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The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the first annual journal of the Section, in keeping with the Section's mission statement, is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



Readers are invited to submit articles, comments, correspondence to Karen Dunne Woodside, Editor, State Bar of Michigan Criminal Law Annual Journal, Wayne County Prosecutor's Office, Frank Murphy Hall of Justice, 1441 St. Antoine, Detroit, Michigan 48226. The publication and editing thereof are at the discretion of the Editor. A cumulative index of articles will be printed in future journals, and will be available on the Criminal Law website:

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Changes in Drunk Driving Laws

By John Reiser, Assistant Prosecuting Attorney for Washtenaw County

During the 2002 calendar year, Michigan's appellate courts published five OUIL-related opinions addressing:

- whether allowing a deputized officer from a religious college to arrest a suspected drunk driver on non-school property violates the Establishment Clause? (No, it doesn't).
- whether a misdemeanor arrest by a police officer outside his jurisdiction requires exclusion of the evidence, or dismissal of the charges? (No, it doesn't).
- whether a man who pleads guilty to OUIL 3rd can later collaterally attack the previous convictions as having been made without an attorney? (No, he can't).
- whether Texas' DWI statute "substantially corresponds" to Michigan's OUIL statute? (Yes, it does).
- whether a man sleeping in his idled pickup truck located in a parking lot can be convicted of attempted OUIL and attempted DWLS ?(No, he can't).

On January 22, 2002, in *People v. Van Tubbergen*, 249 Mich App 354 (2002), the Court of Appeals addressed the issue of whether the county sheriff's appointment of Hope College police officers as deputy sheriffs, with full arrest powers that extended to violations of state law on public streets, was impermissible under state law, or violative of the Michigan or US Constitutions' establishment clauses. Two Hope College police officers, previously deputized by the Ottawa County Sheriff, were traveling on a public road from one college-owned location to another when they stopped and arrested the defendant for OUIL. Defendant argued that the officers should not have been deputized because Hope College, a private institution associated with the Reformed Church of America, paid their salaries; therefore, the deputization was an improper delegation of sheriff's powers to a private non-governmental agency. The Court of Appeals rejected that claim, as they did the assertion that Hope College police officers' law enforcement powers are limited to the private interests of their employer.

The Court then chose to apply the three-part *Lemon* test from *Lemon v. Kurtzman*, 403 US 602 (1971), to determine whether the officers' appointments and conduct violated the United States Constitution, First Amendment, Establishment of Religion Clause, or Michigan's equivalent, Article 1 § 4. (First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third, the statute must not foster an excessive governmental entangle-

ment with religion). The first prong was met because MCL 51.70, which allows the deputization of law enforcement officers, has a secular purpose. The second prong was met because the principal or primary effect of the challenged state action neither advanced nor inhibited religion. The third prong, lack of an excessive entanglement between church and state, was met because religious indoctrination is not a substantial purpose or activity of Hope College, the aid the officers provide in patrolling public streets is merely incidental to their primary purpose of patrolling on campus, and the little aid the deputized officers provide the county is provided on a nonideological basis.

On January 23, 2002, in *People v. Hamilton*, 465 Mich 526 (2002), the Michigan Supreme Court, in a 5-2 decision that reversed the Court of Appeals, held that the remedy for an arrest made without statutory authority differs from that of a constitutionally invalid arrest and reinstated both the evidence, and the charges, for an arrest made by an off-duty officer traveling outside his jurisdiction. A Howell police officer was driving in an adjacent township in the early morning hours when he noticed the defendant's vehicle, which was without operating tail lights, briefly leave the pavement. The officer stopped the vehicle, conducted field sobriety tests, and arrested the defendant for OUIL. Because he had two prior convictions, the defendant was charged with OUIL 3rd, a felony. The trial court dismissed the case, and the Court of Appeals agreed, holding that suppression of the evidence and dismissal of the case were required because the arrest was statutorily defective.

The People had conceded that the police officer was outside his jurisdiction and not acting in conjunction with a local law enforcement agency. The officer was not in hot pursuit, and had not observed what he thought was a felony. Thus, his arrest powers were relegated to that of a private citizen, and MCL 764.16 limits arrests by private citizens to felonies, shopkeepers aside. The Supreme Court stated, however, that a statutory violation, like the violation in this case, does not necessarily require application of an exclusionary rule. The Fourth Amendment's exclusionary rule only applies to constitutionally invalid arrests. The Court found that the Legislature did not intend to impose the drastic sanction of evidence suppression when officers act outside their jurisdiction. The statute that limits police officers from exercising authority and powers outside their jurisdictions, except when working with the Michigan State Police or a host jurisdiction (MCL 764.2a), was intended to protect the local governments' rights and autonomy, rather than to create a new right of criminal defendants to exclude evidence.

On April 9, 2002, in *People v. Roseberry*, 465 Mich 713 (2002), the Michigan Supreme Court addressed the issue of whether a defendant, after pleading guilty to a crime, such as OUIL 3rd, that is based on one or more prior convictions, may collaterally attack a prior conviction on the ground that it was improperly obtained because of a denial of the right to counsel. Noting that the defendant had not sought relief from the trial court to set aside his prior convictions before his plea, and that nothing indicated that the prosecution should have known about any alleged deficiency in the prior convictions, the Court held that he was precluded from collaterally attacking them after his guilty plea.

On May 10, 2002, in *People v. Wolfe*, No. 234940, 251 Mich App ___ (2002), the Court of Appeals held that Texas' drunk driving statute substantially corresponds to Michigan's. The defendant was charged with Child Endangerment 2nd (OWI, OUIL, or UBAL, with a person 16 years old or younger in the vehicle) which is a five-year felony. (First offense child endangerment is only a one-year misdemeanor, hence the significance of the defendant's prior Texas DWI conviction.) The Texas DWI statute defines intoxication as, "not having the normal use of mental faculties by reason of the introduction of alcohol..." whereas Michigan's statute, MCL 257.625, proscribes against the operation of a motor vehicle by one whose "ability to operate the vehicle is visibly impaired..." Although both states also include the .10 blood alcohol level in their definitions of intoxication, the Texas law refers to the normal use of mental faculties, while Michigan's looks at the ability to drive a car without visible impairment.

In determining whether the two statutes substantially correspond with one another, the Court resorted to Random House and Miriam Webster dictionaries to shed light on the phrases, "substantial" and "corresponding" and found that both Michigan and Texas use similar subjective criteria to prohibit similar conduct pertaining to the same essence, namely, drunk driving. The Court also cited the fact that both states set forth identical blood alcohol thresholds, measured in identical ways, in its determination that the statutes substantially correspond to one other.

On July 5, 2002, in *People v. Burton*, No. 226530, the Court of Appeals overturned the defendant's convictions for attempted OUIL 3rd and attempted DWLS 2nd. The defendant was found sleeping in his pickup truck, with the engine running, while in a golf course parking lot at 1:30 a.m. After unsuccessful attempts by the groundskeeper to wake the defendant, a deputy sheriff was called and, after an investigation into how he got there and his sobriety, the defendant was arrested. The defendant told the deputy that he had been stranded after his two friends left him there,

that he drove his car from one side of the parking lot to the other, and that he fell asleep. Defendant's two trial convictions arose from attempted violations of the motor vehicle code, MCL 257, rather than from Michigan's general attempt statute, MCL 750.92, contained in the penal code.

The Court held that the defendant should have been charged under the general attempt statute, reasoning that Michigan's OUIL statute makes no proscription against attempting to operate a vehicle under the influence. While MCL 257.204b requires one convicted of an attempted violation of the law to be punished as if the offense had been completed, the Court noted that the punishment phase of a criminal proceeding is distinctively and qualitatively different from the culpability phase. Had the Legislature intended to include attempted OUIL, or attempted DWLS, as distinct crimes, it would have added the requisite language.

The Court then held insufficient evidence was adduced at trial to support the two convictions because an attempted crime has a specific intent element. The prosecution failed to establish that the defendant intended to drive drunk, or with a suspended license. The arresting deputy had conceded that the pickup truck could have been used as a shelter. In addressing what it means to "operate" a vehicle—for OUIL purposes—the opinion cited *People v. Wood*, 450 Mich 399 (1995): "Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." Because the defendant's truck was not in gear, and parked next to a storage building in a parking lot, it did not pose a significant risk of causing a collision.

In overturning the defendant's DWLS conviction, the Court followed the *Wood* analysis in defining "operating" in terms of the danger the DWLS statute seeks to avoid: preventing a person whose past driving record is so deficient that his license was suspended, from driving because of the danger he poses on the highway or other area open to the general public. The Court found that the defendant was not attempting to violate the statute when he was arrested, and did not believe that the moving of his pickup truck from one side of the parking lot to the other was the type of action the DWLS statute was designed to prevent.

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Notes