

Controlled Substances Benchbook

May-August 2009 Updates

Updates have been issued for the Controlled Substances Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 8: Sentencing

[8.7 Discretionary Sentence Enhancement—§7413\(2\)](#)

“[MCL 333.]7413(2)’s authorization for a trial court to imprison a defendant for a ‘term not more than twice the term otherwise authorized’ signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the ‘term otherwise authorized.’” *People v Lowe* , 484 Mich 718, 724 (2009).

Chapter 12: Search and Seizure

[12.1\(A\) Protection Against Unreasonable Searches and Seizures](#)

“Although a defendant’s status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in [a] defendant’s home . . . there is support for the proposition that status as a drug dealer plus observation of drug activity near [a] defendant’s home is sufficient to establish probable cause to search the home.” *United States v Berry* , 565 F3d 332, 339 (CA 6, 2009).

Chapter 13: Evidentiary Issues

[13.3\(A\) Testimonial Evidence](#)

The affidavits of state laboratory analysts, stating that material seized by police and connected to the defendant was a certain quantity of drugs, constituted testimonial hearsay and could not be admitted as evidence unless the analysts who authored the affidavits testify at trial or the defendant has had an opportunity to cross-examine them regarding the affidavits. *Melendez-Diaz v Massachusetts*, 557 US ___, ___ (2009).

A gunshot victim's responses to police questioning 30 minutes after, and six blocks away from, the shooting regarding "what had happened, who had shot him, and where the shooting had occurred[.]" constituted inadmissible testimonial hearsay because "the 'primary purpose' of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator[.]" as opposed to "enable police assistance to meet an 'ongoing emergency.'" *People v Bryant*, 483 Mich 132, 143 (2009).

article may be imprisoned for a term not more than twice the term authorized or fined in an amount not more than twice that otherwise authorized, or both.”

When [MCL 333.7413\(2\)](#) permits a court to impose a sentence of not more than twice the term otherwise authorized, the enhancement authority extends to both the minimum and maximum terms of imprisonment. *People v Williams*, 268 Mich App 416, 427–428 (2005). Therefore, a minimum sentence authorized under [MCL 333.7413\(2\)](#) may exceed the minimum sentence recommended under the guidelines, and the sentence imposed does not represent a departure from the guidelines. *Id.* at 430–431.

See also *People v Lowe*, 484 Mich 718, 724 (2009) (“§ 7413(2)’s authorization for a trial court to imprison a defendant for a ‘term not more than twice the term otherwise authorized’ signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the ‘term otherwise authorized’”).

[MCL 333.7413\(5\)](#) defines “second or subsequent offense”:

“[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug.”

Because [MCL 333.7413\(5\)](#) does not limit the scope of offenses that qualify as a first offense for purposes of the subsequent offender enhancement, the sentence enhancement authorized by [MCL 333.7413\(2\)](#) applies to repeat controlled substance offenders without regard to whether the offender’s convictions are misdemeanors or felonies.

An offender’s *convictions* for purposes of [MCL 333.7413\(2\)](#) must follow one another: there is no requirement in the statute regarding the temporal sequence of the commission dates of the offenses on which the offender’s convictions are based. *People v Roseburgh*, 215 Mich App 237, 239 (1996).

8.8 Subsequent Convictions Involving Conspiracy

The enhancement mandated under [MCL 333.7413\(1\)](#) expressly applies to individuals previously convicted of conspiring to violate [MCL 333.7401\(2\)\(a\)\(ii\)](#) or [\(iii\)](#) or [MCL 333.7403\(2\)\(a\)\(ii\)](#) or [\(iii\)](#) who are subsequently convicted of conspiring to violate one of those same statutes. [MCL 333.7413\(1\)\(c\)](#). A defendant convicted of a second or subsequent conspiracy violation involving [MCL 333.7401\(2\)\(a\)\(ii\)](#) or [\(iii\)](#) or [MCL 333.7403\(2\)\(a\)\(ii\)](#) or [\(iii\)](#) must be sentenced to mandatory life imprisonment and is not eligible for probation, parole, or suspension of his or her sentence. [MCL 333.7413\(1\)\(c\)](#).

The affidavit or warrant request must state a nexus between the place to be searched and the evidence sought, and the belief that the items sought will be found at the search location must be supported by more than mere suspicion. *United States v Williams*, 544 F3d 683, 686 (CA 6, 2008). “A magistrate may infer a nexus between a suspect and his [or her] residence, depending upon ‘the type of crime being investigated, the nature of [the] things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places.’” *Id.* at 687, quoting *United States v Savoca*, 761 F2d 292, 298 (CA 6, 1985).

“[A]n issuing judge may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking.” *Williams, supra* at 687. This is because a sufficient nexus (between the place to be searched and the evidence sought) exists to search the residence of a known drug dealer after he or she has been arrested for possession of drugs. *United States v Miggins*, 302 F3d 384, 393-394 (CA 6, 2002). “Although a defendant’s status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in [a] defendant’s home . . . there is support for the proposition that status as a drug dealer plus observation of drug activity near [a] defendant’s home is sufficient to establish probable cause to search the home.” *United States v Berry*, 565 F3d 332, 339 (CA 6, 2009). In *Berry*, a defendant’s prior status as a drug dealer, and the discovery of crack cocaine during a search of the defendant’s car after he was arrested in the residence’s driveway, supported the search warrant authorizing a search of the defendant’s home, even though the police had not observed specific drug activity near the defendant’s home. The inference that a drug dealer keeps evidence of wrongdoing in his or her residence is permissible if the affidavit supporting the issuance of the search warrant independently corroborates the fact that the defendant was a known drug dealer at the time the police sought to search the defendant’s residence. *United States v McPhearson*, 469 F3d 518, 524 (CA 6, 2006). This rationale is not limited to defendants engaged in the immediate distribution of drugs; it also extends to the manufacture of controlled substances because “the manufacturer is only a step away from dealing in his product.” *United States v Kenny*, 505 F3d 458, 462 (CA 6, 2007).

Further, “an issuing judge may infer that a suspect keeps the instrumentalities or fruits of his [or her] criminal activity at his [or her] residence, even when that criminal activity is not drug trafficking.” *Williams, supra* at 690 (search warrant affidavit established a sufficient nexus between the defendant’s suspected possession of firearms and his residence to support the issuing judge’s probable cause determination).

Warrant requirements based on information from a confidential informant. It is unnecessary to determine for purposes of MCL 780.653 whether an anonymous informant had personal knowledge of the information contained in the affidavit on which a search warrant is based when the affidavit contains additional information sufficient in itself to support a finding of probable cause. *People v Keller*, 479 Mich 467, 477 (2007).* In *Keller*, the information contained in the affidavit supported the magistrate’s

*Reversing
People v Keller,
270 Mich App
446 (2006).

objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 51–52.

Cases heard since *Crawford* have begun to delineate the parameters of “testimonial hearsay.” The following statements have been found to be “testimonial,” and therefore, inadmissible in the declarant’s absence, unless the defendant had a prior opportunity to cross-examine the declarant:

- ◆ The transcript of an unavailable witness’s guilty plea. *People v Shepherd*, 236 Mich App 665, 671 (2004).
- ◆ Testimony from an investigating officer about information from a confidential informant. *People v Jones*, 270 Mich App 208, 214 (2006).
- ◆ The notes and lab reports of a nontestifying serologist. *People v Lonsby*, 268 Mich App 375, 378 (2005).
- ◆ The affidavits of state laboratory analysts stating that material seized by police and connected to the defendant was a certain quantity of drugs, constituted testimonial hearsay and could not be admitted as evidence unless the analysts who authored the affidavits testify at trial or the defendant has had an opportunity to cross-examine them regarding the affidavits. *Melendez-Diaz v Massachusetts*, 557 US _____, _____ (2009).

In *Davis v Washington*, 547 US 813, 126 S Ct 2266 (2006) (and its companion case, *Hammon v Indiana*), the United States Supreme Court further explained the characteristics of testimonial evidence involving statements made to the police:

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 822.

On this basis, the Court held that statements made to a 911 operator were nontestimonial where the primary purpose was to enable police assistance to meet an ongoing emergency. *Id.* at 828 (*Davis v Washington*). Oral or written statements made in response to police questioning regarding past events, however, were testimonial. *Id.* at 831-832 (*Hammon v Indiana*).

See also *People v Bryant*, 483 Mich 132, 143 (2009) (gunshot victim’s responses to police questioning 30 minutes after, and six blocks away from, the shooting regarding “what had happened, who had shot him, and where the shooting had occurred[.]” constituted testimonial hearsay because “the

‘primary purpose’ of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator[.]’ as opposed to “enable police assistance to meet an ‘ongoing emergency’”.

Exceptions to *Crawford v Washington*. *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133 (2004). Thus, the admission of an unavailable witness’s former testimonial statement is not barred by *Crawford* if the statement is admitted to impeach a witness.

See also *People v Chambers*, 277 Mich App 1, 11 (2007), where the trial court properly admitted a police officer’s testimony regarding a confidential informant’s out-of-court identification of the defendant because the testimony was offered to explain how and why the defendant was arrested, not to prove the truth of the informant’s tip.

Crawford does not bar the admission of an unavailable witness’s testimonial statements where the defendant “has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” *People v Jones*, 270 Mich App 208, 212-214 (2006). See MRE 804(b)(6). However, the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant’s wrongful act has caused a witness to be unavailable to testify at trial. *Giles v California*, 554 US ___, ___ (2008). The doctrine of forfeiture by wrongdoing applies only when the witness’s unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness’s testimony. *Id.* at ___.

B. Statements of Coconspirator or Codefendant

1. Statements of a Coconspirator

MRE 801(d)(2)(E) sets forth the circumstances under which statements made by a defendant’s coconspirator are admissible at the defendant’s trial. Under MRE 801(d)(2)(E), a statement made by a defendant’s coconspirator is admissible at the defendant’s trial if the statement was made during the course of and in furtherance of the conspiracy. The prosecution must introduce proof, independent of the statement sought to be introduced, to establish by a preponderance of the evidence that a conspiracy existed. MRE 801(d)(2)(E); *People v Vega*, 413 Mich 773, 780–782 (1982). The prosecution need not, however, introduce direct proof of the agreement in order to prove the conspiracy. *People v Justice (After Remand)*, 454 Mich 334, 347 (1997). Similarly, the prosecution also need not introduce evidence of a formal agreement in order to prove the conspiracy. *People v Gay*, 149 Mich App 468, 471 (1986). Circumstantial evidence and inference may be used to establish a conspiracy. *People v Martin*, 271 Mich App 280, 317 (2006).