

## **R. Bruce Laidlaw**

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April 15, 2015

Michigan Supreme Court Clerk  
via email to ADMcomment@courts.mi.gov

Re: ADM File No. 2014-09

The proposed amendment to MCR 7.215 would increase the burden in citing unpublished Court of Appeals opinions in briefs in Michigan courts. It would make a bad rule even worse.

Directing the court's reporter not to have some opinions printed may make some sense in terms of saving shelf space. However, giving some opinions second class status should have no place in a common law court system. In reality, all Court of Appeals opinions are published. They appear in Westlaw and other electronic search systems. The State Bar publishes them on its web site. On every business day they are provided to attorneys who subscribe the the State Bar e-Journal. I suspect that most attorneys who practice in Michigan courts have been frustrated by finding that a case that appears to be right on a point under consideration has been designated as having no value as precedent. The proposed amendment would go a step further by specifying that the citation of some opinions is "disfavored."

It is the task of the Court of Appeals to make decisions in cases in accordance with the law. Once that function is performed, there is no reason for the judges to speculate on the value of the opinion as precedent.

There are Michigan Court of Appeals opinions designated as unpublished which are based on legal principals not found in any "published" Michigan decision. I am attaching a copy of a Court of Appeals opinion in a matter in which I have had some involvement. *People v Carlton* was a 1991 decision which dealt with the issue of surgically removing evidence from a person's body when the person did not consent to the surgery and was not in custody. The Court relied on the U.S. Supreme Court decision in *Winston v Lee*, 470 U.S. 753 (1985). But in that case the defendant was afforded a hearing on whether the surgical search was reasonable. In the Carlton case the surgery was done solely on the basis of a district court search warrant. There has been no other Michigan case on surgical removal of evidence. But the decision was made before decisions were widely published electronically. Without going through trial court records, the Carlton decision is almost impossible to find.

The second class status of "unpublished" opinons also makes them difficult to appeal. MCR 7.302 (B) (3) requires that an application for leave to appeal show that "the issue involves legal principles of major significance to the state's jurisprudence." It is hard to make that claim if the opinion is

designated as having no value as precedent. Attached is the Michigan Supreme Court's decision in the *Carlton* case. If another case arose involving surgical removal of evidence, there would be no Michigan authority on the subject.

Finally, I believe that the practice of rendering opinions that cannot be used as precedent can cause a lack of confidence in the judiciary. If a Court of Appeals panel directs that a decision can have no value as precedent, the public can wonder whether it is really based on existing law or has been motivated by some other factor.

I suggest that the changes proposed in subsections (A) and (B) be approved, but the reference to "unpublished" should be changed to unprinted. Subsections (C) and (D) should be completely removed from MCR 7.215.

Very truly yours,

A handwritten signature in cursive script that reads "R. Bruce Laidlaw". The signature is written in black ink and is positioned below the typed name.

R. Bruce Laidlaw

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

April 5, 1991

Plaintiff-Appellee,

v

No. 95900

EDWARD NATHANIAL CARLTON, a/k/a  
THOMAS EDWARD SETH, JR.,

Defendant-Appellant.

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Before: Brennan, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and sentenced to the mandatory term of life imprisonment. On appeal by right, defendant raises five issues concerning search and seizure, the 180-day rule, evidence of prior convictions and an instruction on evidence of flight. We affirm.

The trial court did not err in denying defendant's motion to quash the information and suppress as evidence the bullet surgically removed from his body pursuant to a search warrant. The United States Constitution "does not forbid the States minor intrusions into an individual's body under stringently limited conditions". Schmerber v California, 384 US 757, 772; 86 S Ct 1826; 16 L Ed 2d 908 (1966).

In this case, the affidavit in support of the search warrant for the bullet provided probable cause which, under the facts and circumstances, would have allowed a reasonably prudent person to believe that evidence of a crime was in defendant's back. See People v White, 167 Mich App 461, 463; 423 NW2d 225 (1988), lv den 430 Mich 874 (1988).

According to the facts stated in the affidavit, the deceased victim was found at about 1:00 p.m. on November 2, 1985. He had been shot in the head. A .38 caliber pistol found beneath his body contained one expended shell casing, indicating it had been fired. Witnesses had heard shots fired at approximately 8:00 p.m. on November 1, 1985, the previous evening. Also, on November 1, 1985, the Ann Arbor police received a teletype from the Canton Township police stating that they had a man, later identified as defendant, hospitalized with a gunshot wound to the chest. Defendant claimed to have been shot during an armed robbery in Ann Arbor. When the teletype was received, no shootings or robberies had been reported to the Ann Arbor police except for the shots heard by witnesses near the victim's home. Although there were no witnesses to the shooting, a projectile "believed to be from a .38 caliber weapon" was located just under the skin on the left side of defendant's back.

In addition, we believe the search in this case was reasonable.

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers. [Winston v Lee, 470 US 753, 760; 105 S Ct 1611; 84 L Ed 2d 662 (1985).]

Testimony indicated that the operation here presented "very low risk" to defendant. The procedure was performed in a matter of minutes under local anesthetic by a qualified surgeon in a hospital setting. The evidence could not have been obtained in any other way and, since defendant was not under arrest, there was a risk that the evidence would be lost.

In any case, even if admission of the bullet were error, any error was harmless. MCL 769.26; MSA 28.1096. The actions of the police and prosecutor did not amount to misconduct and the other evidence against defendant was overwhelming.

There is no merit to defendant's claim that the 180-day rule was violated. MCL 780.131(1); MSA 28.969(1)(1).

Defendant was arraigned in district court on November 18, 1985, and the parties effectively agree that the 180-day period commenced on that date. Trial began on August 4, 1986, 259 days later.

On January 7, 1986, defendant moved to quash the information and to suppress the bullet seized from his body, as well as for discovery. On January 17, 1986, the trial court granted the discovery motions, set a date for further hearing on the suppression motion, and ordered the filing of briefs on the motion to quash. At the hearing on the motions on February 18, 1986, the trial court decided to hold an evidentiary hearing on the matter. In addition, defense counsel acknowledged the necessity of the preliminary examination transcripts for the court's determination as to whether there was sufficient evidence before the magistrate for bind over. On March 5, 1986, the evidentiary hearing was set for April 11, 1986, and trial was rescheduled for April 28, 1986. The preliminary exam transcripts were filed on April 2, 1986.

The delay of 85 days from January 7, 1986, the date defendant filed his motion to quash, through April 2, 1986, the date the preliminary exam transcripts were filed with the court for its consideration of the motion to quash, was attributable to defendant. When this delay is subtracted from the total delay of 259 days, the remaining delay is 174 days.

Furthermore, defense counsel acknowledged below that any delay after June 2, 1986, was attributable to the defense filing an interlocutory appeal. Trial began on August 4, 1986, 63 days later. The remaining delay arguably attributable to the prosecution was 111 days, again, within the 180-day period. No violation of MCL 780.131(1); MSA 28.969(1), occurred.

Defendant also argues that the trial court erred in ruling that defendant's prior armed robbery conviction could be admitted for impeachment purposes. Defendant did not testify at trial or express his intention to testify and outline the nature of his expected testimony. Thus, defendant has waived review of this issue. People v Finley, 431 Mich 506, 525-526; 431 NW2d 19 (1988).

Finally, the trial court did not err by instructing, over objection, on evidence of flight. Defendant left the hospital in the early hours of the morning with a drainage tube in his chest and without a word to the hospital staff. When he left the hospital, defendant was aware that police had sought and obtained a warrant for the bullet in his back and that the doctor had removed the bullet and given it to the police. The lack of a formal charge against him was of minimal import in view of his knowledge that the police investigation was focused on him. He was willing to chance obtaining treatment under an alias until shortly after the search warrant was obtained and the bullet was removed. The timing of defendant's flight, in addition to other surrounding circumstances, was sufficient to allow the jury to consider it in weighing the evidence to determine whether it showed consciousness of guilt. People v VanSickle, 116 Mich App 632, 636-637 323 NW2d 314 (1982).

Affirmed.

/s/ Thomas J. Brennan  
/s/ Roman S. Gribbs  
/s/ E. Thomas Fitzgerald

# Order

Entered: May 31, 1991

Michigan Supreme Court  
Lansing, Michigan

Michael F. Cavanaugh  
Chief Justice

Charles L. Levin  
James H. Brickley  
Patricia J. Boyle  
Dorothy Constock Riley  
Robert P. Griffin  
Conrad L. Mallert, Jr.  
Associate Justices

90969

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

EDWARD N. CARLTON, a/k/a THOMAS  
E. SETH, JR.,

SC: 90969  
COA: 95900  
LC: 85-019976-FC

Defendant-Appellant.

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On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should now be reviewed by this Court.

80528



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 31 1991

Corbin R. Davis

Clerk