



MICHIGAN STATE POLICE LEGAL UPDATE

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CRIMINAL LAW AND PROCEDURE MANUAL

The 2009 edition of *Michigan Criminal Law and Procedure: A Manual for Michigan Police Officers* is now available for purchase.

The manual is now published by [Kendall Hunt Publishing Co.](#) Copies may be ordered by calling Kendall Hunt Customer Service at (800) 228-0810 or through their [online catalog](#) (search by title or ISBN: [978-0-7575-6473-4](#)).

CRIMINAL LAW

Prohibited Use of Tracking Devices

[MCL 750.539](#)

A person shall not do any of the following with a tracking device:

- Install or place a device on a motor vehicle without consent.
- Use a device on a motor vehicle without consent.
- Be under a protective order and track the location of a motor vehicle operated or occupied by the protected individual.
- Be on probation or parole for an assaultive crime and track the location of a motor vehicle operated or occupied by a victim or victim's family member.

This does not apply to:

- Mechanical, operational, directional, navigation, weather, or traffic information to the operator of the vehicle.
- Emergency assistance to the operator or passengers of the vehicle.
- Location of a missing vehicle.
- Diagnostic services.

- Use of the device after notification is clearly given to lessee that vehicle may be tracked.
- Device that is installed by a parent or guardian of a minor. However, the vehicle must be owned or leased by that parent or guardian and operated by the minor.
- Device that is installed by a police officer, court officer, a bail agent, or professional investigator while lawfully performing his or her duties. Private investigator exception does not apply if protective order is involved or involves commission of a crime.

"Tracking device" means any electronic device that is designed or intended to be used to track the location of a motor vehicle regardless of whether that information is recorded.

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Downloading child pornography on a CD-R does not automatically mean "manufacturing."

This case presented the question of whether a defendant who downloads child sexually abusive material from the Internet and "burns" that material to a CD-R may be convicted for manufacturing child sexually abusive materials.

The court held that a defendant who downloads child sexually abusive material from the Internet and burns the images to a CD-R, when there is no evidence the defendant had a criminal intent to do something other than possess the CD-R for his own personal use, may not be convicted of violating MCL 750.145c(2), which prohibits making or producing child sexually abusive material. The proper charge should be possession of child sexually abusive

material. [People v. Hill](#), No. 138668 (Mich. July 23, 2010).

Searching for child pornography on the Internet may be possession.

Defendant intentionally accessed and purposely viewed depictions of child sexually abusive material on the Internet. The only child sexually abusive material later found on their computers, however, had been automatically stored in temporary Internet files. Defendant contends that based on this location, he did not knowingly “possess” child sexually abusive material.

The court held that the term “possess” under MCL 750.145c(4) includes both actual and constructive possession. The evidence presented at the preliminary examinations established that defendant did more than passively view child sexually abusive material on the Internet. When any depiction of child sexually abusive material was displayed on defendant’s computer screen, he knowingly had the power and the intention to exercise dominion or control over that depiction. As a result, he constructively possessed those images, which amounts to possession of child sexually abusive material. [People v. Flick](#), No. 138261 (Mich. July 27, 2010)

11-Carboxy-THC is not a controlled substance.

Defendant was driving a car when he was involved in a fatal crash. His BAC at the time of the accident was an estimated 0.091 to 0.115 and there were also 6 nanograms of 11-carboxy-THC in his blood. One of the charges brought against him was OWPD (operating with the presence of drugs) causing death. 11-Carboxy-THC is a byproduct of metabolism created when the body breaks down the psychoactive ingredient of marijuana. Under previous case law, a person who operated a motor vehicle with the presence of any amount of 11-carboxy-THC in his or her system violated MCL 257.625(8) which is the OWPD law. The Michigan Supreme Court reversed the previous holding.

The court held that 11-carboxy-THC is **not** a schedule 1 controlled substance and,

therefore, a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his or her system. For the OWPD charge, lab results should indicate THC levels in the defendant’s blood. [People v. Feezel](#), No. 138031 (Mich. June 8, 2010).

Sexual contact includes touching for humiliation.

Defendant in this case was angry because a child he was watching would not put on his pajamas. Out of his anger, the defendant struck the victim by “flicking” the young boy’s penis. Under MCL 750.520a, “sexual contact” includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for *revenge, to inflict humiliation, or out of anger*.

The court found that defendant’s actions were a form of bullying that resulted in the child crying and that he committed the act because he was frustrated with the child. The court held that these facts demonstrated an intentional touching of the victim’s intimate part in a sexual manner for the purpose of inflicting humiliation and out of anger. [People v. Lee](#), No. 283778 (Mich. App. June 17, 2010).

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