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LEGAL UPDATE

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Violation of the 48-hour rule may lead to liability.

In 1991 the United States Supreme Court held that within forty-eight hours of a warantless arrest, there must be a judicial determination of probable cause. Where an individual arrested and held without a warrant does not receive a probable cause determination within 48 hours, the burden of proof shifts to government to demonstrate existence of a bona fide emergency or other extraordinary circumstance. This cannot include weekends or fact that in a particular case it may take longer than 48 hours after arrest to consolidate pretrial proceedings.

In this case a subject was arrested for OUIL on a Saturday at 9:40 a.m. and arraigned on Tuesday morning, almost 72 hours after his arrest. No probable cause hearing was held before the arraignment. He subsequently sued the sheriff arguing that his Fourth Amendment rights had been violated.

HELD – In determining if the sheriff should be granted qualified immunity the Sixth Circuit asked two questions. First, was a constitutional right violated and second, was the right clearly established at the time. "We conclude that the sheriff is NOT entitled to qualified immunity as to the plaintiff's Fourth Amendment claim. We have already determined that, if plaintiff's version of the facts is believed, a constitutional violation has occurred. There is little doubt, moreover, that the relevant law was clearly established at the time of defendants' actions. Since the events at issue in the instant case occurred more than four years after McLaughlin was decided, it seems apparent that the plaintiff's constitutional right to receive a probable cause determination within forty-eight hours of his arrest was clearly established at the time of his arrest." Alkire v Irving, 2002 FED App 0319P (6thCir.)

Evidence is admissible if it can establish a commons scheme or plan.

Defendant was convicted of felony murder with the underlying felony being child abuse in the first degree. He had been watching a two and half year old when he called 911 to report that the child had stopped breathing. An autopsy revealed that the child suffered several internal injuries and the cause of death was from blunt force. The doctor also discovered bruises on the child's jaw that resembled a fingernail imprint. During trial, the prosecutor offered evidence from three prior girlfriends, that they had suffered similar injuries. The women testified that the defendant would "head-butt" them, poke them with his fingers, and throw them around. He also was known to do a "fish hook" assault that was described as forcefully placing his hands or fingers inside the victim's mouth and pulling. The trial court allowed this testimony to show the defendant's scheme, intent, system, or plan in committing the acts and to show a lack of accident. The Michigan Supreme Court also allowed the testimony from the prior girlfriends.

HELD - "The trial court did not abuse its discretion in determining that the assaults by the defendant on his former girlfriends and the charged offenses regarding the child shared sufficient common features to permit the inference of a plan, scheme, or system. The charged and uncharged acts contained common features beyond similarity as mere assaults." People v Hine, MSC No. 120484 (September 17, 2002).

A person can claim defense of an unborn child.

Defendant and her boyfriend were in an argument. He struck her two times in the stomach at which time she warned him not to hit her because she was carrying his child. He came towards her again and she stabbed him in the chest with a knife. During the trial she wanted to enter as a defense that she

killed her boyfriend to protect her unborn children. In Michigan, a person may use force in the reasonable defense of others.

HELD – "We conclude that in this state, the defense of others should extend to the protection of a fetus, viable or nonviable, from an assault against the mother. We emphasize, however, that the defense is available solely in the context of an assault against the mother." The court continued by holding that this defense does not extend to the embryos existing outside a woman's body or to what the United States Supreme Court has held to constitute lawful abortion. People v Kurr, C/A No. 228016 (October 4, 2002)

Sexual contact for criminal sexual conduct charges has been redefined to include acts of anger – MCL 750.520a

Prior to this change, charges for "sexual contact" under CSC 2 or 4 required the prosecutor to prove that the touching was for the purpose of sexual gratification. The new definition includes the intentional touching of the victim's or actor's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, ***OR in a sexual manner for: (i) Revenge. (ii) To inflict humiliation. (iii) Out of anger.***

Mental health official added to Fourth Degree Criminal Sexual Conduct.

CSC 4 now includes an actor who is a mental health professional, and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient, and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision.

MCL 330.1100b - "Mental health professional" means an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following: (a) A physician who is licensed to practice medicine or osteopathic medicine and surgery in this state under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws.

For the force requirement under CSC, the prosecutor need only prove that absent the force, the act would not have occurred.

The victim of a CSC testified that while she was with the suspect he asked her if he could have sex with her and she stated, "No." After an interval, the defendant repeated his request that they have sexual intercourse. The complainant again said "no," explaining that she "didn't want to." She acknowledged that she did not physically restrain or push him away. Still he did complete the act of sexual penetration.

HELD - "The force under CSC must be force *to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred.* In other words, the requisite "force" for a violation of M.C.L. § 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited 'force' encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." People v. Carlson, 466 Mich. 130 (2002)

Police officers are allowed to carry certain weapons - Public Act 536 of 2002 (July 26, 2002)

Section MCL 750.231, which makes an exception for numerous weapons for authorized police officers who are regularly employed and paid, was expanded to include the following weapons:

224a (device or weapon directing electrical current, impulse, wave or beam),
224b (short barreled shot gun/rifle),
226a (mechanical knife),

The exception for 224a does not apply unless the officer has been trained on the use, effects, and risks of using a portable device or weapon described in section 224a(1).