

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No.:
Court of Appeals No.: 338552
Circuit Court No.: 17-243452-FC

vs.

ROMON MCBURROWS,

Defendant-Appellee

MICHAEL C. BROWN (P64169)

Assistant Prosecuting Attorney
Attorney for Plaintiff-Appellant
125 East Second Street
Monroe, Michigan 48161
(734) 240-7600

NOEL ERINJERI (P72122)

Attorney for Defendant-Appellee
36400 Woodward Ave., Ste. 210
Bloomfield Hills, Michigan 48304
(248) 208-3800

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES	iii
JURISDICTION & JUDGMENT BEING APPEALED AND RELIEF SOUGHT	iv
STATEMENT OF ISSUES PRESENTED	v
STATEMENT OF FACTS	vi
ARGUMENT	1
I. MONROE COUNTY IS A PROPER VENUE FOR THIS CASE INVOLVING THE CHARGE OF DELIVERY OF A CONTROLLED SUBSTANCE CAUSING DEATH	1
STATEMENT OF RELIEF	7

INDEX OF AUTHORITIES**Cases**

<i>People v Houthoofd</i> , 487 Mich 568 (2010)	1
<i>People v Plunkett</i> , 485 Mich 50 (2010)	3
<i>People v Schultz</i> , 435 Mich 517 (1990)	1
<i>People v Southwick</i> , 272 Mich 258 (1935)	5

Statutes

MCL 750.14	5
MCL 750.317a	2, 4
MCL 762.5	1, 4, 5, 6
MCL 762.8	1, 2, 3, 6
21 USC § 812(b)(1)	5, 6
21 USC § 812(b)(2)	5, 6

Court Rules

MCR 7.305(B)(3)	1
-----------------	---

Administrative Rules

21 CFR 1308.11	5
21 CFR 1308.12	5

JURISDICTION & JUDGMENT BEING APPEALED AND RELIEF SOUGHT

This Court has jurisdiction pursuant to MCR 7.303(B)(1).

The People are appealing the Michigan Court of Appeals' published opinion issued on December 19, 2017. (See Attachment A). The People ask this Court to reverse the decision of the Court of Appeals and affirm the 38th Circuit Court's order denying the Motion to Dismiss for Lack of Jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

I. IS MONROE COUNTY A PROPER VENUE FOR THIS CASE INVOLVING THE CHARGE OF DELIVERY OF A CONTROLLED SUBSTANCE CAUSING DEATH?

Plaintiff-Appellant answers this question		“Yes”
Defendant-Appellee answers this question	“No”	
Michigan Court of Appeals answers this question	“No”	
38 th Circuit Court answers this question		“Yes”

STATEMENT OF FACTS

Below is the People's statement of facts. It borrows from the Appellee's statement of facts contained in his Brief on Appeal in the Michigan Court of Appeals.

First District Court Proceedings

The Appellee was charged by the Monroe County Prosecuting Attorney with Delivery of a Controlled Substance Causing Death, contrary to MCL 750.317a. He was charged in the First District Court and a Preliminary Examination was held on March 7, 2017.

On the evening of December 12, 2016, Nicholas Abraham, the victim, traveled from his home in Monroe County to Detroit in Wayne County. PE, 3/7/17, p. 30-33. He was accompanied by his friend William Ingalls, a known drug runner. *Id.* at 11, 30-33. Once in Detroit, Mr. Ingalls called the Appellee to arrange a purchase of heroin. *Id.* at 31. The victim provided money to Mr. Ingalls to purchase the heroin. *Id.* at 31-33. Mr. Ingalls then left the vehicle, leaving the victim alone in the vehicle. *Id.* Mr. Ingalls then purchased heroin from the Appellee. *Id.* at 37-38.

The victim and Mr. Ingalls proceeded to a laundromat in Detroit, where they consumed some of the heroin. *Id.* at 33. They then returned to Monroe County, where the victim gave some of the remaining drug to Mr. Ingalls, dropped Mr. Ingalls off, and then return to his own residence. *Id.* at 33-34. Around 10:00 p.m. that evening, the victim and his wife, Michelle, consumed more of the heroin. *Id.* at 54-55. Michelle passed out a few minutes later, and when she regained consciousness about four hours later she found Nicholas passed out on the floor. *Id.* at 55. At approximately 2:40 a.m., she called 911, and the victim was pronounced dead at 3:25 a.m. on the morning of December 13, 2016. *Id.* at 6.

An autopsy was conducted by Dr. Leigh Hlavaty of the Office of the Wayne County Medical Examiner, who opined that the victim's death was caused by fentanyl toxicity. *Id.* at 88-89. At the preliminary examination, Detective Michael McClain testified that heroin is often cut with fentanyl in order to increase the potency of the dose. *Id.* at 81-82. The Appellee was bound over to the 38th Circuit Court to stand trial.

38th Circuit Court Proceedings

The Appellee was arraigned in the 38th Circuit Court on March 17, 2017. The Appellee filed a Motion to Dismiss for Lack of Jurisdiction. The Honorable Daniel S. White denied the motion and held that the 38th Circuit Court had jurisdiction and Monroe County was a proper venue. Specifically he held that MCL 768.8 and MCL 762.5 gave venue to Monroe County.

Appellate Court Proceedings

The Appellee filed an Application for Leave to Appeal with the Michigan Court of Appeals on May 26, 2017. The Court of Appeals granted leave on July 13, 2017. On December 19, 2017, the Court of Appeals issued a published decision reversing the Circuit Court and holding that Monroe County was not a proper venue and that Wayne County was the proper venue for this case. (See Attachment A).

ARGUMENT

I. **MONROE COUNTY IS A PROPER VENUE FOR THIS CASE INVOLVING THE CHARGE OF DELIVERY OF A CONTROLLED SUBSTANCE CAUSING DEATH.**

Standard of Review

A court's determination regarding the existence of venue in a criminal prosecution is reviewed *de novo*. *People v Houthoofd*, 487 Mich 568, 579 (2010). Questions of law pertaining to statutory construction and interpretation are reviewed *de novo*. *People v Schultz*, 435 Mich 517 (1990).

The People charged the Appellee with one count of Delivery of a Controlled Substance Causing Death, contrary to MCL 750.317a. The Appellee filed a Motion to Dismiss for Lack of Jurisdiction. The Circuit Court denied the motion. The Court of Appeals reversed the Circuit Court and held that Monroe County was not a proper venue and that Wayne County was the proper venue for this case. The People disagree.

Grounds for Appeal

This appeal involves an issue of legal principles of major significance to the State of Michigan's jurisprudence. MCR 7.305(B)(3). There are numerous cases across Michigan where a victim buys a controlled substance in one county and consumes the controlled substance in another county that results in death. The question of whether MCL 762.5 and/or MCL 762.8 allows prosecution of a Delivery of a Controlled Substance Causing Death case in the county where the victim consumed the controlled substance or died from the controlled substance is a question of major significance to Michigan jurisprudence.

Argument

The Circuit Court found that Monroe County is a proper venue. Specially, the court found

pursuant to MCL 762.5 and MCL 762.8, Monroe County is a proper venue. The People will address each section of the Code of Criminal Procedure:

MCL 762.8; Felony Consisting of more than 1 Act

The trial court found that the 38th Circuit Court has jurisdiction and Monroe County was the proper venue pursuant to MCL 762.8. The statute states:

“Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect.” MCL 762.8.

It is the People’s position that the crime in this case consisted of numerous acts and that acts occurred in Monroe County. The Appellee is arguing that no acts occurred in Monroe County.

Acts in Monroe County after Delivery

The record from the Preliminary Examination establishes that the heroin/fentanyl was delivered by the Appellee to the victim in Wayne County. The record provides direct evidence the victim consumed the heroin/fentanyl in Monroe County. PE, 3/7/17, p. 54-57. The death of the victim occurred in Monroe County. *Id.*

The act of delivery occurred in Wayne County by the Appellee. The acts of consumption and death occurred in Monroe County by the victim. *Id.* Consumption of the controlled substance and death of a person are elements of the crime. CJI 12.2a; MCL 750.317a. Therefore, the MCL 762.8 establishes Monroe County and Wayne County both as venues for the trial.

It is the People’s position that two acts of the criminal offense occurred within Monroe County. These acts were committed by the victim (consumption and death), but are still acts that are part of the crime. MCL 762.8 does not require the acts to be committed by the defendant. It is the

People's position that the acts under MCL 762.8 may be committed by anyone involved in the crime: the defendant, co-defendants, accessories, co-conspirators, and victims.

Acts in Monroe County prior to Delivery

It is the position of the People that the Delivery of a Controlled Substance constitutes a conspiracy and acts in furtherance of the conspiracy occurred in Monroe County. The victim, the Appellee, and Mr. Ingalls conspired to deliver a controlled substance to the victim. Acts were done in furtherance of the conspiracy in Monroe County prior to the delivery in Wayne County.

The victim while in Monroe County called Mr. Ignalls for the purpose of jointly obtaining heroin from the Appellee. PE, 3/7/17, p. 11, 30, 61-63. The victim left from his home in Monroe County to pick up Mr. Ignalls to get the heroin from Detroit. *Id.* at 30, 61-63. This conspiracy to obtain the Controlled Substance from the Appellee began in Monroe County. Therefore, acts done in furtherance of the Delivery of a Controlled Substance Causing Death were committed in Monroe County prior to the actual delivery of the heroin/fentanyl.

People v Plunkett

The Court of Appeals held in this case that the crime of Delivery of a Controlled Substance Causing Death is complete when the drugs are delivered. (See Attachment A, p. 3). The court also held that the statute is a "penalty enhancement." *Id.* The court relied on this Court's decision in *People v Plunkett* to support this conclusion. *Plunkett*, 485 Mich 50 (2010). This argument is akin to stating that Murder is a penalty enhancement to Assault. The People disagree with this analysis and holding.

The People are required to prove the following elements for the charge of Delivery of a Controlled Substance Causing Death: 1) the defendant delivered a controlled substance to another

person, 2) the substance delivered was a controlled substance, 3) the defendant knew he was delivering a controlled substance, 4) the controlled substance was consumed by the victim, and 5) that consuming the controlled substance caused the death of the victim. CJI 12.2a; MCL 750.317a. If the Court of Appeals is correct, the prosecution will not have to prove the fourth and fifth elements of this crime at a trial.

Delivery of a Controlled Substance Causing Death is not a penalty enhancement. It is a separate crime that requires the People prove the victim consumed the controlled substance and died as a result of the controlled substance. These constitute separate acts that must occur for the crime to be complete. It is our argument that the Court of Appeals misinterpreted *People v Plunkett* in finding that Delivery of a Controlled Substance Causing Death is a penalty enhancement and that the crime is complete when the delivery occurs.

MCL 762.5; Fatal Force and Death in Different Counties

The trial court found that the 38th Circuit Court has jurisdiction and Monroe County is the proper venue pursuant to MCL 762.5. The statute states:

“If any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in 1 county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county.” MCL 762.5.

It is the People position that the delivery of heroin/fentanyl was a mortal wound, injury, and is a poison.

Mortal Wound

In this case, the mortal wound, violence, or injury was providing the victim with Heroin/Fentanyl, which caused his death to ensue within Monroe County, establishing venue in

Monroe County

This Court held that when a defendant performed an illegal abortion in Jackson County and the victim died in Oakland County, Oakland County was the proper venue under MCL 762.5. *People v Southwick*, 272 Mich 258, 262 (1935). It is our argument that this case is analogous to *Southwick*. At the time of the *Southwick* case, abortion was an illegal medical procedure in the state of Michigan. MCL 750.14. In this case, the Appellee illegally distributed Heroin and Fentanyl to the victim. Heroin is a Schedule I Controlled Substance and is illegal for anyone to distribute. 21 CFR 1308.11. Fentanyl is a Schedule II Controlled Substance that only a Medical Doctor with a DEA Controlled Substance License may prescribe. 21 CFR 1308.12. The Appellee has no such license.

The illegal delivery of the controlled substances of Heroin and Fentanyl to the victim by the Appellee was a mortal wound or injury. The drugs distributed in this case are inherently dangerous. Heroin is a drug that has no accepted medical use in treatment in the United States and there is a lack of accepted safety for its use. 21 USC § 812(b)(1). Fentanyl is a drug that has a high potential for abuse, and is currently accepted for medical use with severe restrictions. 21 USC § 812(b)(2). Just as the illegal abortion in *Southwick* was a mortal wound, the delivery of these dangerous controlled substances was a mortal wound or injury.

Poison

It is the People's argument that heroin and fentanyl are poisons for the purposes of this statute. There is no definition within the statute for "poison". Further, we were unable to find any definition for poison within the Michigan Compiled Laws or within Michigan appellate case law. According to *The Black's Law Dictionary, 4th Edition*, the word is defined, in pertinent part, as follows:

Poison- “A substance having inherent deleterious property which renders it, when taken unto the system, capable of destroying life. A substance which, on being applied to the human body, internally or externally, is capable of destroying the action of the vital functions, or of placing the solids and fluids in such a state as to prevent the continuance of life.”

Heroin is a substance that has no accepted medical use for treatment in the United States and there is a lack of accepted safety for its use. 21 USC § 812(b)(1). Fentanyl is a substance that has a high potential for abuse, and is currently accepted for medical use with severe restrictions. 21 USC § 812(b)(2). Clearly these substances have deleterious properties which renders them capable of destroying life. It is our position that both of these drugs meet the definition of poison for the purposes of MCL 762.5

Conclusion

MCL 762.8 confers venue in Monroe County. Acts in furtherance of the crime occurred in Monroe County. It is also our position that MCL 762.5 establishes venue in Monroe County.

STATEMENT OF RELIEF REQUESTED

FOR ALL THE REASONS STATED ABOVE, the People of the State of Michigan respectfully request that this Honorable Court grant leave to appeal.

Dated: February 13, 2018

_____/s/_____
Michael C. Brown (P64169)
Assistant Prosecuting Attorney
125 East Second Street
Monroe, Michigan 48161