

News & Views



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Events

32nd Mid-Winter Ski Conference President's Day Weekend: February 15-17, 2009 Shanty Creek Resort – Bellaire, MI

Please join us for our annual ski conference, where you can work and play in the same weekend. The following programs will be offered:

Sunday, February 15: The conference opens with our traditional review of the year's high-impact court decisions by **Timothy Baughman**, Chief of Research Training & Appeals, Wayne County Prosecutor's Office. The welcome reception for all conference participants immediately follows.

Monday, February 16: The conference continues with a morning presentation by Third Circuit Court Judge **Daniel P. Ryan**, who will discuss the Rules of Evidence. Seventeenth Circuit Court Judge **Christopher P. Yates** will speak in the afternoon.

The pre-registration form, which should be faxed directly to the hotel to reserve your room, is inserted in this newsletter. For more information, please contact Steve Taratuta at: smtaratuta@gmail.com or 313-224-5770.

Biennial Criminal Law Section Policy Conference "Mental Health Cases in the Criminal Justice System" June 12-14, 2009 Grand Hotel - Mackinac Island

The Section presents its classic every-other-year policy conference at the Grand Hotel. The event attracts legislators, policy makers and other professionals, and our own members. Included topic: "Should Michigan create mental health courts designed to accept diverted criminal cases?" Interest in this topic is reported among district judges, legislators and the National Association of Social Workers. Did you know that 95% of mentally ill persons committed to prison fail after release? The successful alternative handling of such individuals in other jurisdictions will be examined. More details and a pre-registration form will be included in the next newsletter. If you have ideas for program content or speakers, please email Chair Matthew P. Smith: mattboss01@aol.com.

The Detroit Police Department and Crime Lab - The Case for Independent Review and Re-examination of Evidence

by

Brian Zobel*

In April of 2008, a rash of criminal cases exposed systemic problems in the handling of forensic evidence at the Detroit Police Department (DPD). The first involved a charge of drug possession, where a sergeant claimed to have obtained a positive result from a *Travnikoff* field test for cocaine.¹ Subsequent testing proved that the substance was actually heroin.²

In a second case, the DPD firearms lab misidentified a bagful of shell casings as having all been fired from the same weapon.³ Independent testing proved that at least two rifles had been used.⁴ In another shooting case, firearms lab personnel claimed to have made an identification between a shell casing and test firings from the defendant's pistol.⁵ Careful review of the chain of custody proved that the evidence presented at trial actually came from an unrelated suicide; the claimed identification was a forensic impossibility.

The cases drew media attention and the firearms lab was ordered temporarily closed. The Michigan State Police (MSP) was asked to complete a random audit of DPD firearms cases. They discovered an error rate of 10%, most of which involved false positives. The preliminary report predicted: “the negative impact on the judicial system would be substantial, **with a strong likelihood of wrongful convictions and a valid concern about numerous appeals.**”⁶

This resulted in the closure of the entire DPD forensic lab on September 25, 2008. The MSP's final report, released in October, confirmed the 10% error rate. Again, the majority of the errors discovered were false identifications.

The federal agencies with the authority and resources to conduct a comprehensive and independent review of DPD lab cases have yet to become fully invested. Instead, the office of the prosecuting attorney has announced its intention to act as a clearinghouse for the investigation of DPD lab cases.

A county prosecutor's office, however, lacks the legal authority and technical capability to take on such a role. The duties of prosecuting attorneys in the State of Michigan are defined by statute. MCL 49.153 confers no authority on a prosecutor to investigate a police crime lab. More importantly, a prosecutor's office lacks the forensic scientists and equipment necessary to re-examine physical evidence and review test results.

Yet, on December 12, 2008, the Office of the Wayne County Prosecutor announced the creation of a “forensic evidence review unit” to work full-time on cases involving firearms evidence dating back to 2003. Also announced was that the proposed three-year project would cost the taxpayers an additional \$800,000.⁷

The unit is slated to have an “investigation group” of assistant prosecutors (plus an investigator), and a “review group” of prosecutors, defense attorneys and possibly former judges. Under the proposed scheme, criminal defense attorneys and/or former judges working under contract for the prosecutor's

office would make “independent” recommendations to the Prosecuting Attorney. These recommendations would then be “presented to the Prosecutor for a final decision.”

The best of intentions notwithstanding, the prosecutor’s staff is the wrong tool for the job. The prosecutor’s office already reviewed these cases once when issuing warrants, a second time when the cases were tried, and a third when defending the convictions on appeal. The defendants were represented by counsel, and judges reviewed the testimony and arguments presented at trial. Convictions based on these false identifications have been allowed to stand, even after multiple appeals.

Numerous complaints are emerging from prisoners incarcerated in the Department of Corrections. Review of these complaints shows that in cases going back as far as twenty years, DPD lab personnel have been claiming identifications based on firearms evidence that the science of firearms examination simply does not support.

What is necessary now is review and re-examination by demonstrably independent personnel with the technical ability to spot false identifications and falsified results. The right help is available. The DPD lab’s participation in the ATF’s National Integrated Ballistic Information Network (NIBIN) confers a legal basis for federal intervention.

All NIBIN participating agencies sign a Memorandum of Understanding (MOU) that subject them to audit by the ATF, the DOJ - Office of the Inspector General (OIG), the Government Accountability Office, plus any other auditors designated by the federal government. Participating agencies expressly “agree to allow auditors to conduct one or more in-person interviews of any and all personnel the auditors have determined may have knowledge relevant to transactions performed or other matters involving the NIBIN Program.”⁸

While falsified testing at the DPD threatens the integrity and credibility of the NIBIN national firearms database, the ATF at present is only re-examining **federal** cases involving DPD lab work. While highly desirable, review by the ATF is not the only option. There are other federal agencies whose specific purpose is to conduct audits and independent reviews.

In 2003, for example, Michigan’s CODIS (COmbined DNA Index System) Administrator falsified an external proficiency test by having a subordinate take the exam in his place.⁹ In response, the OIG was called into action.¹⁰

Concerned over the integrity of the national DNA database, the OIG and other agencies conducted six months of audits. They identified a number of deviations from national standards governing CODIS activities.¹¹ The OIG completed a voluminous report recommending corrective actions, and thereafter monitored the MSP lab’s compliance.

Federal intervention is available through other means as well. The DPD is currently under federal oversight through the Office of the Independent Monitor. In 2003, the arrest, detention and internal investigative procedures employed by the department were found to be in violation of the civil rights afforded to arrestees. In a combined effort, the United States Attorney’s Office and DOJ – Civil Rights Division brought suit in federal court and obtained consent judgments which established independent oversight.

Fiddling while Detroit burns...evidence

On December 5, 2008, the Detroit Free Press ran a small article: *Detroit police to burn 575 guns*.¹² The vagueness of the information concerning the ongoing destruction of firearms evidence was disturbing:

“Most of these are long guns confiscated in drug raids,” Detroit Police Lt. [C.] said this morning as a crew of officers loaded the weapons onto a truck in the garage of police headquarters downtown to be taken to an undisclosed incinerator. **The department was not able to provide how many guns were destroyed last year.**

Firearms cases cannot be independently re-examined after the evidence is destroyed. Given the discovery of systemic mishandling of evidence at the DPD, it would stand to reason that the preservation and effective quarantine of physical evidence would be a top priority. Yet, eight months into this scandal, the DPD is still being allowed to destroy firearms evidence free of any outside oversight or control.

The office of the prosecuting attorney is not equipped to undertake the review of false and falsified forensic testing. For its part, the DPD continues to destroy evidence. What is needed is federal intervention, right now.

¹ *People v LeEric Carter*, 36th District Court, Case No. 08-58243-01, before the Hon. Vanessa Jones-Bradley; DPD Form 320A dated 3/26/08, Lock Seal Folder Number N00348208

² Laboratory Analysis Report dated 4/16/08, Lock Seal Folder Number N00348208

³ *People v Jarrhod Williams*, 3rd Judicial Circuit Court Case No. 07-011179-01-FC, before the Hon. David J. Allen

⁴ Eric D. Lawrence, *Accuracy of Crime Lab is Questioned*, Detroit Free Press, April 26, 2008

⁵ *People v Howard*, 3rd Judicial Circuit Court Case No. 08-1381-01, before the Hon. Patricia P. Fresard

⁶ Detroit Police Department Firearms Unit Preliminary Audit Findings as of September 23, 2008, Michigan State Police Forensic Science Division, at 3 (emphasis added)

⁷ Naomi R. Patton, *Worthy: Findings about Detroit Crime Lab Appalling*, Detroit Free Press, October 30, 2008

⁸ Example NIBIN Memorandum of Understanding, at 6, available online at www.usdoj.gov/oig/reports/ATF/a0530/app3.htm

⁹ July 30, 2004 correspondence to Dr. Thomas Callaghan, NDIS Custodian, from Michael F. Thomas, MSP Forensic Science Division Commander

¹⁰ August 18, 2004 correspondence to Hon. Glen A. Fine, Inspector General, Office of the Inspector General, USDOJ, from Donald W. Thompson, Jr., Acting Assistant Director, USDOJ-OIG, Inspection Division

¹¹ USDOJ – OIG Audit, June 2005, Executive Summary available online at <http://www.usdoj.gov/oig/grants/g5005011.htm>

¹² Tammy Stables Battaglia, *Detroit Police to Burn 575 Guns*, Detroit Free Press, December 5, 2008

***Brian Zobel is a private attorney and forensic science legal consultant. A former prosecutor and trainer of state prosecutors, he belongs to the Jurisprudence Section of the American Academy of Forensic Sciences. Since the discovery of the DPD lab scandal in April, he has spearheaded an effort to involve federal agencies in remedying the abuses at the lab.**

Indigent Defense Update

The Michigan Coalition for Justice's landmark lawsuit against the state - **Duncan v Michigan** - proceeded to oral argument in the Michigan Court of Appeals. Judges William Murphy, David Sawyer and William Whitbeck comprised the panel. The appeal arose from the class action lawsuit that was filed early last year on behalf of indigent criminal defendants facing felony charges in Berrien, Genesee, and Muskegon Counties. The plaintiffs alleged that the state, and Governor Jennifer Granholm, failed to fulfill its constitutional obligation to provide adequate legal assistance to criminal defendants who could not afford their own attorney. The state sought summary dismissal of the case, arguing that a class action was inappropriate, and that the plaintiffs could not seek relief until they were convicted. The state's claims were rejected by the circuit court, and the state appealed. Oral arguments were heard on December 9, 2008. For more information, please visit <http://www.aclumich.org/>.

Notable State & Federal Criminal Cases

US v Gross, Nos. 07-5971 & 5972 (6th Cir; December 22, 2008). Defendants Michael Gross and Shamone Wilkins pleaded guilty to conspiracy to possess with intent to distribute cocaine hydrochloride, but reserved the right to appeal the denial of their motions to suppress. Gross and Wilkins, both African Americans, were traveling on the interstate when they were pulled over for allegedly straddling lanes. Under Tennessee law, "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane..." Gross consented to a search of the vehicle, and officers found a brick of powder cocaine in the trunk. The defendants argued that the evidence should have been suppressed where the initial stop was not supported by probable cause, and consent to search the vehicle was obtained unlawfully because the stop was unreasonably prolonged. During the motion hearing, the deputy testified that the vehicle straddled the center lane for at least one hundred yards while changing lanes. The Sixth Circuit held that, without further allegation of improper driving, the straddling was simply not within the scope of the statute. The vehicle straddled two lanes for a few seconds while changing from one lane to the other, in an area where the highway began a steep incline and changed from two to three lanes. The court noted that it "clearly is not practicable to change lanes without straddling the lanes for some amount of time." It concluded that the slow lane change observed by the deputy did not give him probable cause to believe that a violation occurred. Accordingly, the judgment of the district court was reversed and the cause remanded.

US v White, No. 05-6596 (6th Cir; December 24, 2008). Defendant Roger White was convicted by jury of armed robbery and possessing a firearm with the serial number removed, but acquitted of four other charges, for his role in a failed bank robbery. He faced a maximum twenty-five year sentence. The district court considered conduct underlying the acquitted counts - including shots being fired in the bank and at pursuing officers - to enhance by ten levels the defendant's offense level under the Sentencing Guidelines. The defendant was sentenced to twenty-two years - fourteen of which came from the upward adjustments for acquitted charges. The defendant appealed, arguing that the district court improperly considered acquitted conduct in calculating his guidelines. The Sixth Circuit disagreed. In an en banc opinion, the court held that acquitted conduct can be considered if the resulting sentence falls within the range prescribed by law for the convicted conduct. The court reasoned that consideration of acquitted conduct was permissible before the guidelines were instituted, and also during the time of mandatory guidelines, and is thus permissible under the advisory guidelines. Accordingly, the defendant's convictions and sentences were affirmed. Judge Merritt filed a dissenting opinion, in which five other judges joined.

People v Poole, No. 137032 (Mich; December 19, 2008). The Michigan Supreme Court, in lieu of granting leave to appeal, vacated the sentence imposed by the Genesee County Circuit Court. Even though the trial court stated that it did not intend to depart from the sentencing guidelines range, which mandated an intermediate sanction, it nonetheless sentenced the defendant to prison. Upon remand, if the trial court again revokes probation, it must sentence the defendant to an intermediate sanction or articulate on the record a substantial and compelling reason for its departure from the sentencing guidelines range. Accordingly, the cause was remanded to the trial court for further proceedings. Justice Kelly wrote separately, concurring in part, and dissenting in part.

People v Taylor, King & Scarber, Nos. 135666, 135683 & 135692 (Mich; December 19, 2008). The Michigan Supreme Court, in lieu of granting leave to appeal, held that to the extent that *People v Poole*, 444 Mich 151 (1993) held “that the admissibility of a codefendant’s nontestimonial hearsay statement is governed by both MRE 804(b)(3) and the Confrontation Clause of the United States Constitution, it is no longer good law.” In this case, two juries convicted the three defendants of multiple crimes related to the kidnapping and murder of the victim. Defendant Robert King argued that the inculpatory statements of a co-defendant, admitted through the testimony of an acquaintance, violated the rules of evidence and his right of confrontation under *Poole*. The Michigan Court of Appeals held that the rules of evidence did not preclude admission of the statements because they fell within the hearsay exception for statements against penal interest under MRE 804(b)(3). The Michigan Supreme Court affirmed, and held that the portion of *Poole* pertaining to the constitutional requirements was no longer good law because it was predicated on *Ohio v Roberts*, 448 US 56, which was overruled by *Crawford v Washington*, 541 US 36 (2004) and *Davis v Washington*, 547 US 813 (2006). The hearsay statements in question in this case were non-testimonial, and thus did not implicate the Confrontation Clause. Instead, the admissibility of the statements was properly governed solely by MRE 804(b)(3). Justice Cavanagh, joined by Justice Kelly, concurred in part and dissented in part.

People v Maxson, No. 129693 (Mich; December 22, 2008). The Michigan Supreme Court, in lieu of granting leave to appeal, affirmed the trial court’s denial of the defendant’s motion for relief from judgment. The issue was the retroactive application of *Halbert v Michigan*, 545 US 605 (2005), which held that indigent criminal defendants who plead guilty are entitled to appointed appellate counsel on direct appeal. The court concluded that, under either federal or state retroactivity jurisprudence, the case does not apply retroactively if a defendant’s conviction is final. Though *Halbert* constitutes a new rule, the court found that it cannot be construed as a “watershed” decision. Furthermore, many guilty-pleading defendants would inundate the appellate process with new appeals of convictions that have become final, thus adversely affecting the administration of justice. Justice Cavanagh, joined by Justice Kelly, dissented.

People v Al-Lahham, No. 280030 (Mich App; December 9, 2008). Defendant Mohamed Al-Lahham, together with another man, was charged with assault with intent to commit murder following the assault of complainant Marlon Ozier. During the preliminary examination, Ozier was vigorously cross-examined by defense counsel, who ultimately asked to adjourn for lunch and continue the cross-examination thereafter. The district court refused, noting that the standard for a preliminary hearing was different than that for a trial, and that the testimony defense counsel wanted to present went to questions of fact that would “be determined by the next—at the next stage of the proceeding..” The court subsequently determined that there was no evidence that the defendant intended to kill the complainant, and instead bound him over on the lesser charge of assault with the intent to do great bodily harm less than murder. Ozier was later murdered, and the prosecution sought to use his preliminary examination testimony against the defendant at trial, arguing that the complainant was now

unavailable to testify. The defense moved to prohibit the testimony on the grounds that it would violate the defendant's right to confront the witnesses against him because counsel did not have a full opportunity to cross-examine Ozier. The trial court agreed, and prohibited the use of the testimony. Three days later, it dismissed the case against the defendant, without prejudice. The prosecution appealed the trial court's order. The Michigan Court of Appeals, in an unpublished per curiam opinion, held that the admission of the preliminary examination testimony would be a violation of the defendant's right to confront witnesses against him. The Confrontation Clause does not require that the defendant be afforded only some opportunity to cross-examine the witnesses against him, it requires that the defendant be afforded the opportunity to effectively cross-examine the witnesses against him. Accordingly, the trial court did not abuse its discretion.

People v Castro, No. 279272 (Mich App; December 9, 2008). Following a bench trial, in which he was convicted of operating a vehicle with any amount of a schedule one controlled substance in his system causing serious impairment of body function, the defendant appealed. He argued that the trial court erred when: it permitted the prosecution to amend the information; it declined to dismiss the case on the ground that his right to a speedy trial had been violated; and, it deprived him of his right to a jury trial. The Michigan Court of Appeals, in a per curiam opinion, concluded that the first two issues did not entitle the defendant to relief. However, it concluded that the trial court erred when it proceeded to a bench trial without first establishing that defendant knowingly and voluntarily waived his right to be tried by a jury. Specifically, the defendant did not sign a written waiver statement and the trial court did not directly question the defendant about whether he wanted to waive his right to a jury. The trial court's failure to obtain a valid jury waiver resulted in the defendant being denied his right to a jury, guaranteed under the Sixth Amendment. The constitutionally-deficient jury waiver was a structural error mandating reversal. Accordingly, the defendant's conviction was reversed, his sentence vacated, and the cause remand for further proceedings.

People v Plunkett, No. 284943 (Mich App; December 16, 2008). The circuit court granted the defendant's motion to quash the district court's bindover on charges of delivery of a controlled substance causing death, and delivery of less than fifty grams of heroin. The prosecution appealed. Defendant Ronald Plunkett and his girlfriend, Tracy Corson, were drug users who met through a dealer. Decedent Tiffany Gregory was a childhood friend of Corson, who ultimately introduced the decedent to heroin, and taught her how to prepare the drug. Corson and the defendant traveled in his car to purchase drugs, and the defendant gave his girlfriend the money to buy crack cocaine and heroin. Corson smoked the crack cocaine, and injected three packets of heroin on the ride home. On the same night, the decedent went to a bar and drank alcohol throughout the evening. Gregory sought out her childhood friend early that morning to get heroin. Corson invited the decedent, who was still intoxicated, to the defendant's apartment. Corson, Gregory, the defendant, and the defendant's friend all smoked crack. Corson and Gregory later went into a bedroom and injected themselves with heroin. Gregory slumped over and died - from multiple drug intoxication - before medical help arrived. The Michigan Court of Appeals held that the evidence did not support a finding that the defendant constructively delivered the heroin. The heroin purchased by the defendant's girlfriend was not under the defendant's control, nor had he directed the drug dealer to transfer the drugs to his girlfriend. Furthermore, no evidence was presented that the defendant had any discussions with the drug dealer regarding the delivery of heroin to Corson. The Appeals Court also held that the defendant did not aid and abet the drug delivery by providing both a ride and money for drugs to Corson. Though the evidence could support a finding that the defendant aided and abetted his girlfriend in receiving the heroin, the statutes in question only criminalize the actions of a person who delivers a controlled substance.

Editor's Note

Happy and healthy 2009! The new year brings a new look to this publication. News & Views is always looking for authors to contribute articles, comments, or notes. If you would like to submit an article, share your view on a controversial topic, or educate other readers on new trends in criminal law, please contact the editor at: newsletter@zaret.com. News & Views looks forward to another exciting year in criminal jurisprudence.

Legislative Update

The Michigan House of Representatives passed a package of bills to provide greater protection to juveniles - individuals who were under eighteen when their crimes were committed - from life in prison without the possibility of parole. House Bills 4402, 4403, 4404, and 4405 were introduced early last year by, respectively, Representatives Paul Condino, Virgil Smith, Mark Meadows, and Robert Jones. HB4402-4404 would amend various acts to prohibit sentencing a juvenile convicted of certain crimes to life without the possibility of parole. HB4405 would revise parole eligibility for juveniles sentenced as adults. Specifically, under that bill, an individual who was younger than eighteen years of age when the crime was committed would be eligible for parole after serving ten years of the sentence. On December 10, 2008, the matter was referred to the Judiciary Committee. To view the bills, please visit: <http://www.legislature.mi.gov/>.