



DETROIT AND MICHIGAN CHAPTER
NATIONAL LAWYERS GUILD
ESTABLISHED 1937



September 30, 2011

Mr. Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2010-13

Dear Mr. Davis and Justices of the Court:

We write on behalf of the Michigan/Detroit Chapter of the National Lawyers Guild to comment on Administrative File No. 2010-13, which proposes a change to MCR 6.001(A). We are a local chapter of the National Lawyers Guild (NLG), a national organization formed in 1937. The NLG was the nation's first racially-integrated voluntary bar association, and was formed to advocate for the protection of rights expressly granted by the United States Constitution, and for the promotion of fundamental principles of human and civil rights. The NLG has frequently commented on issues of criminal procedure in both the state and federal courts.

The National Lawyers Guild joins in the comments submitted on September 9, 2011 by Executive Director Kary Moss and cooperating attorney Ken Mogill of the ACLU of Michigan; on September 16, 2011 by attorney Ken Mogill; and on September 27, 2011 by State Appellate Defender Office Director Dawn Van Hoek. We share the concern expressed in these statements that the proposed amendment to MCR 6.001(A) will be interpreted by prosecutors and District Court Judges to prohibit discovery prior to the preliminary examination in felony prosecutions.

The NLG is encouraged to see the comments of Timothy Baughman, the Chief of Research, Training and Appeals for the Wayne County Prosecuting Attorney, and Timothy K. McMorrow, Chief Appellate Attorney for the Kent County Prosecuting Attorney, who both take the position that the proposed amendment is intended to clarify, and not to change, current discovery practice in felony cases in the District Courts.

The NLG, however, has a serious concern that the adoption of the proposed change will be misinterpreted to mean that no discovery is permitted in felony prosecutions prior to the preliminary examination. The NLG bases its concern on the experiences of its many members who practice criminal law in misdemeanor, and ordinance violation cases in the District Courts since the adoption of Administrative Order 1999-3, which reads:

**ADMINISTRATIVE ORDER 1999-3
DISCOVERY IN MISDEMEANOR CASES**

On order of the Court, in the case of People v Sheldon, 234 Mich App 68; 592 NW2d 121 (1999) (COA Docket No. 204254), the Court of Appeals ruled that MCR 6.201., which provides for discovery in criminal felony cases, also applies to criminal misdemeanor cases. That ruling was premised on an erroneous interpretation of our Administrative Order No. 1994-10. By virtue of this Administrative Order, we wish to inform the bench and bar that MCR 6.201 applies only to criminal felony cases. Administrative Order No. 1994-10 does not enlarge the scope of applicability of MCR 6.201. See MCR 6.001(A) and (B).

Administrative Order 1999-3 was clearly intended to accomplish what Mr. Baughman and Mr. McMorrow suggest is the intended result of the proposed amendment to MCR 6.001(A); to clarify that discovery in the District Courts is not governed by the Michigan Court Rules, but should proceed on a case-by-case basis, according to Michigan common law. However, NLG attorneys have found that, ever since this Court issued Administrative Order 1999-3, prosecutors and city attorneys throughout the state have cited it as authority for the proposition that the District Courts have no authority to order any discovery whatsoever in misdemeanor or ordinance violation cases. What is worse, many District Court Judges have accepted this interpretation.

For example, Assistant Wayne County Prosecutors routinely take the position in state misdemeanor cases that the District Courts have no legal authority to order discovery. Attorneys for the Corporation Counsel of the City of Detroit routinely take the same position with respect to ordinance violation prosecutions in the 36th District Court.

We do not wish to burden the Court, but, for illustrative purposes, we are attaching an excerpt from a memorandum of law filed by the Dearborn City Attorney in a case in which the defendant was represented by Michigan/Detroit NLG Chapter President John F. Royal, in which the City of Dearborn stated that “discovery... is not available at all in misdemeanors.” (Dearborn v Robinson, 19th District Ct. No. 09C1131, 10/17/08, Exhibit A, at p. 16). The Dearborn City Attorney’s position is that the only discovery available in ordinance prosecutions is that which can be obtained pursuant to the Michigan Freedom of Information Act, MCL 15.240 (FOIA). But the NLG does not believe that the state legislature ever intended FOIA to be a vehicle for discovery in criminal cases. Based on the experiences of our members who represent defendants charged with state misdemeanor and city ordinance violation cases, we ask this Court to consider an amendment to either MCR 6.001(B) or 6.201 to clarify that the District Courts do have the authority to order discovery in misdemeanor/ordinance violation cases, in accordance with the common law.

But it is our members’ experience in misdemeanor and ordinance violation cases which causes our organization to be concerned that the proposed amendment to MCR 6.001(A) will be misunderstood by assistant prosecutors, city attorneys, and District Court Judges as stating that no discovery is permitted in felony prosecutions prior to the preliminary examination. Such an interpretation will lead to all the undesirable results which have been described in the many responses which have been submitted by members of the criminal defense bar on this issue.

Mr. Corbin R. Davis
September 30, 2011

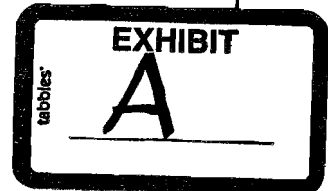
Administrative File No. 2010-13
p. 3

For these reasons, the Michigan/Detroit NLG strongly opposes the proposed amendment to MCR 6.001(A).

Thank you for your consideration of these comments

Very truly yours,

John F. Royal, President
Julie Hurwitz, Vice-President
Desiree Ferguson, Chairperson, Michigan/ Detroit
NLG Committee on the Michigan Court
Rules



STATE OF MICHIGAN
IN THE 19TH DISTRICT COURT

CITY OF DEARBORN
Plaintiff

v

Case No: 08C1131
HON: MARK W. SOMERS

ANTONIO TYRONE ROBINSON
Defendant

WILLIAM M. DeBIASI P35892
DEBRA A. WALLING P37067
Attorneys for Plaintiff
13615 Michigan Avenue, Suite 8
Dearborn, Michigan 48126-3581
(313) 943-2035
(313) 943-2469 fax

HEARING DATE: 10/24/08

JOHN F. ROYAL P27800
Attorney for Defendant
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3739
(313) 962-3779 fax

**RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS,
TO SUPPRESS EVIDENCE AND FOR DISCOVERY**

NOW COMES the City of Dearborn, by and through its attorneys, and in
response to Defendant's Motions, says as follows:

I. COUNTER STATEMENT OF FACTS

On April 12, 2008, at approximately 2:25 a.m., Dearborn officers Finazzo and
Hicks were on routine patrol, traveling west on Tireman, just east of its intersection
with Wyoming. Both officers were in full uniform and in a marked patrol vehicle.

The officers observed a black Chevy Impala being driven by Defendant, aged
36, southbound on Wyoming, north of Tireman "at a high rate of speed."

E. Motion for Discovery

Defendant submitted a lengthy FOIA request to the City on May 28, 2008, demanding a variety of items. A copy of his FOIA is attached under Exhibit B. The City FOIA Coordinator responded, providing videotapes as well as 403 pages of discovery materials. The FOIA Coordinator notified defense counsel that the City would not produce certain items which either did not exist or were exempt under FOIA. Defense counsel was duly notified, on August 28, 2008 as to which items could not or would not be produced, the reasons for non-production, and of the availability of appeal remedies under §10 of FOIA, being MCL §15.240. Defense counsel chose not to appeal under FOIA, but instead has filed the instant motion requesting that the Court order the City to produce as part of the criminal misdemeanor case those items which were denied under FOIA. Defendant's motion is improper and must be denied.

As a general rule, discovery is not permitted in criminal cases, except as provided by court rule.

MCR 6.001(B) specifies those sections of the Michigan Court Rules which govern matters of procedure in criminal cases cognizable in the district courts. None of the sections specified thereunder (MCR 6.001-6.004; 6.006; 6.102; 6.106; 6.125; 6.427; 6.445 (A)-(G)) entitle a defendant in a misdemeanor case in district court to discovery. Further MCR 6.001(E) states that the Michigan Court Rules supersede any statutes or prior rules that are contrary.

MCR 6.201, which governs criminal discovery, is expressly inapplicable to misdemeanor cases, *People v Pruitt*, 229 Mich App 82, 90 (1998). Supreme Court Administrative Order No. 1999-3 further clarified the issue as follows:

On order of the Court, in the case of *People v Sheldon*, 234 Mich App 68 (COA Docket No. 204254), the Court of appeals ruled that MCR 6.201, which provided for discovery in criminal felony cases, also applies to criminal misdemeanor cases. That ruling was premised on an erroneous interpretation of our Administrative Order No. 1994-10. By virtue of this Administrative Order, we wish to inform the bench and bar that MCR 6.201 applies only to criminal felony cases. Administrative Order No. 1994-10 does not enlarge the scope of applicability of MCR 6.201. See MCR 6.201(A) and (B). [Emphasis added.]

Further, in a recent published opinion, the Michigan Court of Appeals has held that a right to discovery in criminal cases is limited, even in felony cases under MCR 6.201. In *People v Greenfield*, 271 Mich App 442, 448 (2006), the Court held that "either the subject of discovery must be set forth in the rule, or the party seeking discovery must show good cause why the trial court should order the requested discovery. Absent such a showing, courts are without authority to order discovery in criminal cases."

Other recent cases are consistent with the concept that discovery is strictly limited, even in felony cases, but is not available at all in misdemeanors.

In the case of *In re Subpoenas to News Media Petitioners*, 459 Mich 1241; 593 NW2d 558 (1999), The Michigan Supreme Court expressly held that:

"[t]he District Court erred in allowing the use of subpoena under MCR 2.506 as a discovery procedure in a criminal case."

In that case, the Washtenaw County Prosecutor attempted to subpoena news media videos of the Michigan State basketball "riots" for the purpose of supporting potential charges against rioters. The Supreme Court held that the use of an MCR 2.506 subpoena was beyond the scope of criminal discovery. The County prosecutor then attempted to obtain the same materials via an "investigative subpoena" under MCL

767A.6, an effort which was also rejected by the Supreme Court in *In re Investigation of March 1999 Riots*, 463 Mich 378; 617 NW2d 310 (2000).

In essence, the Supreme Court correctly takes the position that criminal discovery is governed, and limited by, the express provisions of MCR 6.201. Defendant had the opportunity to obtain his materials through FOIA; if certain materials are exempt, he has recourse under FOIA. He chose not to exercise that option. The current attempt to end run the FOIA process is both improper and unsupported by law.

Defendant's citation of *People v Walton*, 71 Mich App 478 (1976) in support of his claim that he should be permitted access to all of the officers' personnel records is at best disingenuous. Walton was a pre-MCR 6.201 case in which the Court considered, in camera, witness statements made in connection with a police investigation into misconduct by the officers in that particular case. The records sought by Defendant are both irrelevant and protected.

F. Motion to Dismiss For Destruction of Evidence

Defendant claims that this case should be dismissed due to "destruction of exculpatory evidence." The City responds that the purported "evidence" was neither destroyed nor exculpatory.

Defendant claims that at some point after arrest, he was administered a PBT by an unidentified officer outside of his cell. Even if that is true, no records are kept of the results of PBT tests administered to subjects while in custody.


Furthermore, Defendant's claim that the purported test is "exculpatory evidence" is specious. Defendant was not charged with any alcohol related offense.

Nowhere in the police report does it indicate that Defendant was intoxicated; to the contrary, the sole reference to alcohol by the police was that "while removing him (Defendant) from the vehicle, Finazzo and I smelled an odor of intoxicants coming from his mouth area." Given the facts of the case, there was no obligation on the part of the police to "preserve" the PBT results (even if there existed a mechanism to preserve them), and any results of the test would be of limited relevance, depending upon when the test was given and the reason it was given.

IV. CONCLUSION

Based upon the foregoing, the City of Dearborn requests that the Court deny all motions in their entirety and set the matter for trial.

Respectfully submitted,


 WILLIAM M. DeBIASI P35892
 Debra A. Walling


DEBRA A. WALLING P37067
 Attorneys for Plaintiff
 13615 Michigan Avenue, Suite 8
 Dearborn, MI 48126-3581
 (313) 943-2035
 (313) 943-2469 fax

DATED: October 17, 2008

PROOF OF SERVICE

On the 17th day of October, 2008 I sent first-class mail a copy of PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS VIA FACSIMILE TO: JOHN F. ROYAL, (313) 962-3779.

I declare that the above statement is true to the best of my information, knowledge and belief.


 NANCY C. MAROSI