

Traffic Stop --- Reasonable Suspicion --- Traffic Violations ---- Sufficiency of Evidence

Ruling/Holding: The evidence presented at trial was sufficient to establish a permissible traffic stop; the officer had reasonable suspicion to believe that defendant had committed a civil infraction - he testified that defendant's license plate lights were not functioning properly as required by state law.

Summary/Facts/Reasoning: Officer Leggitt pulled up next to the Impala and noticed that the driver/defendant was looking straight ahead, holding onto the steering wheel. Defendant did not look to the left or right to see if cars were coming from either direction. Leggitt found this behavior to be "suspicious or a bit odd."

Upon further inspection of the vehicle, Leggitt noticed that it had no working license plate lights, so he decided to "turn around and start to follow this car potentially to make a traffic stop on it." Leggitt stated that, after observing the vehicle follow what he deemed to be "increasingly odd, more suspicious" driving patterns, he "turn[ed] on [his] overhead emergency lights because [he was] going to pull the vehicle over for, the odd behavior, but two, it [had] no license plate lights which are required by state law." Leggett also shined his spotlight on the vehicle to gain the driver's attention.

Defendant did not immediately pull over in response to Leggitt's activation of his vehicle's emergency lights and spotlight. After Leggitt followed defendant for 2 or 3 city blocks, defendant pulled over into a parking lot. Defendant testified that he never saw Leggitt's police car or lights until he was in the parking lot. Defendant remained in his vehicle, and even though defendant was alone in the vehicle, Leggitt testified that he could hear yelling coming from inside the car.

The officer testified that defendant's vehicle did not have functioning license plate lights, while defendant testified that his vehicle had been inspected during an oil change and was fully functional mere days before the incident. Despite the apparently conflicting testimony, the jury found Leggitt's testimony to be credible. Matters involving the weighing of evidence and determining the credibility of witnesses are left to the jury. See *Wolfe*, 440 Mich. at 514–515; see also *Meshell*, 265 Mich. App. at 619.

The evidence was sufficient to conclude that the officer had reasonable suspicion to believe that defendant had committed a civil infraction, and to allow a rational jury to conclude that the traffic stop was valid.

***People v Nadeau*, No. 336853, 2018 WL 1437265 (March 22, 2018), app den 914 NW2d 929 (Mich 2018)**

Traffic Violations --- Reasonable Suspicion --- Officer Observations --- Deference to Officer's Experience and Knowledge --- Police Camera 'Frozen' - 'Corrupted' Car Video

Ruling/Holding: Overly technical reviews of officer's assessment are unwarranted, and deference is afforded to the officer's experience and knowledge. Officer's testimony demonstrates reasonable and particularized suspicion that defendant was violating traffic laws, justifying the traffic stop to investigate the possible violations.

Officer was not required to show that defendant was guilty of a traffic violation or even that there was probable cause that a crime had been committed. See *Rizzo*, 243 Mich. App. at 156. Rather, "[t]he dispositive question ... is not whether an actual violation occurred, but whether the officer had a reasonable suspicion that a violation may have occurred. ." *People v. Fisher*, 463 Mich. 881, 882; (2000) (Corrigan, J., concurring). The trial court did not err by denying the motion to suppress evidence of the traffic stop.

Summary/Facts/Reasoning: MSP pulled the vehicle over because he believed that the vehicle's front-window tint and loud exhaust system were possible traffic violations. Officer Tuckey indicated that, after he pulled the vehicle over, he saw that the front driver's side window was fully tinted, but he did not inspect the exhaust system. Tuckey became suspicious that defendant was intoxicated. Defendant refused field sobriety tests, and Tuckey transported defendant to the hospital for a blood alcohol test.

At the hearing, defendant testified that his front windows were not tinted and that his exhaust system had been recently installed. Defendant presented with photos of the vehicle, two witnesses denied that the front windows were tinted, and one of the witnesses corroborated that a new exhaust system had recently been installed.

Tuckey testified that he believed a camera in his patrol vehicle was recording his stop of defendant, but he discovered at the hospital that the camera had "frozen" when he activated his vehicle's lights. He testified that he had been instructed to unplug and restart the camera in such a situation, and that when he did so, the previous video file was "corrupted;" therefore, no recording was available of Tuckey's stop of defendant.

***People v Piotrowski*, No. 338509, 2018 WL 6252053 (Mich Ct App, November 29, 2018)**

Automobile Exception --- Probable Cause --- Arrest --- Officer Observations --- Vehicle Search --- Plain View Doctrine --- Terry Stop --- IAC

Ruling/Holding: Counsel was not ineffective assistance for failing to file a suppression motion where probable cause existed for his arrest, and the search of his vehicle was permissible under the plain view doctrine and the automobile exception.

Summary/Facts/Reasoning: A drug transaction between defendant and G, which was witnessed by two law enforcement officers. Defendant contended, among other things, that his trial counsel was ineffective for failing to file a motion to suppress. Where the police observed them "engaged in a suspicious transaction in an area known for drug activity, and both were discovered with prescription drugs in their possession shortly after," probable cause existed for his arrest. Moreover, the search of his vehicle was justified under more than one exception to the search warrant requirement.

(1) "The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent.'" Officer M testified at the preliminary exam, that "the pill bottle defendant held between his legs was readily visible to him when the police confronted defendant and" G.

(2) The automobile exception, which "allows police to search an automobile without a warrant if probable cause exists to support the search." Probable cause exists when "'there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in the particular place.'" M testified at the preliminary exam "that defendant, seated in the vehicle with a pill bottle between his legs, was suspected of engaging in illegal drug activity where he was observed handing an item to [G] in a suspicious manner." Given that probable cause existed for his arrest, and the warrantless search of his vehicle was permissible, trial counsel was not ineffective.

***People v Rodriguez*, No. 335239, 2018 WL 521835 (Jan 23, 2018), app den 502 Mich 904 (2018)**

Officer Reliance of Information --- Traffic Stop ----Reasonable Suspicion ---- Search of Defendant ---- Vehicle Search --- Search Incident to Arrest

Ruling/Holding: The trooper could reasonably rely on the information relayed to him by the investigators when determining whether to stop defendant. The trooper could lawfully stop defendant to arrest him on suspicion of illegal drug trafficking. Once the trooper arrested defendant, he could lawfully search defendant and the passenger compartment of his truck.

Summary/Facts/Reasoning: A series of cocaine sales were made to members of the WMET. A MSP trooper was asked to assist a multijurisdictional task force; specifically, to "perform a traffic stop for them on that day." The trooper was given the details about the stop "earlier in the day" and knew that the other officers had a location under surveillance at the time. When advised by the officers who were conducting the surveillance that the vehicle had left the location, the trooper followed defendant and made the planned traffic stop. When asked how far it was from the place of the stop to the place where the "drug deal was to take place," the trooper estimated that he stopped defendant about a mile and half away.

The trooper stated on cross-examination that he acted as though it were a normal traffic stop and returned to his car to verify defendant's identity with the undercover officers. After he verified his identity, the trooper returned and asked defendant to get out of the truck and placed him in the back of his squad car. The trooper's testified that he had been briefed about the investigation earlier in the day, understood that the investigators believed that defendant was a participant in a drug deal, and had been assigned the task of stopping Rodriguez after he left Guzman's house.

The information available to the trooper was sufficient to "warrant a man of reasonable caution in the belief that an offense has been or is being committed." The trooper could lawfully stop defendant to arrest him on suspicion of illegal drug trafficking and after arresting defendant, he could lawfully search defendant and the passenger compartment of his truck. The trial court did not plainly err when it failed to sua sponte declare the search illegal and suppress the fruits of the search. *Carines*, 460 Mich. at 763.

***People v Voisin*, No. 335907, 2018 WL 1020195 (Mich Ct App, February 22, 2018)**

Traffic stop --- Canine Sniff --- Reasonable Suspicion --- Vehicle Search --- Probable Cause

Ruling/Holding: Canine sniff, during traffic stop for speeding, was valid where canine partner was legally present at the scene of the traffic stop. Reasonable suspicion existed to execute the canine sniff, and probable cause to search the vehicle, once her dog indicated the presence of drugs. *Rodriquez* distinguished because reasonable suspicion to search the vehicle by using a canine sniff based on the signs of drug influence exhibited, as well as her extremely nervous behavior and mannerisms.

Summary/Facts/Reasoning: Voisin was pulled over for speeding. When she appeared nervous and to be under the influence of a stimulant-type substance, the officer conducting the traffic stop had her K–9 dog sniff the exterior of defendant's vehicle. The dog indicated positively on the outside of the vehicle, which led the officer to search the interior of defendant's vehicle.

b. Non-Automobile related warrantless searches and seizures

***People v Al-Hajam*, No. 337222, 2018 WL 4576740 (Mich Ct App, September 18, 2018)**

Standing --- Warrantless Cell Phone Seizure --- IAC

Ruling/Holding: Defendant lacks standing to challenge the seizure of the phone. Accordingly, defendant cannot argue that defense counsel was ineffective for failing to investigate the legality of the seizure of Al-Jamilawi's phone.

Summary/Facts/Reasoning: The police obtained codefendant Al-Jamilawi's cell phone from his brother, Mohannad, after Al-Jamilawi left the country and went to Iraq. Defendant argued that defense counsel was ineffective for not investigating whether the police obtained a search warrant for that phone. Any rights under the Fourth Amendment are personal and may not be asserted vicariously. *Alderman v. United States*, 394 U.S. 165, 174; 89 S.Ct. 961; 22 L.Ed. 2d 176 (1969). The fact that a defendant is harmed by the seizure of someone else's property does not confer standing on the defendant to object to that evidence, even when those involved are codefendants. Id. at 171-173.

***People v Betts*, No. 338965; 2018 WL 4579710 (Mich Ct App, September 18, 2018)**

Warrant Exception ---Inevitable Discovery --- Standing ---Overnight Guest --- Temporary Visitor ---Credibility Determinations --- Reasonable Expectation of Privacy ---Totality of Circumstances --- Abandonment of Items --- Evidentiary Hearing --- Record Evidence

Ruling/Holding: Defendant lacked standing to challenge the searches of his girlfriend's house and the jacket found inside, and even if he had standing as to the jacket, the evidence he sought to suppress was admissible under the inevitable discovery rule.

Summary/Facts/Reasoning: Defendant argued that he had standing to challenge the search of his girlfriend's home because he was an overnight guest. The court disagreed, concluding that, similar to the defendant in *Parker*, he could not prove that he was an overnight guest.

While he asserted at the suppression hearing that he was in the house "well after midnight," the record did not indicate when he entered the home or show that he had permission to be there. He was "not an overnight guest simply because he was in the girlfriend's house after midnight." He also contended that he had standing as an overnight guest because the girlfriend testified that they "went to bed together." However, she "initially testified that defendant was in her house, but suggested he was not in her room. She then changed her testimony and claimed that she and defendant 'went to bed together.' As the district court found, and the circuit court affirmed, the girlfriend's testimony was contradictory and lacked credibility." The court did not find any error in the circuit court's credibility determinations.

Defendant also argued that he had standing to challenge the search of a black and white jacket (found in the basement of the home) in which a speed loader containing several bullets and his Michigan Temporary Personal Identification Card were discovered. The court again disagreed; defendant arguably abandoned the jacket when he told officers that it was not his. Further, even if he had standing to challenge the jacket search, it was inevitable that the ammunition would have been discovered by lawful means.

***People v Brooks*, No. 336036, 2018 WL 2370691 (May 24, 2018), app den 920 NW2d 134 (Mich, 2018)**

Arrest --- Probable Cause ----- Officer Information ----Statutory Requirements --- Search Incident to Arrest

Ruling/Holding: Based on defendant's assertions, the actions of Officer Hicks in effectuating defendant's arrest were legitimate in accordance with MCL 764.15(1)(b), (c) and (e). Having received instructions from the detective bureau regarding the need to effectuate defendant's arrest and the existence of information pertaining to the assault involving SG and the arrest of RD that occurred the previous day, Hicks had probable cause to make the arrest. Because defendant's arrest was proper, there was no basis to suppress the money taken from defendant incident to his lawful arrest.

Summary/Facts/Reasoning: SG went with her friend and neighbor, RD, to find a used vehicle for her to purchase. RD drove to a house where defendant was located and defendant got into the vehicle, sitting in the rear passenger seat behind SG. SG had seen defendant with RD on five or more previous occasions. After RD began driving, defendant immediately attacked SG with a handgun and yelled at her to give him her money.

SG gave defendant her purse and tried to open the passenger door to escape the vehicle at which time defendant fired two or three shots. One bullet struck an area near SG's head and damaged the neck and collar area of her coat. The second bullet struck her left elbow. SG jumped from the moving vehicle and ran. SG received help from a stranger and the police were called. She was taken to the hospital for treatment of the gunshot wound and later required surgery. RD was arrested on the same day and defendant was arrested the next day, after SG identified him in a photolineup as her attacker.

***People v Clower*, No. 334943, 2018 WL 2165866 (May 10, 2018), app den 919 NW2d 791 (Mich, 2018)**

Cell Phone Search --- Sources of Evidence --- Insufficient Record Evidence --- Unpreserved Claim

Ruling/Holding: Defendant did not established that the evidence obtained from his cell phone affected his substantial rights.

Summary/Facts/Reasoning: Defendant argued that police illegally seized and searched his cell phone. Defendant did not raise this issue in a motion to suppress in the trial court [raised in Standard 4 brief]; therefore, he has the burden of demonstrating a plain error affecting his substantial rights. See *Carines*.

There is no indication in the record whether the search of defendant's cell phone was done without a warrant or pursuant to a search warrant. Accordingly, there is no basis for finding a clear or obvious error. Moreover, a police witness testified at trial that he obtained screen shots of defendant's text messages from Baxter. He then verified the text messages pursuant to a search warrant served on the telecommunications carrier. Because this evidence was lawfully obtained from other sources, defendant has not established that the evidence from his cell phone affected his substantial rights.

***People v Dalton*, No. 338792, 2018 WL 3635136 (Mich Ct App, July 31, 2018)**

Incriminating statements --- Effect of Invocation of the Right to Remain Silent or Cut Off Questioning --- "In Custody" Determination --- Public Safety Exception to Miranda

Ruling/Holding: The trial court should have suppressed all of defendant's incriminating statements made during two interrogations. The public safety exception did not apply to the first interview and "by initiating the second interrogation despite the repeated violation of defendant's right to remain silent during the first interview, law enforcement failed to scrupulously honor defendant's invocation of his right to remain silent," and his statements during the second interview had to be suppressed.

Facts/Summary /Reasoning: The charges arise from shootings at three separate locations in After his arrest, defendant was interrogated at KDPS for more than 3 hours, beginning at approximately 1:00 a.m. Following this first interrogation, defendant was transported to the Kalamazoo County Jail. Later that same day, in the afternoon, defendant was interrogated a second time, by a detective of the Michigan State Police. Defendant made incriminating statements during both interrogations. The trial court suppressed the majority of the statements he made during his first interview, finding the police "failed to scrupulously honor [his] invocation of his right to remain" silent. It allowed other statements as elicited under the public safety exception. As to his second interview, it held that these statements were admissible because, "although he invoked his right to an attorney and initially declined to waive his Miranda rights," he changed his mind, initiated a discussion with police, and voluntarily waived his rights.

On appeal, the court agreed with defendant that the public safety exception did not apply to the first interview. "[C]onsidering the three hour interview, the vast majority of questions had nothing to do with public safety, and in the context of the interrogation at a whole, it is plain that the purported public safety questions—most of which came late in the interview—were simply another means of interrogation, i.e., another means of eliciting incriminating statements from defendant."

It also agreed with defendant that the trial court erred by refusing to suppress his statements during the second interview. First, "by initiating the second interrogation despite the repeated violation of defendant's right to remain silent during the first interview, law enforcement failed to scrupulously honor defendant's invocation of his right to remain silent," and his statements during the second interview had to be suppressed. Second, "even supposing [the detective] could approach defendant for a second interview, the record shows that defendant unequivocally invoked his right to

counsel and again unequivocally invoked his right to remain silent." Yet, the detective "ignored defendant's invocation of his rights and continued to interrogate defendant, meaning that defendant's statements during the second interview must also be suppressed on this basis."

***People v Davis*, No. 338101, 2018 WL 3129524 (Mich Ct App, June 26, 2018)**

Warrantless Home Arrest --- Probable Cause ---Officer Observations --- Plain View --- Officer Knowledge ---Totality of Circumstances --- Consent --- Emergency --- Children Safety

Ruling/Holding: The officer was faced with emergency of ensuring the safety of an unknown number children. Based on his initial observations and defendant's unwillingness to cooperate with the investigation, officer had probable cause to believe that defendant was obstructing a police investigation. Under the exigent circumstances exception to the warrant requirement, he had probable cause to lawfully enter the dwelling to effectuate the arrest of defendant. Given the totality of the circumstances, the actions were reasonable.

Summary/Facts/Reasoning: Officer LaCross found a baby girl near the side of the road crying. He did not see an adult nearby. Shortly after he made contact with the girl, a four year-old boy came from across the street and told LaCross that she was his sister. LaCross told the boy to get his father, who is defendant. When LaCross attempted to ascertain whether defendant was the father of the children and whether he was capable of providing them the care necessary to keep them from harm, defendant refused to give LaCross his name or answer any questions relative to the minor children. LaCross saw the children enter the home and had no knowledge of whether there were other children who could be a risk in the home or if there were any other adults in the home.

Prior to LaCross grabbing defendant from behind his storm door, defendant had failed to comply with LaCross's lawful orders to provide his name and produce identification so that the officer could determine whether defendant was in fact the father of the unattended children, that the children were rightfully in his care, and that he was competent to watch them given the circumstances in which the officer encountered them unattended along the street. Then, LaCross grabbed defendant, and placed him under arrest. A pat-down revealed drugs and $540 in cash. Defendant told the officers that he did not live at the home; he identified Amber Morris, the children's mother, as the resident of the home. LaCross entered the home to determine if there were any other adults or children inside. A sleeping infant was lying on the couch, but no other adults were present. LaCross saw a handgun in plain view on the kitchen counter.

According to LaCross, Morris subsequently arrived at the home and became upset after being told that there was a gun in the house. Morris told LaCross that defendant, who is the father of her three children, did not live at the home. She gave the officers consent to search the home. During the consent search, the officers found drug paraphernalia throughout the home and ammunition on a table and entertainment center in the living room. A Bridge card with defendant's name on it was found in a drawer beneath the counter where the gun was located. A gym bag containing shotgun shells, handgun bullets, a pistol flashlight, and a diaper was found in an upstairs bedroom. A box of .9 millimeter ammunition was found on a dining room table.

Viewing the record evidence in its totality, we conclude that at the time of the arrest, LaCross did not know whether defendant was authorized to care for the children,

or whether defendant was competent to care for the children under the circumstances. Because of defendant's failure to identify himself or otherwise provide information relative to the number of children in the home or defendant's relationship to them, LaCross was unable to ascertain whether the minor children were being cared for or were in danger. LaCross was therefore faced with the emergency of ensuring the safety of an unknown number of minor children.

Based on his initial observations and defendant's unwillingness to cooperate with the investigation, LaCross had probable cause to believe that defendant was obstructing a police investigation. Under the exigent circumstances exception, had probable cause to lawfully enter the dwelling to effectuate the arrest of defendant. We also conclude that given the totality of the circumstances, the actions of LaCross were reasonable. The actions of LaCross satisfy the requirements set forth in *In re Forfeiture*, 443 Mich. at 271, and defendant's warrantless arrest did not violate his constitutional rights.

***People v Evans*, No. 337831; 2018 WL 1767569 (Apr 12, 2018), app den 917 NW2d 55 (Mich, 2018)**

Terry Stop --- Weapons --- Searches --- Timing --- Plain View --- Probable Cause --- Arrest

Ruling/Holding: A *Terry* stop did not occur. Probable cause supported defendant's arrest; he was not subjected to an illegal search. The gun was found in plain view on a shelf, open to the public; it was not seized because of a search.

Summary/Facts/Reasoning: The court rejected defendant's argument that the trial court erred in denying his motion to suppress evidence. It concluded that the arresting officer (M) was able to show "that he had a reasonable, articulable suspicion that defendant was engaged in a crime."

The officer M "never made a *Terry* stop." He followed defendant into the store and tried "to close the gap between them so that he could stop defendant and speak to him. Before [he] could stop defendant, defendant pulled a 'black object that appeared to be a gun' out of the waistband of his pants and placed it on a metal shelf. Defendant was not stopped or seized" before M saw him drop the gun on the shelf. Once M saw that he "had what looked to be a gun, he bypassed the *Terry* stop altogether and attempted to place defendant under arrest."

Based on the preliminary exam testimony that the trial court considered during the suppression hearing, probable cause supported M's decision to arrest defendant. Having followed him into the store and watched him place a gun on the shelf, M had probable cause for the arrest. The gun was in plain view on the shelf in a store.

***People v Lane*, No. 335153; 2018 WL 472215 (Jan. 18, 2018), app den 503 Mich 885; 919 NW2d 47 (2018)**

Warrantless search --- Exigent circumstances --- Standing --- Seizure ---Plain view doctrine --- Hot Pursuit Doctrine --- Evidentiary hearings --- Lack of record evidence

Ruling/Holding: Defendant failed to show at the suppression hearing that he had standing to challenge the search, and exigent circumstances justified the warrantless search. Further, once the officers were in the house, they could seize incriminating evidence in plain view.

Summary/Facts/Reasoning: There was no evidence "at the suppression hearing to establish that defendant had a legitimate expectation of privacy in" the house. He did not present any evidence at the hearing. The only witness who testified, an officer (Z), "indicated that defendant's girlfriend lived at the house and that defendant's identification card contained a different residential address.

No evidence was presented at the suppression hearing that defendant was staying" there or had "any expectation of privacy there." A motion to suppress has to be "determined on the basis of the facts produced at the time of" the suppression hearing.

Further, there was no search or seizure of defendant before he entered the home, and that the officers' entry was justified under the exigent circumstances exception to the warrant requirement. They were "pursuing defendant, who had exhibited suspicious behavior by grabbing his right waistband area and fleeing upon being illuminated by a police spotlight in an area where there had been a recent report of shots having been fired." He pulled a gun from his waistband area as he entered the home. Thus, they were "pursuing a fleeing suspect when they entered the house.

The officers had reason to believe that defendant could pose a danger to the officers or to persons inside the house given that" he had a gun and "fled from the police in the vicinity in which there had been a report of shots fired." Z saw him through a "picture window leaning down in the area of a couch." It was reasonable to infer that he was trying to conceal the gun. "Overall, the entry into the house to pursue defendant was justified under the hot pursuit doctrine."

***People v McCree*, No. 339802, 2018 WL 6579225 (Mich Ct App, December 13, 2018)**

Consent --- Actual Authority --- Apparent Authority--- Bailment --- Expectation of Privacy --- Standing --- Cell Phone --- Probationer --- Unpreserved Claims

Ruling/Holding: Defendant had no expectation of privacy in DB's home and no standing to challenge the search of Burgess's home. Defendant also had no expectation of privacy with regard to DB's person and therefore no standing to challenge a search of him. The trial court did not err by denying the motion.

Summary/Facts/Reasoning: Defendant argued that the police seized his cellular telephone when his friend, DB, who was on probation, gave them the phone. Defendant argued below that Burgess did not have actual or apparent authority to consent to the seizure of the telephone. DB was a bailee who was holding the telephone for defendant. The trial court denied the motion to suppress on the basis that there was no bailment, Burgess consented to giving the telephone to the police and, defendant did not have an expectation of privacy in someone else's home, from where the item was taken.

On appeal, defendant raised a new argument—that the police lacked reasonable suspicion to believe that DB was engaged in any criminal activity. Because this argument was not raised below, it is unpreserved.

***People v McJunkin*, No. 338400; 2018 WL 4099714 (Mich Ct App, August 28, 2018)**

Standing --- Privacy Expectations --- Consent ---Plain-View --- Officers' Knowledge

Ruling/Holding: Assuming defendant had standing, it was undisputed that the property's resident (W) gave police consent to search the garage, and there was no

indication he limited the scope of his consent. Thus, the officers' entry into and search of the garage was reasonable and did "not implicate the Fourth Amendment protections."

Summary/Facts/Reasoning: Police officers responded to a report of suspicious activity at a home that was later determined to be the residence of Craig Wightman. According to Wightman's neighbor, a green Ford Explorer had pulled into Wightman's detached garage, drapes were drawn over the garage windows, and an odd smell became apparent shortly thereafter.

While approaching the garage on foot, the officers detected a strong odor of ammonia, which indicated to the officers that there may have been an active, one-pot methamphetamine laboratory within the garage. When the officers were about 10 feet away from the garage, Wightman left the garage through a side door, leaving that door open behind him.

The officers detained Wightman and looked through the door, spotting two people: McCowen—who was standing in front of a dryer—and McJunkin—who was sitting in the driver's seat of the Explorer with the driver's door open. Both McCowen and McJunkin were ordered out of the garage and detained. Wightman gave Officer Huggett consent to search the garage. Once inside, they saw an active, one-pot meth lab on the dryer and coffee filters near the SUV in which defendant was seated. "The driver-side door was open and additional folded up coffee filters were located in the driver-side cup holder.

The trial court denied the motion to suppress on the basis that McJunkin lacked standing to challenge the search because he was neither the homeowner nor the owner of the Explorer. The court also noted that the police acted in reasonable reliance upon the consent obtained from Wightman and McCowen.

Given the strong odor of ammonia in the garage, the presence of an active, one-pot" meth lab, and the officers' knowledge "that coffee filters are commonly used in manufacturing" meth, the coffee filters in the SUV "could be viewed as obviously incriminatory. Upon closer inspection the filters appeared to contain crushed pseudoephedrine, another item" needed for meth production. "Under these circumstances, the police officers were able to seize the pseudoephedrine under the plain-view exception."

***People v Randolph*, on remand, No. 321551, 2019 WL 286678 (January 22, 2019)**[6]

IAC --- Warrantless Search --- Abandoned Property --- Consent --- Standing --- Independent Basis --- Reasonable Expectation of Privacy --- Evidentiary Hearings --- Defendant Testimony --- Lack of Record Evidence --- Ginther Hearing ---

Ruling/Holding: On remand from the Supreme Court [502 Mich 1; 917 NW2d 249 (2018)], the appeals court applied the *Strickland* test and held that defendant's trial

[6] *People v Randolph*, 502 Mich 1; 917 NW2d 249 (2018) (Court of Appeals erred by using a plain-error analysis, rather than a *Strickland* ineffective assistance of counsel analysis), on remand, *People v Randolph*, No. 321551, 2019 WL 286678 (Mich Ct App, January 22, 2019) (finding no IAC for failure, inter alia, to file motion to suppress evidence).

counsel did not render ineffective assistance for failure, *inter alia*, to file motion to suppress evidence

Summary/Facts/Reasoning: Defendant argued that the guns were found in connection with his arrest, which was based upon ammunition found at defendant's father's house in defendant's belongings pursuant to a search conducted without a warrant under consent granted by defendant's father. However, the ammunition was found in his father's house, not only in defendant's bags, but also in a bedroom. Defendant offered no argument that he would have had standing to challenge the .38-caliber ammunition that was found in the bedroom. Nor did he explain why that ammunition does not constitute an independent basis—completely separate from the challenged search of his bags—that justified the later actions taken by the government, including the issuance of a warrant for defendant's arrest.

The record—even as supplemented by the *Ginther* hearing—is not sufficient to answer the first part of the *Strickland* inquiry. Defendant testified neither at trial nor at the *Ginther* hearing. As a result, there is no explicit evidence that he had a subjective expectation of privacy in the bags or their contents. Nor do his actions implicitly suggest such an expectation.

The fact that defendant left his bags unattended at his girlfriend Kanisha's house—after he had just physically assaulted her—strongly suggests that he lacked any subjective expectation of privacy. Because there is no evidence that he had a subjective expectation that the contents of his bags would remain private after he left them and failed, on a timely basis, to come back and retrieve them, defendant cannot satisfy the second prong of *Strickland*.

He cannot demonstrate that there is a reasonable probability that a motion to suppress based on the search of the bags would have been successful. Therefore, he cannot demonstrate a reasonable probability that counsel's failure to make such a motion affected the outcome of the trial.

Even if there were some circumstantial evidence that defendant had a subjective expectation of privacy in his abandoned bags; he cannot demonstrate that that expectation was objectively reasonable.

***People v Roberts*, No. 337938, 2018 WL 4339542 (Mich Ct App, September 11, 2018)**

Home Surveillance Camera ---Government Agents --- Private Citizens --- Lack of Evidence

Ruling/Holding: Defendant failed to establish Cilc and Jensen as government agents rather than private citizens, despite his contention that his neighbors acted as police agents when they when they installed and conducted the video surveillance at the behest of the Fairhaven Chief of Police.

Summary/Facts/Reasoning: Cilc testified that she and Jensen installed a video surveillance system to deter defendant from continuing his harassing behaviors; the surveillance system was not installed to collect evidence that may have been useful in a criminal prosecution. Moreover, the cameras were not pointed directly at defendant's home. Cilc testified that the cameras were situated such that they recorded her property and parts of defendant's property. . . . Defendant additionally notes that Cilc testified that she and her husband felt that they needed to install the cameras in order to prove that defendant was the one causing the disturbances.

Admittedly, the evidence conflicts as to whether Kowalski knew of Cilc and Jensen's video surveillance while the system was being utilized. Huron County Sheriff Deputy Ryan Neumann testified that "Jensen said he was advised by the Fairhaven Chief [of Police] to put up surveillance cameras on the exterior of his home to capture evidence of the neighbor harassing him." However, Kowalski denied that he asked Cilc and Jensen to surveil defendant for gathering evidence, and he indicated that he learned about the videos and pictures of defendant when Cilc and Jensen gave him the evidence.

Even assuming that Kowalski advised Cilc and Jensen to install surveillance cameras to capture evidence of defendant's conduct, defendant cites no evidence that Cilc and Jensen did so with the "intent of assisting the police in their investigative efforts," *McKendrick*, 188 Mich. App. at 143; rather, it appears that they did so with the intent of assisting *themselves* in their *own* efforts to prove to the police that defendant was harassing them. Even if they did so at Kowalski's suggestion, "[a] person will not be deemed a police agent merely because there was some antecedent contact between that person and the police ...." *Id.*

***People v Robinson*, No. 337755, 2018 WL 6579355 (Mich Ct App, December 13, 2018)**

Real-Time Cell Tracking --- Cell Phone Pinging ---- IAC --- Lack of Binding Precedent

Ruling/Holding: Given that there is no binding precedent to support defendant's argument that his Fourth Amendment rights were violated when police found defendant's location by pinging his cellphone, defense counsel's failure to object on this ground cannot be considered ineffective assistance of counsel.

Summary/Facts/Reasoning: Defendant previously was in a dating relationship with Marsha Williams. They had two children together. After that relationship ended, Williams began dating the victim [Details from May 1, 2016 and May 15, 2018, omitted].

On May 27, 2016, while the victim and Williams's son were returning to Williams's home, a man wearing a mask jumped out of some bushes and shot the victim. Officers that responded to the scene found four bullet casings. Detective Lieutenant Cox, one of the responding officers at the scene, spoke with Williams, who gave the detective defendant's name as a possible suspect. Cox went back to the police station to search the database for defendant.

Around 7:45 p.m. that day, defendant called Cox at the police station to ask why the police were looking for him. According to Cox, there was no reason why defendant would have known that police were looking for him. Cox told defendant he was a person of interest in a crime—but did not specify what the crime was—and that Cox wished to speak with him. Defendant told Cox that he would call back later, and did so twice that evening. During each call, defendant declined Cox's invitation to come to the police station for questioning. At the end of the third and final call, defendant told Cox that he would get back to him because "[h]e was going to seek a lawyer."

According to Cox, because defendant refused to come to the police station, police were forced to search for him. Cox used the number that defendant called him from to get a court order to ping defendant's cellphone. This allowed Cox to trace defendant's real-time location. Cox gave defendant's phone carrier defendant's number, and the phone carrier told Cox that defendant was near 19400 Beland Street in Detroit, Michigan.

Officers went to that address and saw defendant walking outside. The officers verbally identified defendant and then detained him while they awaited a warrant to

search 19400 Beland Street. After obtaining a warrant, the officers searched the home and found a piece of mail addressed to defendant—establishing his residency—and a loaded 9mm handgun. Forensics determined that the casings recovered at the scene of the shooting were fired from the 9mm handgun officers recovered at defendant's home.

It is not settled law, however, that pinging a cellphone for a suspect's real-time location constitutes a search within the meaning of the Fourth Amendment and defendant concedes as much on appeal. "[D]efense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument."

***People v Williams*, No. 335401; 2018 WL 987395 (Feb 20, 2018); app den 502 Mich 940 (2018)**

IAC --- Warrantless Search of Apartment --- Emergency Aid Doctrine ---"Welfare Check" Suppression of Derivative Statements --- Failure to Support Argument on Appeal

Ruling/Holding: The warrantless search of the victim's apartment fell within the emergency-aid exception. Counsel was not ineffective for failing to move to suppress the video recording of the statements made while defendant was inside a patrol car on the specific ground that those statements were the product of an illegal warrantless search of the victim's apartment. Assuming that the statements should have been suppressed, defendant has still failed to demonstrate that the suppression of his statements would have likely resulted in a different outcome during trial.

Summary/Facts/Reasoning: Defendant was arrested after officers were dispatched to the victim's apartment after the victim's employer requested a welfare check on the victim due to her absence at work. The officers noticed that the victim's car was outside her apartment, and when they looked into one of the apartment's windows they saw a red stain with white foam in the hallway. One of the officers saw defendant inside the apartment, and they proceeded to have a conversation at the apartment door.

Defendant claimed that he was inside the apartment to retrieve his personal belongings because he and the victim had just broken up; however, he refused to let the officers inside the apartment. He explained that there was a "sick dog" inside. After one of the officers shined his flashlight on defendant's clothing, the officer noticed that defendant's pants and shirt were covered in red stains. Ultimately, defendant was handcuffed and placed in a police patrol car, while the police searched the apartment.

The inside of the patrol car was equipped with active video and audio recording equipment. Defendant was recorded saying: "I swear I should have just never came back. I should have never came back. F**k. Well, three meals a day. Son of a b***h. They caught me that fast. I should have never walked into that f****n' [sic] house. Yep. Yep."

The police officers entered the apartment to determine whether the victim was inside the apartment and in need of assistance based on the welfare check request they received from the victim's "boss." Their need to check was emphasized by the fact that the victim's car was parked outside the apartment, as well as the red stain with white foam they saw inside the apartment, defendant's peculiar explanation for why he refused to let them enter the apartment, and the red stains on defendant's shirt and pants.

Defendant abandoned several of his ineffective assistance of counsel claims . . . the only support" he provided for his argument was his statement that an evidentiary hearing was "needed to further factually develop his claims. As defendant's motion for an evidentiary hearing was already denied in the trial court," the appeals court's review was "limited to mistakes that are apparent from the record."

D. BIBLIOGRAPHY / RESOURCES /ADDITIONAL INFORMATION

- Live streaming and video archives of Supreme Court oral arguments are located on the Michigan 'One Court of Justice' Website, Supreme Court, Oral Arguments, available at: https://courts.michigan.gov/courts/michigansupremecourt/oral-arguments/pages/default.aspx
- Summaries of Michigan cases are available on the State Bar of Michigan website - opinion searching - available at: https://www.michbar.org/opinions/opinionSearch
- Free legal research available for Michigan attorneys (SBM membership) through Casemaker: available online at https://www.michbar.org
    - Includes: "case law, constitution, and statutes for all 50 states, including the District of Columbia. . . . Michigan primary law, administrative code, state court rules, federal court rules, attorney general opinions, and the model civil jury instructions"
- Proper citation formats are available at Michigan Appellate Opinion Manual, December 2017, Michigan Supreme Court, Office of the Reporter of Decisions, https://courts.michigan.gov/Courts/MichiganSupremeCourt/Documents/MiAppOpManual.pdf
- Copies of the Michigan Judge's Bench Books, sentencing guidelines and other resources are available from the Michigan Judicial Institute [MJI] Publications, https://mjieducation.mi.gov/publications
    - Judges Bench Books, https://mjieducation.mi.gov/benchbooks
    - Felony Sentencing Resources, https://mjieducation.mi.gov/felony-sentencing-resources
    - Quick Reference Materials - https://mjieducation.mi.gov/quick-reference-materials