STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

File No. 92-6205-AR
HON. PHILIP E. RODGERS, JR.

THEODORE LEONARD BAYS,

Defendant-Appellee.
_____/

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DECISION AND ORDER

Plaintiff filed a Claim of Appeal and a brief in support of the appeal. Plaintiff appeals the 86th District Court's Decision entered on November 13, 1992 in which the lower court refused to bind the Defendant over to the Circuit Court for trial on the charges of felonious driving. Defendant filed a brief in opposition to the appeal. Neither party requested oral argument pursuant to MCR 7.101(K). Accordingly, no hearing was held in this matter. MCR 7.101(L)(2).

In its consideration of this appeal, the Court reviewed the briefs in support of and in opposition to the Claim of Appeal, the transcript of the preliminary examination, and the court file. The Court now presents its analysis and rulings on the two issues raised by this appeal.

I.

In the Defendant-Appellee's brief, he argues that the "People's appeal should be dismissed because their only avenue for review of the District Court Judge's decision not to bind over the defendant was by way of a complaint for writ of superintending control." The parties acknowledge that the higher courts'

decisions on this issue have not been consistent. The Court finds no merit in Defendant-Appellee's position that it is improper for the Plaintiff-Appellant to file a Claim of Appeal.

Superintending control is a procedural remedy whose applicability is limited by the conditions described in MCR 3.302. MCR 3.302(D)(2), reads as follows:

> When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed. (Emphasis added.)

A review of the Supreme Court cases cited by Defendant-Appellee shows that they are significantly distinguishable from the instant matter. Further, the Court finds that the more recent cases decided by the Court of Appeals support Plaintiff-Appellant's filing of a Claim of Appeal as a means of seeking the Circuit Court's review of the District Court's refusal to bind this matter over for trial.

The Court will present, then, its analysis of the cases cited by Defendant-Appellee in his efforts to quash this matter procedurally. In People v Cason, 387 Mich 586, 590; 198 NW2d 292 (1972), the Supreme Court addressed the scope of People v Paille #1, 383 Mich 605 (1970), delineating the issue as follows:

> The basic issue in this case is whether MCLA 726.2; MSA 27.3552, as construed in People v Paille #1, supra, prevents a judge of the Recorder's Court of the City of Detroit, sitting as a trial judge, from reviewing the examining magistrates' action where the magistrate is an elected Recorder's Court judge, or a judge sitting by appointment of this Court.

As shown above, the highest court clearly defined the narrow issue addressed in Cason; the case deals with particular issues which arise in Recorder's Courts. The opinion, drafted by Justice Swainson, provides an analysis of the legislative provisions of recorder's courts since the last century and relevant case law since 1918. With reference to Defendant-Appellee's argument on page 16 of its brief, it is this Court's opinion that Defendant-

Appellee took undue literary license in substituting "[the preliminary examination court]" for the original words of the Cason text, "Recorder's Court." The result distorts the Cason ruling.

Defendant-Appellee also cited People v Flint Municipal Judge, 383 Mich 429; 175 NW2d 750 (1970), in support of Defendant's position. There, the Supreme Court describes the purpose and process of superintending control and to which court a complainant seeking superintending control should direct the complaint.

> The Supreme Court, the Court of Appeals, and the circuit court all have jurisdiction to hear original complaints for superintending control, and to issue orders of superintending control directed to courts and judges of earlier jurisdiction. GCR 1963, 711.4(1).
>
> Reasons of policy dictate that such complaints be directed to the first tribunal within the structure of Michigan's one court of justice having competence to hear and act upon them.
>
> Original complaints for superintending control against municipal judges, district judges, and probate judges should be directed to the circuit courts.

Id., supra, p 432.

The citations to Flint Municipal Judge found in Defendant-Appellee's brief are used out of context. In light of the previous quotation, it is clear that Flint Municipal Judge only describes the proper court in which to seek superintending control not whether it is a mandated remedy over a claim of appeal where a District Court refuses to bind a case over to Circuit Court.

This problem recurs in Defendant-Appellee's reference to Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 675; 194 NW2d 693 (1972). There, the Supreme Court addressed the "ability and integrity of the judiciary to exercise the authority of judicial supremacy in determining and delineating the basic constitutional doctrine of separation of legislative, executive and judicial powers". The Court's opinion sets forth the issues as follows:

> I. Does the Court of Appeals have jurisdiction to entertain a complaint for superintending control which charges that a trial judge acted without authority in

accepting, over the objection of the prosecutor, a plea of guilty to an offense not charged by the people or included within the offense charged in the information?

II. Does a trial judge have the authority to accept an offer and plea of guilty over the objection of the prosecutor to an offense not charged or included in the information?

Id., supra, pp 675-676. The issues in Genesee Prosecutor, 1972, are dissimilar to the instant factual situation and have no bearing on the propriety of the People choosing a claim of appeal as their form of remedy.

The Defendant-Appellee next offered a successor case in which Genesee County Prosecuting Attorney Robert F. Leonard appealed Genesee County Circuit Judge Elza H. Papp's dismissal of a complaint for superintending control filed by the Prosecutor to quash Judge Papp's "action in accepting a plea of guilty to a lesser included offense, directing the defendant judge to vacate the plea and sentence, and to reinstate criminal proceedings based on the information." Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974)

In this case, the Supreme Court granted the request for superintending control, set the plea and sentence aside and remanded the case for trial. Again, the Defendant-Appellee has failed to distinguish the factual differences between the case at bar and this appellate case. Clearly, Judge Papp's acceptance of a guilty plea to a lesser offense over the objections of the prosecutor is significantly different from the action taken by the local District Court. The instant matter is an appeal wherein the prosecutor seeks review of the magistrate's refusal to bindover a matter to the circuit court, a dispute as to whether reasonable factual inferences support the elements of the crime charged.

The Supreme Court's opinion in In re Burton, 429 Mich 133; 413 NW2d 413 (1987), described the purpose and use of an order of superintending control. In his appellate brief, Defendant-Appellee sets forth snippets of the opinion to support the thin procedural argument that Plaintiff-Appellant has pursued redress

ineffectually. This Court's reading of Burton yields no such support. First, as is true for all the cases analyzed above, Burton does not address a situation in which a prosecutor appeals a district court's refusal to bind a defendant over to the circuit court for trial based solely only on a finding that probable cause does not exist.

In Burton, the Court reviewed a post-trial matter. Justice Archer, who drafted the opinion, set forth the issue and summarized the process which culminated in the appeal to Michigan's highest court as follows:

> In this case, we must decide whether the Court of Appeals erred in granting an order of superintending control reversing the trial court's order granting a new trial in a criminal case.

Id., supra, p 135.

> After hearing the arguments at the post-trial hearing, the trial court granted the defendant's motion for a new trial. The prosecutor challenged the trial court's decision by seeking an order of superintending control in the Court of Appeals.

Id., supra, p 138. The Supreme Court's holding reads as follows:

> We hold that the Court of Appeals lacked jurisdiction to invoke its extraordinary power to issue an order of superintending control in this case; therefore, the Court of Appeals erred in reversing the trial court's order granting a new trial.

Id., supra, p 135.

Justice Boyle, in a concurring opinion, offered the following didactic remarks,

> An appeal and a writ of superintending control are, functionally and conceptually, different. An appeal is primarily a device for correcting legal error which occurs in the course of litigation. A writ of superintending control, on the other hand, is "designed to correct errors so gross as to be almost foreign to the judicial system." Note, Supervisory and advisory mandamus under the all writs act, 86 Harv L R 595, 626 (1973). The former primarily protects the interests of the particular litigants as the final stage of the process through which justice is achieved. The latter serves the interests of the judicial system as a whole as a device for protecting the system's integrity and furthering its efficiency. Id., 626-627.

Burton, supra, p 146.[1]

This Court finds nothing in the several appellate opinions analyzed above which supports the Defendant-Appellee's contention that the proper means for the prosecutor to seek reversal of the lower court's dismissal of the Information is through a complaint for superintending control. Indeed in Genesee Prosecutor (1974), the Supreme Court's opinion contained clear language to the

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[1] This Court takes judicial notice that In the Matter of Hague, 412 Mich 532; 315 NW2d 524 (1982), presents a situation which meets Justice Boyle's criteria (as set forth in Burton) for resort to superintending control. In Hague, the Supreme Court reviewed the extensive record which had accumulated in response to Judge William C. Hague's wholesale dismissal of prostitution cases brought before the bench in the Traffic and Ordinance Division of the Recorder's Court of Detroit. The record included entry of superintending control orders dated February 17, 1978; March 24, 1978; May 3, 1978; May 30, 1978 and an order to show cause dated June 22, 1978. Id., supra, p 547. This Court finds the following remarks from the Hague opinion illustrative of the circumstances which warrant orders of superintending control:

> It is clear from this Court's opinion in Cahill v Fifteenth District Judge, 393 Mich 137; 224 NW2d 24 (1974), that availability of an appeal in the individual case does not preclude superintending relief when that procedure does not provide an adequate remedy. Implicit in Cahill is the idea that a superior court always has jurisdiction to issue an order of superintending control and that adequacy of the appeal remedy is not a jurisdictional test but merely a procedural requirement to be met before relief can be granted.
>
> It is apparent to us, however, that the case-by-case appeal to the Court of Appeals of the hundreds of prostitution cases dismissed by Judge Hague would not have been a practical, efficient or common sense remedy for his persistent, wholesale dismissal of all prostitution cases prosecuted in the City of Detroit during his service as presiding judge. The delay and expense inherent in the appeal of dozens upon dozens of such cases, while during their pendency Judge Hague continued to refuse to enforce the ordinance, suggests persuasively that, in the circumstances, case-by-case appeal was neither an adequate nor realistic remedy.

Hague, supra, pp 546-547.

contrary. The Supreme Court described in unambiguous terms the conditions and limitations on the resort to the extraordinary remedy of superintending control. Hague, supra, pp 141-143 and Genesee Prosecutor (1972), supra, 678-682 and Genesee Prosecutor (1974), supra, pp 121-122, n 12.

In this Court's opinion, the instant matter was properly pursued by the prosecutor as an appeal of this singular refusal to bindover. Nothing before this Court suggest that the District Judge has made a decision which attacks the integrity of the judiciary or evidences a pattern of invalid judicial orders which threatens to destroy the judicial system's integrity.

The Court now turns to an analysis of the Court of Appeals precedent. In People v Tait, 99 Mich App 19; 297 NW2d 853 (1980), the Court of Appeals addressed two questions. The first was, "did the trial court err in reversing the magistrate's finding[?]". Id., supra, p 22.

> The magistrate concluded there was insufficient evidence produced to bind over on the assault with intent to murder charge and instead bound defendant over on a charge of felonious assault. The prosecution then filed an appeal with the circuit court and also sought an order of superintending control. The circuit judge correctly ruled that abuse of discretion is properly raised by appeal and not by application for an order of superintending control. People v McCoy, 75 Mich App 164; 254 NW2d 829 (1977).

Id., supra, p 23, (Emphasis added.)

Within the Court of Appeals opinion in People v George, 114 Mich App 204, 206; 318 NW2d 666 (1982), which otherwise dealt with double jeopardy, is a statement which succinctly supports the People's appeal of the instant matter.

> If a prosecutor is dissatisfied with a finding that no crime has been committed, or that there is not probable cause to believe the accused committed it, the proper procedure is for a prosecutor to appeal to circuit court. People v Nevitt, 78 Mich App 402, 404; 256 NW2d 612 (1977), Oakland County Prosecutor v 46th Dist Judge, 72 Mich App 564; 250 NW2d 127 (1976), MCL 600.308; MSA 27A.308, MCL 770.12; MSA 28.1109.

Id., supra, pp 208-209.

In George, the higher court set forth the issue and its holding as follows:

> When a trial judge has found no probable cause to hold a defendant for trial and the prosecutor has appealed that decision, may the prosecutor seek to dismiss the appeal and bring new charges against the defendant when he has discovered no new evidence? We believe that, on the facts of this case, this procedure violates a defendant's right to due process of law.

In a long footnote found at page 17 of Defendant-Appellee's brief, twelve appellate cases are cited to support the proposition that "the writ of superintending control was found to be the correct avenue to review a preliminary examination court's failure to bind a defendant over to circuit court for trial". Leading that listing is People v Makela, 147 Mich App 674; 383 NW2d 270 (1985). The introductory paragraph of the Makela opinion, drafted by Justice Shepherd, contains the following explanation:

> We granted defendant's application for leave to consider the merits of the case and do not consider whether the prosecution should have proceeded in the circuit court by way of superintending control or appeal as of right. We affirm the circuit court's orders on the merits. (Emphasis added.)

Id., supra, p 677.

Following Makela, the Defendant-Appellee cites In re Wayne County Prosecutor, 110 Mich App 739; 313 NW2d 95 (1981) as supportive precedent. In fact, In re Wayne Co Prosector addresses circumstances factually dissimilar to the case at bar. There, the complaint for superintending control involved a greater complexity of issues than a magistrate's refusal to bind over a defendant to stand trial. The Court described the situation which resulted in the prosecutor's filing of the complaint for superintending control, as follows:

> The prosecution's dilemma was that the magistrate refused to compel the attendance of the witness without whose testimony the magistrate refused to bind over defendants. The prosecution could sustain its burden of producing evidence of probable cause only if the magistrate issued the bench warrant compelling the necessary witness to appear.

Id., supra, p 745.[2]

The statutory provision which supports the People's choice of procedure is MCL 770.12; MSA 28.1109 which reads, in pertinent part, as follows:

> (1) An appeal may be taken by and on behalf of the people of this state from a court of record in all criminal cases, in any of the following instances:
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> (b) From a decision arresting a judgment of conviction or directing a judgment of acquittal for insufficiency of the indictment, information, or other charging instrument, where the decision is based upon the invalidity or construction of the statute upon which the indictment, information, or other charging instrument is founded.

While there is inconsistency in the Court of Appeals decisions related to this issue, recent decisions support the People's filing of a claim of appeal to seek reconsideration of a magistrate's dismissal of an information.

It is the opinion of this Court that the People's appeal should not be dismissed on the procedural argument that a district court judge's decision not to bind over a defendant may only be reviewed by way of a complaint for writ of superintending control. A claim of appeal is an appropriate remedy. People v George, supra; People v Tait, supra; and MCL 770.12.

II.

The substance of this appeal is the magistrate's refusal to bind the Defendant over to the circuit court to face charges of felonious driving. The Court will first review the statutory provisions for the instant charges and then the procedural requirements incumbent on the magistrate at the preliminary examination. The Defendant was charged with felonious driving

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[2] The Wayne County Prosecutor sought vacation of the magistrate's dismissal of charges against defendant, remand of the case to the magistrate for examination of the necessary witnesses, and an order directing the magistrate to issue a bench warrant to secure the attendance of any witnesses who refused to appear. Id., supra, p 742.

pursuant to MCL 752.191; MSA 28.661. The statute, in pertinent part, reads as follows:

> Every person who drives any vehicle upon a highway carelessly and heedlessly in wilful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property and thereby injuring so as to cripple any person, but not causing death, shall be guilty of the offense of felonious driving... .

The bindover statute, MCL 766.13; MSA 28.931, reads as follows:

> If it shall appear to the magistrate at the conclusion of the preliminary examination either than an offense has not been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.

MCR 6.110(E) addresses the probable cause finding:

> If after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial.

Thus, the dual requirements of the bindover statute require that the magistrate, during the preliminary examination, determine both whether the offense charged has been committed and whether there is reason to believe that the defendant committed the offense. These requirements are reiterated in the applicable court rule. For more than forty years, Michigan case law has acknowledged these dual requirements.

> The matter of "probable cause", as the expression is used in the statute, has reference to the connection of the defendants with the alleged offense rather than to the corpus delicti, that is, to the fact that the crime charged has been committed by some person or persons.

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> The query presented in the instant case is whether there was competent evidence before the justice of the peace on which to base a finding that the crime of conspiracy as charged in the warrant had been committed.
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> The circuit judge correctly determined that there was no competent evidence taken on the examination to show that the crime charged against defendants had been committed. For that reason the order granting the motion to quash was not erroneous, and such order is affirmed.

People v Asta, 337 Mich 590, 609-610, 614; 60 NW2d 472 (1953); People v Paille #2, 383 Mich 621, 628; 178 NW2d 465 (1970).

The corpus delicti is established when:

> ***the people have introduced evidence from which the trier of fact may reasonably find that acts constituting all the essential elements of the offense have been committed and that someone's criminality was responsible for the commission of those acts. (Emphasis in original. Citations omitted.)

People v Juniel, 62 Mich App 529, 537; 233 NW2d 635 (1975).

More recently the Court of Appeals restated the requirements for bindover and the burden of proof required in People v Coddington, 188 Mich App 584, 591; 470 NW2d 478 (1991):

> A defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator. MCL 766. 13; MSA 28.931; People v Gonzales, 178 Mich App 526, 530; 444 NW2d 228 (1989). At this stage, the prosecutor is not required to prove each element beyond a reasonable doubt. Id. However, there must be some evidence from which these elements may be inferred. People v Greenberg, 176 Mich App 296, 306; 439 NW2d 336 (1989) Thus, circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to justify a bindover. People v Drayton, 168 Mich App 174, 176; 423 NW2d 606 (1988).

This Court also was guided in its deliberations by People v Fiedler, 194 Mich App 682, 693; 487 NW2d 831 (1992). Fiedler provides the following cautionary instruction to a reviewing court:

> In reviewing a district court's decision to bind over a defendant, a circuit court should not substitute its judgment for that of the district court and may

> reverse only if it appears from the record that there was an abuse of discretion. People v Lopez, 187 Mich App 305, 308; 466 NW2d 397 (1991). On review of a circuit court's decision to quash an information, this Court must determine whether the district court abused its discretion in binding over the defendant. Id. At the preliminary examination, the prosecution need not establish guilt beyond a reasonable doubt. People v Hill, 433 Mich 464, 469; 446 NW2d 140 (1989). However, evidence regarding each element of the crime or evidence from which the elements may be inferred must exist. Id.

People v Fiedler, supra.

In People v Talley, 410 Mich 378, 386-387; 301 NW2d 809 (1981), the Supreme Court's per curiam opinion provides the following description of the current applicable standard of review:

> Our task in assessing the trial court's decision to quash the information is to determine whether or not there has been an abuse of discretion on the part of the examining magistrate because, as observed above, a reviewing trial court may only substitute its judgment for that of the examining magistrate where there has been such an abuse. Our standard for review, furthermore, in testing for an abuse of discretion is a narrow one. The classic description of this standard, first articulated in Spalding v Spalding, 355 Mich 382, 384-385; 94 NW2d 810 (1959) (a modification of a divorce decree case) and later given a somewhat stricter interpretation in the criminal context by this Court in People v Charles O Williams, 386 Mich 565, 573; 194 NW2d 337 (1972), reads as follows:
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> > Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

In Talley, Justice Levin wrote a concurring opinion commenting

on the Spalding decision and advocating a "more balanced view of judicial discretion":

> Spalding's hyperbolic statement leaves the impression that a judge will be reversed only if it can be found that he acted egregiously--the result evidencing "perversity of will", the "defiance [of judgment]", "passion or bias". To repeatedly invoke this overstatement leads lawyers and judges to believe that a discretionary decision is virtually immune from review and leads appellate courts to view any challenge to such a decision as essentially unfounded. Repetition of this statement is simplistic and misleading, and should not be indulged in by this Court or any other.
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> A more restrained statement, speaking merely of the exercise of will, logic an reason, would have said all that needed to be said. Unfortunately, in the endeavor to send an unmistakably clear message, the Court raised the standard of review to an apparently insurmountable height.
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> A more balanced view of judicial discretion was presented in Langes v Green[3], where Justice Sutherland said:
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> > The term "discretion" denotes the absence of a hard and fast rule. * * *When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.
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> Thus when a question of abuse of discretion is properly framed, it is incumbent upon a reviewing court to engage in an in-depth analysis of the record on appeal. (Emphasis added.)

Talley, supra, p 396-399.

The Felony Complaint alleged that, on August 18, 1992,

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[3] Langes v Green, 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931).

Defendant Theodore Bays violated the Felonious Driving statute when he drove a vehicle in Peninsula Township in a manner which injured Roxanna M. Rose. Several witnesses testified at the preliminary examination held November 13, 1992. At the conclusion of the preliminary examination, the magistrate refused to bind the Defendant over to stand trial in circuit court.

Having reviewed the transcript of the preliminary examination, applicable case law and the court file, this Court finds that the District Court abused its discretion when it refused to bind the Defendant over to stand trial on the charge of felonious driving. The Court will now present its review of the facts and the law.

Five witnesses to the subject auto accident testified at the preliminary examination. Two of the witnesses saw the accident which, according to their testimony, occurred in the early afternoon on a clear fall day. Witness Jason Wares stated that he was driving southbound on Center Road near the intersection with McKinley Road when he saw a small pick-up truck approaching the intersection eastbound on McKinley Road. Mr. Wares testified that he swerved off the road to miss hitting Defendant Bays small pick-up truck as it went into the intersection without stopping at the stop sign.

Mr. Wares stated that he saw Defendant Bays truck collide with a northbound car. "As he crossed -- crossed my front bumper, I observed right -- he hit the car that was headed in the northbound lane, right beside me." (Transcript of Preliminary Examination [hereinafter referred to as Tr.], p 6-7.) Mr. Wares stated that he could see the driver of the truck "pretty clear" as he passed within a few feet of Defendant Bays truck. He stated that,

> I could see his hand on the wheel and I could see him looking down -- looking to the right, and it looked like he was looking down to the right towards the passenger side seat area of the vehicle. (Tr., p 8-9.)

Mr. Wares, who stated that he is a Traverse City Police Reserve Officer, described the activities at the scene of the accident immediately following the collision. He described Mrs.

Rose as badly injured and stated that he and others at the scene agreed that she should not be moved before the EMS workers arrived. (Tr., pp. 11-12.)

Another witness, Gregory Kilinski, testified that he saw the accident when was working nearby on a well drilling rig. He stated, "I was basically looking at the road at the time, I was in that direction, but it kinda (sic) drew my attention that he was moving fast the fact that there was a stop sign right there." (Tr., p 44) Mr. Kilinski stated that he thought he saw the eastbound truck (driven by Defendant Bays) hit the southbound truck (driven by Mr. Wares). (Tr., p 45.) Both Mr. Wares and Mr. Kilinski testified that they observed that the pick-up truck went through the stop sign without stopping. (Tr., p 5 [Wares] and p 48 [Kilinski].

Dr. Daniel H. Drake testified at the preliminary examination that he is a cardio-thoracic surgeon and that he performed emergency surgery on Mrs. Roxanna Rose on August 18, 1992. The physician stated that, "she had a significant hyperextension injury of her left arm. . .in such a way as to produce several injuries to the nerves and blood vessels inside her chest." (Tr., pp 31-32.) He remarked that such injuries are nearly always fatal. (Tr., p 33.)

The prosecutor asked Dr. Drake, "[W]ould you classify this as a crippling injury? Disabling injury?" The surgeon responded that Mrs. Rose's voice will "be hoarse for the rest of her life." (Tr., p 34) He went on to describe additional residual effects including weakness of her left arm and left leg associated with nerve damage to those areas. (Tr., p 35.) The preliminary examination was held more than two months after the accident. Dr. Drake testified that the injuries and limitations would persist for her lifetime.

Sabrina Hedlin testified at the preliminary examination that, as a rescue worker for Red Seven, a unit of the Peninsula Township Fire Department, she went to the scene of the accident. She testified that she arrived at the scene after the injured passengers were on their way to the hospital. She reported

overhearing a conversation between the driver of the small black pick-up truck, Defendant Bays, and Sergeant Daniel Scott. She said that he decided not to stop at the stop sign but then restated that he did not stop and that he stated at the time that he was aware that the stop sign was there. Ms. Hedlin mentioned that Defendant Bays was "wobbly and tipsy." (Tr., p 61.) She concluded her remarks on direct examination with, "I believe he was mentally aware, but he was shaken up from the whole ordeal." (Tr., p 64.)

At the preliminary examination, Prosecutor LaBelle asked Sergeant Daniel Scott of the Sheriff's Department whether Defendant Bays made any statements to the officer at that time regarding the cause of this accident and whether the Defendant was aware of the stop signs. Sergeant Scott recounted the following information,

> He advised me that he had travelled through the stop sign. Travelling east on McKinley Road, he had travelled through the stop sign and struck the second vehicle after going through the stop sign. ...
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> He advised me that he thought that he could make it into the traffic lane. He had planned on turning south on Center Road, and going into Traverse City. He told me that as he approached the intersection he realized he might've been going a little fast, his brakes were mushy. He had a heavy load of tree stumps or wood on the rear of the truck. He said as he got to the intersection he realized that he couldn't roll through and make the right turn, and so he tried to go straight through. . .
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> He repeated himself a number of times that he thought he could make it through the intersection without being involved in an accident. (Tr., pp 75-76.)

Sergeant Scott read the following verbatim remark, made by the Defendant at the scene, from his field notes, "Going too fast to stop that little truck." (Tr., p 77.) During cross-examination, Officer Scott was asked about the Defendant's mental state after the accident. The officer responded with this statement, "He -- he had no problem expressing himself or -- relating the circumstances surrounding the accident to me." (Tr., p 85.)

At the conclusion of the preliminary examination, the trial judge discussed his opinion as to whether the testimony supported

inferences that there was a crippling injury and that the Defendant's driving at the time of the accident satisfied the elements of felonious driving. (Tr., pp 96-97) The magistrate compared "multiple interpretations of the driving of the Defendant" and applicable case law. (Tr., pp 98-99.)

> When we speak of gross negligence, we're talking about something which is more than an ordinary violation of the motor vehicle code, more than an ordinary violation of the safety rules of the road, of which there are many. So, the speeding, in and of itself, is not ordinarily such as would constitute gross negligence. It certainly would be an act of ordinary carelessness, but not gross negligence. Going through a stop sign without coming to a stop, again, while it is a motor vehicle violation in and of itself, would not ordinarily be understood as constituting gross negligence because it does not have ordinarily that suggestion of a contempt for the rights of other people, or a kind of callousness in the face of an imminent danger that we ordinarily think of when we talk about willful and wanton disregard of the rights of other people. In this case, the -- apart from what the Defendant may have said to a bystander or to an officer, the observed facts are, that he was pulling a heavy load in a small truck, that he did not come to a stop when he came out of the side road onto the highway, and went across the highway, and caused the accident. If he approached the highway and saw oncoming traffic, and in reckless disregard of the safety of the people in the oncoming vehicles, decided to make a run for it and -- and hurry and speed up, cross the highway, try to av-- so that he was not inconvenienced, then I think that would -- would be the kind of callousness or contempt for the safety of the other people that would raise an ordinary traffic violation to -- to willful and wanton conduct. If he simply was approaching the -- the highway and through lack of attention, or even because at the last minute he -- he determined that he was going too fast and was not gonna (sic) be able to come to a safe stop, and decided to go through, but was unaware of any oncoming vehicles, then I think it would not be gross negligence on his part. So a lot depends, in my mind, on -- on whether he saw the oncoming vehicles and decided to perhaps speed up to -- to take a chance that he might make it, on the other hand he might not, or on the other hand if he was unaware of any oncoming vehicles, and -- and just committed the minimum act of not coming to a complete stop at an intersection. There is testimony that he made a statement to a -- a bystander and to the officer, in language that -- which may suggest that he

realized he -- first of all, that he did see the stop -- the sign, was aware there was a stop sign there, so it wasn't a matter of his not noticing it. And that he went ahead, because he apparently didn't think he could make a right turn onto the right of way, and apparently felt that it was safer to cross rather than -- try to make the in-- originally planned right turn.

I guess weighing it all I do not think that the circumstances here rise to a probability that he acted in willful or callous disregard for a known or probable danger, but merely failed to come to a stop in violation of that section of the motor vehicle code which requires you come to a stop. And that the fact that it resulted in a terrible accident, was nothing that he had reason to contemplate at the time that he approached the sign and didn't make a stop. On that basis I'm concluding that the evidence is insufficient on that point, and refusing to bind over. (Tr., pp 99-101.)

In People v Marshall, 74 Mich App 523; 255 NW2d 351 (1977), the Court of Appeals reviewed a case in which the Defendant appealed a conviction of felonious driving. This Court found the following interpretation of the felonious driving statute, as stated in Marshall, helpful in its consideration of the instant appeal:

> The statute focuses on the result of the defendant's actions rather than on the nature of the actions. In other words, it is possible that two individuals could engage in identical conduct but yet receive different penalties by virtue of the fact that the results differed. Injury oriented penalties are not infant to our law. To illustrate, we reiterate a well-known and perhaps overused law school example. If A hits B in the nose and B suffers no physical injury, A could be charged with battery. Yet, if C hit D, a hemophiliac, in the nose and D bled to death as a result, C could be charged with involuntary manslaughter.
>
> We find that in the instant case the evidence presented was sufficient to sustain a conviction of felonious driving. The injury is not disputed. It is therefore only necessary that the evidence support either negligent or reckless driving.

Id., supra, p 527.

Testimony at the preliminary examination established that Defendant Bays was "going too fast to stop" his small pick-up truck

which had "mushy" brakes and "heavy load of tree stumps or wood on the rear truck" when he went through the stop sign and struck the vehicle in which Roxanna Rose was a passenger. (Tr., p 75-77.) Further, the surgeon who treated Mrs. Rose after the crash testified that she has residual injuries. At the preliminary examination, the magistrate determined that the injuries, as described by the physician, are "crippling" injuries. (Tr., p 97.)

Michigan's higher courts hold that the condition and character of the vehicle driven by an individual charged with felonious driving can properly be used in determining whether charges of felonious driving are criminally actionable. The per curiam opinion in People v Sherman, 188 Mich App 91, 94-95; 469 NW2d 19 (1991), includes this interpretation,

> In construing our statute, it is apparent that the initial clause--"Every person who drives any vehicle upon a highway"--is modified by two separate clauses: (1) "carelessly and heedlessly in wilful and wanton disregard of the rights or safety of other," and (2) "without due caution and circumspection and at a speed or in a manner so as to endanger any person or property." While the second clause may not prohibit driving an unsafe vehicle in an otherwise reasonable manner and at an otherwise reasonable speed, the same cannot be said of the first clause, which is not limited to the speed or the manner of driving.
>
> In our opinion, a fair reading of our statute leads to the conclusion that it encompasses the driving of a vehicle with the knowledge that it may cause serious injury to others because the vehicle itself is inherently dangerous. Such conduct constitutes driving a vehicle "upon a highway carelessly and heedless in wilful and wanton disregard of the rights or safety of others." This construction is within the fair import of the terms of the statute, would promote justice be discouraging others from similar conduct, and would effect the safety of our highways.
>
> After reviewing the circuit court's conclusions of law, we are convinced that the lower court erred in determining that the felonious driving statute refers only to the manner in which a vehicle is driven. The statute also applies to the driving of a vehicle which the driver knows is so unsafe, regardless of the manner driven, that it poses a substantial threat to the safety

of others.

In the instant case, both parties cited Michigan Criminal Jury Instructions in their briefs. In Michigan, in actions involving the charge of felonious driving, trial courts are required to instruct the jury on the elements of gross negligence as shown in CJI2d 16.18. Those jury instructions set forth the following three-part test taken from People v Orr, 234 Mich 300, 307: 220 NW 777 (1928):

> (1) Gross negligence means more than carelessness. It means willfully disregarding the results to others that might follow from an act or failure to act. In order to find that the defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt:
>
> (2) First, that the defendant knew of the danger to another, that is, he knew there was a situation that required him to take ordinary care to avoid injuring another.
>
> (3) Second, that the defendant could have avoided injuring another by using ordinary care.
>
> (4) Third, that the defendant failed to use ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious injury.

The record suggests a factual inference that Defendant Bays knew that his vehicle was heavily laden and had "mushy" brakes. The testimony of Sergeant Scott and rescue worker Hedlin supports a factual inference from Defendant's statements that Defendant knew he could not stop at the stop sign and made a conscious decision to try to go "straight" through the intersection.

The record also supports a factual inference that the Defendant was familiar with the intersection and of the likelihood of injury to another if he failed to stop. Finally, the record would support a factual inference that despite the knowledge of likely injury to another, injury that would have been avoided by ordinary care, the Defendant drove through the intersection and caused foreseeable injury.

It is the opinion of this Court, that the evidentiary record construed most favorably from the People's perspective supports a finding that Defendant Bays acted "without due caution and

circumspection and at a speed or in a manner so as to endanger or be likely to endanger" those travelling on the roads in the area at the time. The Defendant could have avoided causing the collision in which Roxanna Rose sustained crippling injuries if he had used ordinary care by stopping at the stop sign at the intersection of McKinley and Center Roads.

It is the opinion of this Court, then, that the magistrate erred in not finding probable cause to believe that the Defendant violated the felonious driving statute. "Felonious driving is a crime against a person which focuses on both the culpable nature of the defendant's actions and the resultant harm." People v Crawford, 187 Mich App 344,350; 467 NW2d 818 (1991). The danger of striking another car in the intersection was apparent, the accident could have been avoided with ordinary care and the Defendant's failure to use such care resulted in permanent crippling injuries.

A careful review of the record indicates the existence of sufficient evidence to warrant binding Defendant Bays over to the Circuit Court for trial on the charge of felonious driving. This Court's finding of an abuse of discretion is aided by Justice Levin's separate concurring opinion in Talley, supra, at pp 396-399. The magistrate's refusal to bind the Defendant over is hereby overruled.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 12/30/93