

# The GREEN LIGHT NEWS

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## Inhalants and Driving – A Dangerous Combination

By: Kenneth Stecker and Kinga Canike

Most everyone knows the dangers of drinking and driving, but recent news articles have put the spotlight on another danger on our roads—huffing and driving:

“Traverse City Man Arrested for Huffing While Driving.”<sup>1</sup>

“Huffing causes Mills Township crash, driver arrested.”<sup>2</sup>

“Man Huffing cans of air duster crashes car into Otsego church, police say.”<sup>3</sup>

“Police: Man ‘huffing’ narrowly misses MDOT workers before crashing.”<sup>4</sup>

Huffing is the inhaling of chemicals, which many times involves chemicals found in aerosol cans. It is an extremely dangerous and illegal activity that can cause permanent brain damage.<sup>5</sup> As the

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name implies, inhalants enter the body through breaths drawn in with the nose and/or mouth.<sup>6</sup> Methods of ingestion are to either inhale the product's fumes after placing the fumes inside a plastic bag, or, as in the case of paint thinner and gasoline, to inhale directly from an open container.<sup>7</sup>

The fumes produce an instant high that can vary widely among users. It will depend on the substance being inhaled, method of inhalation, and other factors such as frequency of use and amount being inhaled.<sup>8</sup>

The effects of inhalants include, but are not limited to the following:

- Slurred speech
- Loss of motor coordination
- Wheezing
- Loss of consciousness
- Memory impairment
- Red or watering eyes
- Hallucinations<sup>9</sup>

Health risks are from overuse or use under conditions that create a dangerous effect from the vapors of the inhalants, due to lack of oxygen and/or breathable air in a room used to inhale certain substances.<sup>10</sup>

The most common inhalants fall into four categories:

1. Volatile solvents such as paint thinner, degreasers, gasoline, lighter fluid or dry-cleaning solvents;
2. Non-volatile solvents such as correction fluid, felt-tip marker fluid or dry-cleaning solvents;
3. Aerosol sprays such as hair spray, cooking oil sprays, fabric protector sprays, computer cleaning sprays and spray paints;
4. Gases found in butane lighters, propane tanks, whipped cream

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2. “Huffing causes Mills Township crash, driver arrested,” Kelly Dame, published Friday, September 8, 2017, Midland Daily News.
3. “Man Huffing cans of air duster crashes car into Otsego church, police say,” Rex Hall, Jr., published September 6, 2012, MLive.
4. “Police: Man ‘huffing’ narrowly misses MDOT workers before crashing,” Ken Palmer, published August 25, 2017, Lansing State Journal.
5. “Indiana Police: Driver was Huffing Drugs Before Fatal Crash,” published March 24, 2011, Keller & Keller.
6. “Inhalants and Driving Impairment,” published March 7, 2013 in Club Drugs.
7. The Good Drugs Guide.com – Inhalant Basics <https://www.thegooddrugsguide.com/inhalants/basics.htm>
8. Id.
9. “Driver Education: How Drugs Affect Driving-Inhalants,” published June 17, 2009 in Safe Teen Driving Blog-Providing a solid base for teen drivers by improving behavior, attitude, skills and experience.
10. The Good Drugs Guide.com – Side Effects. <https://www.thegooddrugsguide.com/inhalants/basics.htm>

# Revisiting *Navarette*: Important United States Supreme Court Decision Regarding 911 BOL Tips

By: Will Lathrop

The Supreme Court's decision in *Navarette v. California* is a modest victory for law enforcement, adding clarity to "reasonable suspicion" based exclusively on an anonymous tip. Interestingly, in deciding the veracity of an anonymous tipster, the Court gave greater weight to tips received in the 911 dispatch system, reasoning that there are inherent safeguards that enhance the reliability of anonymous 911 tips.<sup>1</sup>

## Navarette Facts

In 2008, an anonymous caller phoned a Mendocino County, California 911 dispatcher to report being run off the road by a reckless driver five minutes prior to the call. The caller identified the offending driver's license plate information, as well as the make, model, and color of the vehicle. Specifically, the caller explained that the offending driver had run the caller off the road at approximately mile marker 88 on Highway 1. Dispatch relayed the caller's information to a California High Patrol (CPH) officer who located the vehicle approximately 20 minutes later at mile marker 69, and initiated a traffic stop. While the officer did confirm the information provided by the anonymous caller, the officer did not personally witness the driver make any driving infractions. Once the vehicle was stopped, the officer noticed a strong smell of marijuana emanating from the vehicle. A subsequent search of the vehicle revealed that the driver and passenger were transporting 30 pounds of marijuana. After both men were convicted of transporting marijuana, they filed appeals claiming that, supplied with only the information provided by the anonymous caller, the CHP officer did

not have reasonable suspicion to initiate a stop.<sup>2</sup>

## The Legal Analysis

In *Navarette*, the Court again rejected the defense assertion that reasonable suspicion must be based solely on an officer's personal observation,<sup>3</sup> but cautioned that an "anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."<sup>4</sup> In other words, when it comes to anonymous tips and reasonable suspicion, the poles are set. At the safe end, an officer bases reasonable suspicion on his or her first-hand observations. At the other, an officer develops reasonable suspicion relying exclusively on information provided by an anonymous source. *Navarette* adds clarity to the bounds of the latter. The Court reiterated that

**In *Navarette*, the Court again rejected the defense assertion that reasonable suspicion must be based solely on an officer's personal observation,**

sufficient reasonable suspicion based solely on an anonymous tip is rarely sufficient because it is difficult for an officer to ascertain the informant's basis of knowledge or veracity.<sup>5</sup> However, in certain circumstances an anonymous tip can include "sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop."<sup>6</sup> So, that begs the question: what constitutes "sufficient indicia of reliability?"

In their analysis, the Court explained that anonymous tips become more reliable with: 1) specific details that can be corroborated by police; 2) evidence that a



tip has been made contemporaneous to the event; and 3) evidence that the tipster has first-hand knowledge of the event.<sup>7</sup> As to the first assertion, the Court has repeatedly deduced that "an informant who is proved to tell the truth about some things is more likely to tell the truth about other things."<sup>8</sup> Police corroboration of specific details establishes the accuracy of anonymous information, and thus adds to its veracity. Contemporaneousness is also useful for establishing veracity and credibility. The closer to the event a report is made the less the "likelihood of deliberate or conscious misrepresentation"<sup>9</sup> — logic similar to that used in the present sense impression exception to hearsay evidence rules. Put simply, the closer in time a report is made to an event, the less time an informant has to make up facts. Finally, establishing the tipster's first-hand knowledge of the event is important to show that the informant police are relying on is the same person who actually witnessed a crime or infraction.<sup>10</sup>

Applying these three parameters to the *Navarette* facts, the Court found that the 911 call "bore adequate indicia of reliability for the officer to credit the caller's account."<sup>11</sup>

*(Continued on page 7)*

1. *Prado Navarette Et Al v. California*, 572 U.S. \_\_\_\_ (2014)

2. *Prado Navarette Et Al v. California*, supra

3. *Adams v. Williams*, 407 U.S. 143, 147 (1972)

4. *Alabama v. White*, 496 U.S. 325, 330 (1990)

5. *Alabama v. White*, supra

6. *Alabama v. White*, supra

7. *Prado Navarette Et Al v. California*, supra

8. *Prado Navarette Et Al v. California*, supra (citing *Illinois v. Gates*, 462 U.S. 213, 244 (1983)).

9. *Prado Navarette Et Al v. California*, supra (citing Advisory Committee's Notes on Fed. Rule Evid. 803(1), 28 U.S.C. App., P. 371)

10. *Illinois v. Gates* 462 U.S. 213, 234 and *Spinelli v. United States*, 393 U.S. 410, 416 (1969)

11. *Prado Navarette Et Al v. California*, supra

# Michigan's Oral Fluid Roadside Drug Testing Pilot Program Underway

By: Kinga Canike and Kenneth Stecker

All eyes are on Michigan as its oral fluid roadside drug testing pilot program enters its fifth month. It is the first of its kind in the nation created and funded by a state law.

That law is Public Act 242 and 243 of 2016. It puts the Michigan State Police (MSP) in charge of running the one-year pilot program, which began on November 8<sup>th</sup>, 2017. MSP's Traffic Safety Specialist Lieutenant James Flegel is in charge of the program. He put together a group of traffic safety professionals to help hammer out the details of the pilot program. This subcommittee includes MSP personnel, Michigan's DRE Program Coordinator, MSP Forensic Laboratory technical director, and Michigan's two Traffic Safety Resource Prosecutors.

Under the law, only Drug Recognition Expert (DRE) officers may participate in the pilot. DREs are officers who have undergone highly specialized training in identifying drivers impaired by drugs. Currently there are 27 DRE officers participating in this program. Even though this is an MSP-run program, DREs employed by county, township, and municipal police agencies are also involved.

These tests are occurring in five counties. They are Berrien, Delta, Kent, Saint Clair, and Washtenaw. These counties were chosen by the subcommittee, which looked at several criteria including the number of impaired driving crashes, number of impaired driving arrests, number of active DRE officers in that county, and geographic diversity.

Under the pilot program, a DRE may require a person to submit to a preliminary oral fluid analysis to detect the presence of a controlled substance in the person's body if he or she suspects the driver is impaired by drugs. Refusal to submit to a preliminary oral fluid analysis upon a lawful demand of a police officer is a civil infraction.

The preliminary oral fluid analysis consists of a mouth swab using a handheld device which can be used to test for drugs at the roadside. The instrument being used in Michigan's pilot program is the Alere DDS2. It can test for the following six classes of drugs in oral fluid: marijuana, cocaine, methamphetamine, amphetamine, opiates,



and benzodiazepines. It was chosen for Michigan's pilot program for its portability, easy to use, and rapid test results (within five minutes).

**Getting a mouth swab is quicker, easier, and less invasive than a blood draw.**

It is important to note that nothing in the pilot program changes the normal protocol in a drugged driving investigation. Even though the Alere can indicate the presence or absence of drugs in a driver's oral fluid, it cannot determine whether that driver's ability to operate a motor vehicle is impaired. Officers in the pilot program will still need to establish a driver's impairment through a roadside investigation, which may include observations of driving, physical observations, driver's admissions, and field sobriety testing. The oral fluid swab will also not substitute the 12-step evaluation that DREs are trained to perform on suspected drugged drivers.

Drugged driving investigations also include the collection of blood from that driver, oftentimes through a search warrant. The same will continue to be done in this pilot program. First, two oral fluid swabs are collected—the first one is put in the handheld device by the officer for an immediate reading, and the second swab is sent to Forensic Fluids Laboratory in Kalamazoo for confirmatory testing. This swab is voluntary and there is no penalty if a driver refuses. Second, a blood draw is taken and sent to the MSP Forensic Laboratory to be compare with the oral swabs.

The oral fluid samples collected pursuant to the pilot program are not admissible in court. Under Michigan law, only breath, blood, and urine samples are admissible as evidence in impaired driving investigations. The oral fluid results are to be used similar

to preliminary breath test results in drunk driving cases.

Those involved in organizing the pilot program hope it will provide solutions for dealing with drugged driving. Their end goal is to show that oral fluid testing is accurate and reliable, and they hope to one day see it used by all road officers in the state. Michigan has seen a steady increase in fatal crashes involving drivers impaired by drugs. Last year, drug-involved traffic fatalities rose over thirty percent, from 179 in 2015 to 236 in 2016.

This problem is not unique to Michigan. A 2015 National Roadside Survey by the National Highway Traffic Safety Administration showed that drugged driving is rising all around the country. About twenty percent of drivers in the national survey tested positive for at least one drug—an increase from 16.3 percent in 2007. Of that number, 12.6 percent had evidence of marijuana use in their systems.

Oral fluid collection may also be a better tool for investigating drugged drivers than blood. Getting a mouth swab is quicker, easier, and less invasive than a blood draw. In the United States Supreme Court decision *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177 (2016), the Supreme Court even acknowledged this when it referred to the swabbing of the inside of a person's cheek for DNA as a "negligible" intrusion under the Fourth Amendment.

Results from Michigan's pilot program won't be available until after the completion of the one-year pilot. If the program goes well, oral fluid testing may give law enforcement in Michigan another valuable tool to keep dangerous drugged drivers off the road.

**Editor's Note:** Kenneth Stecker and Kinga Canike are Michigan Traffic Safety Resource Prosecutors.

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# Michigan's Eighth DRE School A Success

Twenty-two law enforcement officers and five prosecutors successfully completed Michigan's eighth Drug Recognition Expert (DRE) School. The training was held from January 23<sup>rd</sup> through February 2<sup>nd</sup> in the Lansing area.

A DRE is an officer with specialized training to recognize signs of drug impairment in drivers and to identify the category or categories of drugs that may be causing that impairment. A DRE utilizes a 12-step evaluation to make this determination which includes administering divided attention tasks, taking vital signs, and measuring pupil size in three different light conditions.

There are now 137 DRE-trained officers in Michigan. The new DRE-trained officers are from the following agencies: Adrian Township, Auburn Hills, Belding, Birmingham, Grand Rapids, Midland, Muskegon, Novi, Pleasant Ridge, and St. Louis police departments; Allegan, Bay, Emmet, Marquette, Saginaw, and Washtenaw sheriff offices; and Michigan State



Police Brighton, Hart, Lapeer, Paw Paw, and Wayland posts.

have been through the training. This year's prosecutors included Elected Prosecutors from Roscommon and Crawford, as well as assistant prosecuting attorneys from Jackson, Washtenaw and Wayne counties

Michigan is the only state that puts prosecutors through the two-week training. To date 38 prosecutors

## Mark Your Calendar

Seminar	Date	City	Location
Advanced OWI Prosecutions	Feb 13, 2018	Grand Rapids	Crowne Plaza Grand Rapids-Airport
OWI Drug Forfeiture	March 8, 2018	Lansing	Crowne Plaza Lansing West
Total Trial Advocacy	Feb 23, 2018	Gaylord	Otsego Club
Lethal Weapon	April 16-17, 2018	Traverse City	Great Wolf Lodge
PAAM Basic Training	May 14-17, 2018	Grand Rapids	Crowne Plaza Grand Rapids-Airport
Prosecuting the Drugged Driver	June 6, 2018	Mt. Pleasant	Comfort Inn and Suites
Visual Trial School	June 13-15, 2018	Port Huron	DoubleTree Port Huron
Cops in Court	July 19, 2018	Gaylord	Otsego Club
Fourth Annual Drug Initiatives Conference	Aug 1, 2018	East Lansing	Kellogg Hotel and Conference Center
Nuts and Bolts of OWI Investigations	Aug 2018	TBA	TBA
Cops In Court	Sept 13, 2018	Marquette	TBA
Felony Trial Practice	Sept 19-20, 2018	Kalamazoo	Radisson Hotel

# For Your Information

## Drug-Impaired Driving Campaign Toolkit

*DUI is more than alcohol. Pass It On.*

Drug-impaired driving is a problem on America's highways. Like drunk driving, drugged driving is impaired driving. It is dangerous and illegal in all 50 States, Puerto Rico, and Washington, DC. Whether the drug is legally prescribed or illegal, driving while drug-impaired poses a threat to the driver, vehicle passengers, and other road users.



Spread the word about drug-impaired driving and remind all drivers: If you are impaired by drugs and thinking about driving, pass your keys on to a sober driver.

Click [here](#) to view the materials available.

## Medication Effects That May Impair Driving Ability WebMD/Medscape Training Program

# Medscape

WebMD has launched a free webinar to educate and increase awareness among clinicians regarding the potential adverse effects of prescription and Over-the-Counter (OTC) medication on driving. The training webinar reviews the types of drugs that may impair driving and discusses the importance of clinicians communicating the risks to their patients, to help decrease drug-impaired driving crashes. At the end of the webinar, clinicians (including physicians, physician assistants, nurses, pharmacists and pharmacy technicians) will have greater knowledge regarding the potential adverse effects of OTC and prescription medication that may impair driving ability among drivers and strategies to mitigate these adverse effects.

Free continuing education credits are available with this webinar. Click [here](#) to participate. New users can set up an account in minutes.



## Saint Patrick's Day Saturday, March 17, 2018

St. Patrick's Day is one of the most popular holidays in the United States. For this reason, NHTSA is asking you join us in spreading the message about the dangers of drunk driving this St. Patrick's Day.

[These](#) St. Patrick's Day marketing tools can be used to reach out to your community about the dangers of drinking and driving.

## New NCSA Publication

*Early Estimate of Motor Vehicle Traffic Fatalities for the First Half (Jan–Jun) of 2017 (DOT HS 812 453; December 2017)*

A statistical projection of traffic fatalities for the first half of 2017 shows that an estimated 17,530 people died in motor vehicle traffic crashes.

This represents a marginal decline of about 0.6% as compared to the 17,630 fatalities that were reported to have occurred in the first half of 2016. The second quarter of 2017 represents the first year-to-year quarterly decline in fatalities since the third quarter of 2014. Preliminary data reported by the Federal Highway Administration (FHWA) shows that vehicle miles traveled (VMT) in the first 6 months of 2017 increased by about 24.6 billion miles, or about a 1.6% increase. The fatality rate for the first half of 2017 decreased to 1.11 fatalities per 100 million VMT, down from 1.13 fatalities per 100 million VMT in the first half of 2016. Click [here](#) to view the publication.

## Alcohol Measurement Devices Web Page

The National Highway Traffic Safety Administration (NHTSA) has posted a new page on their website containing links to model specifications relating to evidential breath testing instruments (EBTs), alcohol screening devices (ASDs), calibrating units (CUs) and Breath Alcohol Ignition Interlock Devices (BAIIDs). The page also includes Conforming Products Lists for EBTs, ASDs and CUs, as well as other resources. Click [here](#) to visit the web page.



## Inhalants and Driving *(continued from page 1)*

dispensers and refrigerant gases, medical gases such as chloroform, and nitrous oxide.<sup>11</sup>

Inhalants are found everywhere, including in drivers on our roads. This is where Michigan Public Act 543 of 2012, comes into play. It states in pertinent part as follows:

Sec. 625. (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

(25) As used in this section: (a) "Intoxicating substance" means any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following: (i) Recognized as a drug in any of the following publications or their supplements: (A) The official United States pharmacopoeia. (B) The official homeopathic pharmacopoeia of the United States. (C) The official national formulary. (ii) *A substance, other than food, taken into a person's body, including, but not limited to, vapors or fumes, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.*

In testimony before the Senate Judiciary Committee regarding Public Act 243, a Grand Blanc police officer said he had encountered several cases in which a driver's ability to operate a vehicle was impaired.<sup>12</sup> The officer told of responding to a car crash in which a driver was "huffing" an aerosol spray can. The driver had four spray cans in his car and 20 empty cans in the trunk.<sup>13</sup> Another former law enforcement officer recalled having pulled over a driver who was sucking on a rag soaked with lighter fluid. All of these drivers were a threat to themselves and others because they were operating vehicles while impaired by an intoxicating substance.<sup>14</sup>

Because inhalants fall under the category of "intoxicating substance," a person violates this law only when he or she operates a motor vehicle while under the influence by an intoxicating substance.

"Under the influence" means that, because of consuming an intoxicating substance, a person's ability to operate a motor vehicle in a normal manner was substantially lessened. The test is whether one's mental or physical condition is significantly affected and they are no longer able to operate a motor vehicle in a normal manner.

In essence, if a police officer suspects that someone is inhaling while driving, there are signs that are indicators that the driver is under the influence of an intoxicating substance.

Common examples include loss of normal road awareness, loss of the ability to react properly to changing driving circumstances, loss of the ability to properly control driving speed, loss of the ability to safely maintain position

within a lane, loss of the ability to follow other vehicles at a safe distance, and an increased tendency to attempt unsafe driving maneuvers.<sup>15</sup>

As with alcohol intoxication, these impairments create seriously elevated risks for involvement in crashes that damage property and/or lead to major injuries or fatalities.<sup>16</sup>

Additional signs to look for are appearance of rashes or blisters around the mouth and nose of the user.<sup>17</sup> Many times the vapors are toxic enough to cause rashes or burns with frequent use.<sup>18</sup> Their behavior may be similar to someone who is drunk, but most often speech will be slurred and behavior will be erratic.<sup>19</sup>

We have a responsibility for road safety in Michigan, and as we go forward, we need to continue to reassess our efforts to combat the dangers on our roads. One way we can make a difference is by making sure inhalant-abusing drivers are kept off our roads.

**Editor's Note:** Kenneth Stecker and Kinga Canike are Michigan Traffic Safety Resource Prosecutors.

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11. The Good Drugs Guide.com – Side Effects. <https://www.thegooddrugsguide.com/inhalants/basics.htm>

12. <http://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-0353-A.pdf>

13. Id.

14. Id.

15. Inhalants and Driving Impairment," published March 7, 2013 in Club Drugs.

16. Id.

17. The Good Drugs Guide.com – Signs of Usage <https://www.thegooddrugsguide.com/inhalants/basics.htm>

18. Id.

19. Id.

## Revisiting *Navarette* *(continued from page 2)*

The Court went on to emphasize that the caller provided very specific details to the dispatcher (make, model, color, and license plate of the suspect and the mile post where the incident occurred), and that the officer had been able to confirm those details. The Court found that the call was made contemporaneously with the event. The Court noted that the suspect was located 19 miles from where the caller reported the incident had occurred about 18 minutes after the call. Finally, the Court deduced that the caller had personally witnessed the event because the caller reported that she had been run off the road by the suspect.<sup>12</sup>

### New Development in Anonymous Tip Analysis

In deciding that the anonymous tip in the *Navarette* case “bore adequate indicia of reliability” by which to establish reasonable suspicion, the Court expounded upon the traditional inquiry and made an important comment on the reliability of information transmitted via the 911 emergency phone system.<sup>13</sup> Essentially, the Court elevated anonymous 911 tips over other anonymous information, creating a quasi-anonymous category. In doing so, they identified various safeguards with the 911 system as follows: 1) 911 calls can be recorded; 2) It’s a crime to falsely report or harass another person using 911, and violators are subject to prosecution for such acts; and, 3) 911 caller information, such as phone number and call location, cannot be blocked per FCC regulations.<sup>14</sup> These safeguards work to bolster the reliability of 911 tips in two important ways. First, the caller isn’t truly anonymous. Police have access to a recording of the caller’s voice, the telephone number of the caller, the location from which the call was made, and potentially other personal information of the caller electronically stored by the 911 operating system. Second, with such

personal information easily collected by 911 systems, subsequent prosecution for false reporting is a realistic deterrent.<sup>15</sup>

The new treatment of 911 tips is not without bounds. The Court was careful to mention that none of these safeguards “suggest that tips in 911 calls are per se reliable,” just more reliable than the average anonymous tip.<sup>16</sup> Justice Thomas explained, “given the foregoing technological and regulatory developments . . . a reasonable officer could conclude that a false tipster would think twice before using such a system.”<sup>17</sup> In sum, due to technological and legal safeguards, anonymous 911 tips are inherently more trustworthy than most anonymous tips, but not so much so that they can always be deemed reliable. The ultimate question, even when dealing with 911 tips is whether, given the totality of the circumstances, the officer can substantiate an informant’s “basis of knowledge [and] veracity.”<sup>18</sup>

### Best Practices

Going forward, police and dispatchers need to be vigilant and gather as much specific detail from tipsters as possible, including establishing whether the offense occurred at or near the time of the report and if the tipster has first-hand knowledge of the offense. Further, it is imperative that officers attempt to corroborate as much of the anonymous information as possible and document those details in a report. When possible, officers should combine their own personal observation of a suspect’s suspicious behavior with an anonymous tip to greatly increase the objective strength of the reasonable suspicion.

With regards to the role of prosecuting attorneys, the risk of losing a case because the investigating officer relied on a 911 tip can be substantially

mitigated by establishing a complete and detailed record. In reality, this case did not involve an anonymous tip at all. A footnote in the *Navarette* holding revealed that the prosecutor did not introduce the 911 recording because neither the caller nor the dispatcher were available as witnesses (presumably to lay a foundation for the recording).<sup>19</sup> On the 911 recording, the caller actually identified herself by name, but unfortunately, the Court could not consider that evidence as it was not part of the record.<sup>20</sup> Most prosecutors would agree that calling witnesses and introducing evidence in practice can be very challenging for a myriad of reasons. The takeaway for prosecutors is to try to introduce 911 recordings at motions hearings if possible—or, other evidence identifying an anonymous caller. If doing so proves to be a practical impossibility, prosecutors should glean as much specific information as possible from the police officer about the details he or she received (contemporaneousness, personal observation, specificity of the incident) and the ways the officer verified the detail in the subsequent investigation.

### Conclusion

While the *Navarette* ruling did not drastically change the standing rules and analysis surrounding anonymous tips and reasonable suspicion, it was a minor victory for law enforcement. The unique takeaway from *Navarette* is the Court recognizing anonymous 911 tips hold fundamental safeguards that make them, at least to a degree, more reliable than other standard tips.

**Editor’s Note:** Will Lathrop is a Staff Attorney for the National Traffic Law Center. This article is reprinted with the permission of the National Traffic Law Center.

12. *Prado Navarette Et Al v. California*, supra

13. *Prado Navarette Et Al v. California*, supra

14. *Prado Navarette Et Al v. California*, supra

15. *Prado Navarette Et Al v. California*, supra

16. *Prado Navarette Et Al v. California*, supra

17. *Prado Navarette Et Al v. California*, supra

18. *Alabama v. White*, supra

19. *Prado Navarette Et Al v. California*, supra

20. *Prado Navarette Et Al v. California*, supra

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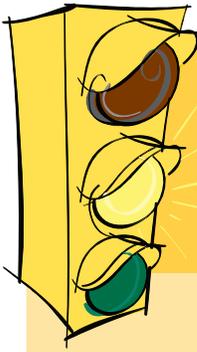
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# The YELLOW LIGHT LEGAL UPDATE

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Clicking on case names (highlighted in blue text) will take you directly to the PDF version of the opinions online.

## Unpublished Cases

(An unpublished opinion is not binding as precedent but may have persuasive value in court. See, Michigan Court Rule 7.215)

The Defendant was convicted by a jury of unlawful manufacture of marijuana, unlawful possession of marijuana with intent to deliver, and knowingly keeping or maintaining a drug house, MCL 333.7405(d). She was sentenced to 24 months' probation and appealed as of right.



The Michigan Court of Appeals previously affirmed the convictions. *People v Rocafort*, unpublished opinion per curiam of the Court of Appeals, issued January 7, 2016 (Docket No. 321804). The Defendant filed an application for leave to appeal, and the Michigan Supreme Court, in lieu of granting leave, remanded the case to the Michigan Court of Appeals for reconsideration in light of *People v Manuel*, 319 Mich App 291; 901 NW2d 118 (2017).

The *Manuel* Court held that "usable" marijuana only encompasses marijuana that has completed the drying process and not marijuana that is still in the process of being dried. Therefore, the *Manuel* Court affirmed the trial court's ruling dismissing the charges against the defendant on the

basis that the defendant was entitled to immunity under MCL 333.26424, which is § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 et seq.

In this opinion, the Court "concluded that the instant case is factually indistinguishable from *Manuel*, and because the Supreme Court remanded the case to us with the specific direction to reconsider our previous ruling in light of *Manuel*, we now hold that defendant was entitled to immunity under § 4 of the MMMA and that the trial court, therefore, erred in failing to dismiss the charges.

Vacated defendant's convictions and remanded to the trial court for dismissal of the charges. The dissent "Believes this case is controlled by this Court's binding precedent, *People v Carruthers*, 301 Mich App 590, 597; 837 NW2d 16 (2013), and even though the trial court may have erred regarding its determination that all of the seized marijuana was 'usable' under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 et seq., the trial court reached the correct result; consequently, I would affirm

*People v. Rocafort*, case no. 321804, decided January 2, 2018.

Defendant pled guilty to one count of operating a motor vehicle while intoxicated (OWI), third offense, and operating a vehicle with a license suspended (DWLS), second offense. The trial court sentenced Nowak to one to five years' imprisonment for the OWI conviction and one year in county jail for the DWLS conviction.

The defendant argued trial court should have allowed him to withdraw the guilty plea to the OWI offense and to correct an allegedly invalid sentence. The Court of Appeals disagreed.

More specifically, the defendant argued that his plea was not accurate because the defendant did not describe facts showing that he was operating the vehicle. The defendant maintained he was not operating the vehicle because the engine was not running and he was asleep. Again, the Court disagreed.

**A defendant does not have an absolute right to withdraw a guilty plea once it has been accepted.**

The Court noted, "When a defendant enters a guilty plea, he "must enter an understanding, voluntary, and accurate plea." *People v Brown*, 492 Mich 684, 688-689; 822 W2d 208 (2012); see also MCR 6.302(A). A defendant does not have an "absolute right to withdraw a guilty plea once it has been accepted." *People v Blanton*, 317 Mich App at 117. To withdraw a plea, a defendant "must demonstrate a defect in the plea-taking process." *Id.* at 118.

The Court stated the following reasons as to why the plea was inaccurate: "The trial court properly inferred that Nowak operated the vehicle because Nowak did not live on the road he admitted being on and did not start his evening there. In response to the trial court's question of what Nowak did to be guilty of operating while intoxicated, Nowak answered, he "got in the seat, turned the radio on, keys in the ignition, cops pulled up, knocked on the window, [he] answered the questions and that was it . . . ." In response to defense counsel's question whether Nowak was "operating a motor vehicle[.]" after defense counsel explained what it means to operate a motor vehicle, Nowak answered "yes." Nowak again answered yes to the prosecution's question whether Nowak "actually operated the vehicle on Wiltshire Drive[.]"

Therefore, the trial court did not err by concluding that the plea was accurate.

Affirmed.

*People v Nowak*, case no. 335097, decided December 26, 2017.

A jury convicted defendant Steve Kelty of operating a motor vehicle while license suspended or revoked causing death, MCL 257.904(4), and operating a motor vehicle with the presence of a controlled substance (THC) causing death, MCL 257.625(4).

In the early morning of September 2014, Kelty's Chevrolet Blazer collided with a motorcycle. According to an eyewitness, the motorcycle turned right from Figurski Road into a northbound lane of Latson Road. Kelty was driving his Blazer southbound on Latson Road, intending to make a left turn onto Figurski Road, when he turned too early and collided nearly head-on with the motorcycle. The motorcyclist was killed.

Kelty conceded at trial that he was operating the vehicle with a suspended or revoked license and that he had THC in his system at the time of the collision. The principle issue at trial was whether Kelty's conduct was a proximate cause of the motorcyclist's death.



On appeal Kelty challenged the prosecution's references during trial to two medications found in his system (Flexeril and Valium) and their clinical effects.

The COA found that Kelty failed to establish that his unpreserved claim of evidentiary error affected his substantial

rights because the issue at trial was whether Kelty's operation of the vehicle proximately caused the motorcyclist's death, and not whether a reason explained how Kelty operated his vehicle.

Evidence presented at trial overwhelmingly indicated that Kelty was driving his Blazer southbound in the northbound lane of Latson Road when the motorcycle legally turned into the northbound lane of Latson Road and collided head-on with Kelty's Blazer, thereby demonstrating that Kelty's operation of the motor vehicle directly and naturally caused the motorcyclist's death.

Affirmed.

*People v. Kelty*, case no. 334295, decided December 12, 2017.

The defendant appealed by right his conviction of operating under the influence of a controlled substance causing death. The trial court sentenced defendant as a third offense habitual offender.

The facts are that a motor vehicle crash that occurred on May 3, 2015, and caused the death of Nikkie Thomas. Thomas, defendant, and Thomas's friend, Shalisa Porter, traveled from Benton Harbor to Muskegon on May 2, 2015, to watch a boxing match with Thomas's brother. At trial, Porter testified that the three smoked marijuana during the drive to Muskegon, that she saw defendant smoking marijuana outside while they were at the gathering, and that the three again smoked marijuana during the ride home. According to Porter, defendant drove the three back to Benton Harbor around 3:00 a.m. on May 3, 2015, following southbound US 31. She fell asleep during the drive, but she awoke to Thomas screaming and the vehicle's leaving the roadway.

Ottawa County Sheriff officers with specialized knowledge of crash reconstruction later concluded that the vehicle, traveling about 55 miles per hour, drifted into the median, abruptly returned to the southbound roadway, and then abruptly swerved back into the median, flipping several times before coming to rest on its side in the northbound lanes. The airbags did not deploy. Defendant and Thomas, who were not wearing their

seatbelts, were ejected from the vehicle. Thomas was pronounced dead at the

**The Court held, "There was sufficient evidence to support defendant's conviction of operating under the influence of a controlled substance causing death, and that he was not denied the effective assistance of counsel"**

scene by responding officers. Porter told officers that defendant had been driving, that they had smoked amarijuana earlier in the day, and that they had just been at a party where alcohol was present. Officers obtained a search warrant to perform a blood test on defendant. The test results were negative for alcohol but positive for marijuana.

The defendant argued that this evidence was not sufficient because Porter's testimony was not credible. The Court of Appeals disagreed.

The Court held, "There was sufficient evidence to support defendant's conviction of operating under the influence of a controlled substance causing death, and that he was not denied the effective assistance of counsel. The prosecution presented ample evidence that defendant had marijuana in his system when the motor vehicle accident occurred through the toxicologist's testimony as to defendant's blood sample and the testimony of a witness, Porter, that defendant had smoked marijuana three times on the day in question. Further, Porter testified that defendant was driving the vehicle when the accident occurred."

Affirmed.

*People v. Hornes*, case no. 333886, decided November 21, 2017.

## New Laws

### Specialty Courts (DWI/sobriety) Effective, February 11, 2018

Public Acts 161, 162, 163, and 164 of 2017 requires drug treatment and DWI/sobriety courts, mental health courts, and veterans treatment courts, respectively, and circuit or district courts that seek to adopt those types of specialty courts, to be certified by the Michigan Supreme

Court Administrator's Office (SCAO); and prohibits those courts from performing certain functions or receiving funding unless they are certified.

It also amends the definition of "violent offender" as used in Chapter 10A of the Act (Drug Treatment Courts).

In addition, it allows a case to be transferred from one court to another for the defendant's participation in a state-certified treatment court, and prohibits the consummation of a transfer until a memorandum of understanding (MOU) is executed, and requires the MOU to include certain statements, including how funds assessed to the defendant will be accounted for.

Finally, it allows, at the discretion of a judge, the custodian of a minor child to drive to and from the facilities of a day-care services provider or an educational institution at which the child is enrolled, for specific purposes.

### **Prior Conviction for Purposes of License Suspension Effective, January 1, 2018**

Public Act 358 amends MCL 257.319 to define a "prior conviction" for purposes of a license suspension and indicates that it includes either a misdemeanor or a civil infraction determination.

- One prior conviction (either a state civil infraction or a misdemeanor) the license must be suspended for 90 days, a restricted license may be issued after 30 days
- Two or more prior convictions the license must be suspended for 1 year, a restricted license may be issued after 60 day

### **Electronic Display of Motor Vehicle Registration Effective September 26, 2017**

Public Act 59 of 2017 amended MCL 257.223 of the Michigan Vehicle Code to allow for the production of an electronic copy of a vehicle's registration certificate.

As amended MCL 257.223 allows the person driving or in control of the vehicle to display an electronic copy of the registration certificate for that vehicle using an electronic device (e.g., cellphone, tablet) when requested to produce a registration certificate.

A person who displays a registration certificate to a police officer using an electronic device is not presumed to have consented to a search of the device, and the police officer is prohibited from manipulating the device to view any other information on the device.

A police officer may require the person to electronically forward the electronic copy of the registration certificate to a specified location provided by the police officer so the police officer may view it in a

**A person who displays a registration certificate to a police officer using an electronic device is not presumed to have consented to a search of the device**

setting which is safer for the police officer to verify that the information contained in the registration certificate is valid and accurate.

The State of Michigan, a law enforcement agency, or an employee of the State of Michigan or a law enforcement agency is not liable for damage to or a loss of an electronic device that occurs as a result of a police officer's viewing an electronic copy of a registration certificate as provided in MCL 257.223, regardless of whether the police officer or the owner or operator of the vehicle was in possession of the device at the time the damage or loss occurred.

A digital photograph of a valid registration certificate satisfies the requirements of MCL 257.223.

### **Requirements for Leaving an Unattended Vehicle on a Highway Effective September 26, 2017**

Public Act 61 of 2017 amended MCL 257.676 of the Michigan Vehicle Code to require persons leaving unattended vehicles standing on a highway to do all of the following:

- Stop the vehicle
- Engage the parking brake or place the vehicle in park
- Remove and take possession of the ignition key
- If standing on a grade, turn the front wheels towards the curb or side of highway



Pursuant to MCL 257.676, the above requirements do not apply to a vehicle that is standing in place and is equipped with a remote start feature that is engaged at the time. Violations of MCL 257.676 are punishable as a civil infraction.

Public Act 61 of 2017 rescinded Rule 28.1458 found in the Uniform Traffic Code (UTC) provisions of the Michigan Administrative Code which, if adopted by a city, township, or village, had prohibited leaving unattended vehicles "on any street or any other place." Officers should note that although R 28.1458 of the UTC was rescinded, it does not impact local ordinances previously adopted using the UTC as a model. Such ordinances authorizing enforcement in "any other place" may still have effect unless separately repealed by the local governing body that previously adopted the ordinance.

### **Consult Your Prosecutor Before Adopting Practices Suggested by Reports in this Article.**

The statutes and court decisions in this publication are reported to help you keep up with trends in the law. Discuss your practices that relate to these statutes and cases with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practices in reliance on a reported court decision or legislative change.



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