CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

Advanced Criminal Defense Practice Conference

RECENT DEVELOPMENTS IN MICHIGAN CRIMINAL LAW

NEW CASES – ADDENDUM TO MATERIALS

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Lansing, MI

FALL, 2011

November 3-5, 2011

PARK PLACE HOTEL

TRAVERSE CITY, MI

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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The 2011 CDAM Advanced Criminal Defense Practice Conference is funded in part by a grant from the Michigan Commission on Law Enforcement Standards

I. Case Law

A. Fourth Amendment.

B. Other Pretrial Matters.

Confession, Miranda, Custody. *People v Cortez,* __ Mich App __; __ NW2d __ (2011 WL 5105742, No. 298262, decided October 27, 2011)**(oct'11).** Defendant was a prisoner of the MDOC when shanks were found within his area of control after a lockdown following gang fights. He was placed in isolation, per policy, and later questioned by an MDOC official without *Miranda* warnings. Defendant's statements were later turned over to the Michigan State Police and used against him at trial. The court agreed with the circuit court that the Defendant's statements were admissible despite the lack of warnings. In a custodial setting, custody demands added restrictions beyond those normally experienced in prison. In this case Defendant's isolation was general policy following a prison disturbance and/or the discovery of weapons. Moreover, no "outside official" was involved in the questioning. Therefore, though a "close call" Defendant's questioning was more akin to general on the scene questioning and no warnings were required. *Miranda* is note intended to hamper prison officials investigating prison offenses.

C. Confrontation, Counsel, and Other Trial Issues.

Confrontation, DWLS, Certificate of Mailing Notice of Suspension. *People v Nunley,* __ Mich App __; __ NW2d __ (2011 WL 4861858, No. 302181, decided October 13, 2011)**(oct'11)**. In this 2-1 decision (Saad, J. dissenting) the court upheld the circuit court's partial affirmance of the district court's denial of the prosecutor's motion in limine to allow a secretary of state "certificate" showing that Defendant had been notified of the suspension of his drivers license, a necessary element to prosecution under MCL 257.904(1), driving with a suspended or revoked license. The majority agreed with the circuit court and held that because the certification at issue was not merely documenting the authenticity of records but was in fact "attesting to a required element of the charge," the confrontation clause would be violated if the author of the certification did not appear at trial, citing the recent United States Supreme Court ruling in *Melendez-Diaz v Massachusetts*, __ US __; 129 S Ct 2527 (2009).

Counsel, Ineffective Assistance, Inability to Admit Evidence. *People v Armstrong,* __ Mich __; __ NW2d __ (2011 WL 5083255, No. 302181, decided October 13, 2011)**(oct'11).** Mr. Armstrong, 25, was charged with twice brutally raping a 15 year old. The complainant had some serious credibility issues. She testified that after the second

alleged rape she made no effort to contact Defendant. Her cell phone records provided abundance of evidence to the contrary. Trial defense counsel who, according to the court, had been practicing only 8 months, became flustered by an objection from the prosecutor when he tried to admit the phone records without a proper foundation, and gave up. The trial court and the court of appeals agreed that the performance prong of *Strickland* had been met, but both ruled that there was insufficient prejudice to Defendant to require reversal. The supreme court disagreed, and noted that the cell phone records provided the only documentary proof that the complainant "lied to ***this*** jury."

Evidence, Domestic Violence Cases. *People v Meissner*, __ Mich App __; __ NW2d __ (2011 WL 5061594, No. 298780, decided October 25, 2011)**(oct'11).** Defendant was charged with first degree home invasion, domestic violence and obstruction. By the time of trial the complainant, pregnant with Defendant's child, substantially recanted. The court held that under MCL 768.27c, allowing hearsay in DV cases if certain circumstances are met (statements must be trustworthy and timely), statements made to police months or days after the alleged acts of violence are timely. And by definition statements made to police are trustworthy. Finally, under MCL 768.27b, prior acts of domestic violence can be admitted even if identical to the charged offense.

D. Crimes and Offenses, Sufficiency

Sufficiency, Assault Resulting in Death, Shaken Baby Syndrome. *Cavazos v Smith,* __ US __; __ S Ct __ (2011 WL 5118826, No. 10-1115, decided October 31, 2011)**(oct'11).** Competing medical evidence in this SBS case caused the court to issue a slap-down to the 9th Circuit after that court repeatedly refused to cancel the writ they had granted to a caring grandmother who was sentenced to 15 years to life with little evidence that she had caused the death of her grandchild. The Court held that *Jackson v Virginia* "makes clear that it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial."

E. Sentencing

Consecutive Sentencing, Offenses While Incarcerated. *People v Williams,* __ Mich App __; __ NW2d __ (2011 WL 4953483, No. 299809, published October 25, 2011)**(oct'11).** Defendant, in jail for domestic violence, tried to swap marijuana for a candy bar. He was convicted of delivery of marijuana and inmate in possession. The substantial sentences (4th offender) for these felonies were set to run consecutive to the DV sentence he had been serving *and consecutive to each other.* The court held that the latter consecutive term was improper as MCL 768.7a(1) cannot be used to impose consecutive sentences for contemporaneous acts giving rise to offense tried together at one trial.

Non-Parolable Life for CSC, Cruel and Unusual. *People v Brown,* __ Mich App __; __ NW2d __ (2011 WL 5108500, No. 297728, decided October 20, 2011)**(oct'11).** Defendant was convicted of first degree CSC and was sentenced to life without parole mandagted by MCL 750.520b(2)(c) when a defendant is over 17 and the complainant is under 13 if defendant had a similar previous conviction. After discussing penalties for similar offenses in other state the court turned down Defendant's claim that his sentence was unconstitutional because it was cruel and unusual.

F. Miscellaneous

Parole, Prosecutor's Appeal of Grant, Standard of Review. *People v Haeger and Parole Board,* __ Mich App __; __ NW2d __ (2011 WL 5169431, No. 297099, decided November 1, 2011)**(nov'11)**, and *Smith v Elias and Parole Board,* __ Mich App __ (2011 WL 5169431, No. 300113, decided November 1, 2011)**(nov'11).** In these two detailed, lengthy, and unanimous, published decisions, both authored by Judge Gleicher, the court set out to define the legal parameters for prosecution challenges to grants of parole by the board. Haeger and Elias had both been granted parole after both had served well beyond their minimum sentences and after both had been repeatedly flopped. In both cases the local circuit courts had reversed the grant of parole upon complaint of the prosecutor. The court of appeals upheld the reversal of the grant in *Haeger*, not because the board had acted wrongly, but because they had not made a sufficient record to assure that they had properly exercised their discretion in granting parole. In *Elias*, the court reversed the circuit court's reversal of the parole board's grant of parole because the parole board, in that case, had laid a proper record justifying its action. Judge Gleicher made it clear that in *Elias* the circuit court had "overstepped the bounds of judicial review," and erred when it applied the standard of review utilized under the Administrative Procedures Act as this is not a contested case under the APA. Judicial review in this context is limited by the abuse of discretion standard. The decision of the parole board must be upheld if it is supported by competent, material and substantial evidence on the whole record. It is improper for the circuit court to substitute its judgment for that of the parole board.