MICHIGAN STATE POLICE

LEGAL UPDATE

MAY 2006

This update is published by the Michigan State Police Executive Division. Questions and comments may be directed to the Executive Resource Section at MSPLegal@Michigan.gov.

STATUTES

To read the full text of these statutes go to www.michiganlegislature.org, or click on the public act or statute citation following each summary.

MCL 768.27c

Admissibility of statements made by victims of domestic violence

Effective March 24, 2006

This statute amends the Code of Criminal Procedure by creating an exception to the hearsay rule in domestic violence cases. It applies to trials and evidentiary hearings commenced or in-progress *on or after May 1, 2006*.

Under the new rule, statements made by victims of domestic violence are admissible in court if certain criteria are met.

Criteria for Admissibility

In order to be admissible, the victim's statement must:

1. Be made to a law enforcement officer
2. Describe the infliction or threat of physical injury
3. Be made at or near the time of the infliction or threat of physical injury
4. Be made under circumstances indicating that the statement is trustworthy

Trustworthiness

Factors to be considered in determining trustworthiness include, but are not limited to:

1. Whether the statement was made in contemplation of litigation
2. Whether the victim has a bias or motive for making a false statement
3. The extent of any bias or motive for making a false statement
4. Whether the statement is corroborated by other evidence

Officers investigating domestic violence cases should consider having the victim make a statement in writing when practical. A written statement admitted under this section could then be entered into evidence in the victim's own words rather than the officer's restatement of what the victim told the officer.

Officers should also ensure that indicators of trustworthiness are documented in the statement itself or in the supporting police report. This will assist a court deciding admissibility by providing them with a documented picture of the situation at the time the statement was made.

MCL 768.27c

MCL 750.168 and 750.167d

Disorderly conduct at funerals

Effective August 22, 2006 (PA 148 & 150)

On May 23, 2006, Governor Granholm signed into law a package of bills designed to address disorderly conduct at funerals.

PA 148 of 2006 created a new section of criminal law – MCL 750.167d. This section makes it a crime to engage in disorderly conduct within 500 feet of a funeral, memorial service, or viewing of a deceased person.

Conduct prohibited under the new section includes: Making a loud and raucous noise after being asked to stop, making any statement or gesture that would intimidate a reasonable person, and engaging in any other conduct that the person should reasonably know will adversely affect the funeral.

PA 150 of 2006 amends MCL 750.168 by making it a felony to violate the newly created MCL 750.167d.

PA 152 of 2006, which was effective May 24, 2006, allows local units of government to enact ordinances necessary to protect people attending funerals. Ordinances allowed include requiring a permit for demonstrations on public property near a funeral.

Public Act 148 of 2006

Public Act 150 of 2006

Public Act 152 of 2006

SEARCH & SEIZURE

Full citations have been omitted.

Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

In *Brigham City v. Stuart*, the United States Supreme Court reaffirmed the use of the emergency exception to the search warrant rule. In that case, police officers responded to a report of a loud party. When they arrived, they heard shouting inside the house and they walked down the driveway to investigate.

From the backyard, they were able to see through a screen door and windows and observed four adults trying to restrain a juvenile in the kitchen. The juvenile broke free and punched one of the adults in the face sending him to a sink spitting blood. The officers then entered the home and arrested several persons after the fight ended.

Severity of Injury

One of the defendants' claims was that the injury viewed by the officers was not serious enough to justify entry under the emergency exception. The court disagreed, stating that the officers didn't have "to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering."

According to Chief Justice Roberts' opinion, officers are "not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided." Officers may enter a home to stop a fight because police officers are expected to prevent violence and restore order, not simply render first aid after an incident.

Officer Motivation for Entry

Another claim made by the defendants was that the officers actually entered the home for the purpose of making an arrest, not to render aid. Even if this contention were true, the court said it was irrelevant. In analyzing an entry under the emergency exception, the test is not what an officer's *subjective* reasons were, but whether the entry is reasonable if viewed by an *objective* person.

LEGAL RESOURCES

Have you ever wondered exactly how hearsay is defined? Or what evidence a court should consider relevant? Or exactly how motions are filed? The answers to questions like these aren't magically imparted to lawyers and judges during law school. They find them in Michigan's Court Rules and Rules of Evidence. Those rules and other useful court-related information can be found at http://www.courts.michigan.gov/.

CRIMINAL LAW & PROCEDURE

Full citations have been omitted.

Statute prohibiting use of a computer to solicit a minor is constitutional.

In *People v. Cervi*, the Michigan Court of Appeals heard the first appellate challenge on constitutional grounds to MCL 750.145d. That statute prohibits a person from using the internet or a computer for the purposes of committing, attempting, or soliciting another to commit certain crimes.

In *Cervi*, an undercover deputy posed as a 14 year-old girl and communicated with the defendant (an adult male) via e-mail and instant messaging. The communications included solicitations to engage in sexual activity (CSC III). The defendant arranged to meet the "14 year-old" and was arrested after arriving at the agreed upon location.

Constitutionality

The court examined whether the statute violated the First Amendment by impermissibly punishing speech. The court found no constitutional violation because the statute doesn't criminalize words alone, rather it criminalizes communications with a minor (or perceived minor) with the specific intent to make the minor the victim of a crime listed in the statute.

Multiple Counts

The defendant was charged with two counts of violating MCL 750.145d because he communicated with the "14 year-old" on two separate occasions. Even though the content of those communications were essentially the same, the court held that they were not part of one continuing act, but were two separate acts that could be charged as such.

Child Sexually Abusive Material

The defendant was also charged with communicating with a minor for the purposes of attempting to produce child sexually abusive material in violation of MCL 750.145c. During his online communications with the "14 year-old," the defendant asked for permission to videotape their forthcoming sexual encounter. The court held that the defendant's request was enough to at least bind the case over for trial in circuit court.

DID YOU KNOW?

Note: The following material does not represent new law. Instead, it addresses issues raised by worksites throughout the state.

Persons under 18 may not possess a BB handgun outside the curtilage of their home unless accompanied by an adult.

Standard BB guns (.177 caliber) are not firearms for the purposes of Michigan's statutes governing the use, possession, and registration of firearms. However, MCL 752.891 makes it a misdemeanor for a person under 18 years of age to use or possess a handgun designed to propel BBs while outside the curtilage of their home – unless accompanied by a person over 18.

Cigarette butts can be litter.

There is a common misconception that cigarette butts are not litter under Michigan's littering statutes, MCL 324.8901, et seq. Some believe that a court opinion excludes cigarette butts from the littering statutes. Others believe that an Attorney General Opinion creates the exception.

The Executive Division has researched the issue and no controlling court opinion or official AG Opinion has been found. Absent such controlling authority, the plain language of Michigan's littering statutes includes cigarette butts in the definition of litter.

SUBSCRIPTIONS

It is the intent of the Executive Division to provide the Legal Update to all interested law enforcement officers. Officers from any agency are welcome to subscribe, and may do so by sending an e-mail to MSPLegal@Michigan.gov. The body of the e-mail must include:

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BACK TO BASICS!

Note: The following material does not represent new law. Instead, it is intended to reinforce basic rules of law that police officers frequently apply.

There is not an "officer safety" exception to the search warrant rule – Terry pat-downs require more than a concern for safety.

In *Terry v. Ohio* the United States Supreme Court created the stop-and-frisk exception to the search warrant rule. In creating the exception, the court's overriding concern was officer safety. But the court did not allow officers to search simply to ensure safety – they required that officers have a reason to be concerned for their safety *before* conducting the search.

Terry essentially requires that two elements be met before a "Terry pat-down" (also called "stop-and-frisk") is conducted:

1. Reasonable suspicion that crime is afoot, AND
2. Reasonable suspicion that the person is armed.

It's not enough to tell a court that a pat-down was conducted for "officer safety." The evidence will likely be suppressed. A court needs to hear that the above elements have been met in order to find that a search was a legally justifiable intrusion into an area protected by the Fourth Amendment. Police reports should also address the elements, rather than simply making the plain statement that a pat-down was conducted for officer safety.

Of course, using multiple exceptions ("piggy-backing") always helps ensure the admissibility of evidence. For example, asking for consent to search before conducting a pat-down offers the protection of both exceptions (consent and stop-and-frisk).
