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BILL



ANALYSIS

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Senate Bill 26 (as passed by the Senate)  
 Sponsor: Senator Michael J. Bouchard  
 Committee: Judiciary

Date Completed: 2-9-95

### RATIONALE

The Fourth Amendment to the U.S. Constitution, and Article 1, Section 11 of the Michigan Constitution of 1963, guarantee the right of the people to be secure in their homes and possessions from unreasonable searches and seizures. As a rule, for a search to be reasonable, a warrant must be issued by a magistrate or judge based upon probable cause--to interpose the neutral judgment of a disinterested third party between the privacy of the citizen and the governmental intrusion on that privacy. Pursuant to various U.S. Supreme Court decisions, evidence that is seized in violation of the Constitution may not be admitted at the prosecution of the person whose privacy rights were violated. This suppression of evidence is referred to as the "exclusionary rule".

In 1984, the U.S. Supreme Court created a "good faith exception" to the exclusionary rule (*United States v Leon*, 468 US 981). Since the primary purpose of the rule is to deter police misconduct, the Court reasoned that the rule's purpose is not served by suppressing evidence seized by a police officer acting in reasonable reliance upon a search warrant issued by a detached and neutral magistrate even if the warrant is ultimately found to be invalid. Subsequently, the Court applied the good faith exception to uphold a warrantless search conducted pursuant to a statute that was later ruled unconstitutional, and to uphold a search in which the police reasonably relied upon the consent of a third party who did not have authority to give consent (*Illinois v Krull*, 480 US 340 (1987); *Illinois v Rodriguez*, 110 S Ct 1793 (1990)).

Based upon the same reasoning applied by the U.S. Supreme Court in *Leon*, many believe that Michigan should follow suit and similarly restrict the exclusionary rule. (For a discussion of the exclusionary rule in Michigan, see BACKGROUND.)

### CONTENT

**The bill would amend the Code of Criminal Procedure to specify circumstances under which otherwise admissible evidence could not be excluded in a criminal proceeding on the basis that it was obtained through an unconstitutional search or seizure or in violation of a statute, ordinance, or rule; and to provide that, "A statute, ordinance, or rule shall not be construed to require or authorize exclusion of evidence in a criminal proceeding under circumstances in which the evidence would be admissible in a federal court."**

A court could not exclude evidence that was otherwise admissible in a criminal proceeding on the basis that the evidence was obtained as a result of an unconstitutional search or seizure if the court determined that the search or seizure was carried out under circumstances in which a peace officer acted with an "objectively reasonable good faith belief" that his or her conduct was lawful and constitutionally permissible. Circumstances under which an officer acted with this belief would include, but would not be limited to, the following:

- Obtaining evidence pursuant to a search warrant or an arrest warrant obtained from a neutral and detached magistrate that the peace officer reasonably believed to be valid.
- Obtaining evidence pursuant to a warrantless search incident to an arrest for violation of a statute or ordinance that was later declared unconstitutional or otherwise invalidated.
- Obtaining evidence in reliance upon a court precedent that was later overruled.

A showing that a peace officer obtained evidence pursuant to and within the scope of a search

warrant would constitute prima facie evidence that the officer acted with an objectively reasonable good faith belief that his or her conduct was lawful and constitutionally permissible (that is, the described showing would be sufficient to establish the objectively reasonable good faith belief unless that evidence were rebutted).

A court could not exclude evidence that was otherwise admissible in a criminal proceeding on the basis that the evidence was obtained in violation of a statute, ordinance, or rule unless the court found one or more of the following:

- The statute, ordinance, or rule expressly authorized exclusion of evidence as a sanction for its violation.
- The violation was deliberate and without justification.
- There was a substantial likelihood that the reliability of the evidence had been materially affected by the violation.
- The exclusion of the evidence was required under the State or U.S. Constitution.

The bill specifies that it would not require or authorize the exclusion of evidence in any criminal proceeding.

Proposed MCL 768.27a

## **BACKGROUND**

Article 2, Section 10 of the Michigan Constitution of 1908 provided as follows:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

Although not required to do so by the U.S. Constitution, the Michigan Supreme Court in 1919 adopted the exclusionary rule as the remedy for violations of this section (*People v Marxhausen*, 204 Mich 559). In 1936, the people of the State added the so-called "anti-exclusionary provision" to Article 2, Section 10, providing that the section could not be construed to bar from evidence in any criminal proceeding certain firearms and other weapons seized outside the curtilage of a dwelling.

In 1961, the U.S. Supreme Court decided *Mapp v Ohio*, which required the states to apply the

exclusionary rule to Fourth Amendment violations in all cases (367 US 643). The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Michigan Constitution of 1963 readopted the language of Article 2, Section 10. Currently, Article 1, Section 11 reads as follows:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

In 1970, the Michigan Supreme Court held that the third sentence of Article 1, Section 11--the anti-exclusionary provision--violated the Fourth Amendment to the U.S. Constitution and the U.S. Supreme Court's *Mapp* decision (*People v Pennington*, 383 Mich 611). Then, in 1974, the Michigan Supreme Court gave limited effect to that sentence, holding that it precludes a higher standard of reasonableness for searches that uncover narcotics or firearms than the standard imposed by Federal law (*People v Moore*, 391 Mich 426).

In a 1983 opinion, the Court addressed the issue of whether Article 1, Section 11 prescribes a higher standard of police conduct than that required by the Federal Constitution (*People v Nash*, 418 Mich 196). The Court stated, "There is no indication that in readopting the language of Const 1908, art 2, sec 10 in Const 1963, art 1, sec 11 the people of this state wished to place restrictions on law enforcement activities greater than those required by the federal constitution. In fact, the contrary intent is expressed." Subsequent appellate court cases have cited *Nash*

to affirm that the Michigan Constitution does not impose a higher standard of reasonableness than that required by the Fourth Amendment (*People v Ragland*, 149 Mich App 277 (1986); *People v Alfara*, 140 Mich App 551 (1985)).

Concerning the anti-exclusionary provision, the Michigan Court of Appeals held in *People v Jackson*, "This provision is, of course, ineffective to prevent application of a federal exclusionary rule... However, the provision prevents formulation of a state exclusionary rule applicable to the facts of this case" (in which a pistol was obtained from a purse searched incident to a lawful arrest) (123 Mich App 423 (1983)). In *People v Harmelin*, the Court of Appeals held that, since the evidence (narcotics) was seized from the defendant on an open highway, and therefore outside the curtilage of a house, "defendant is entitled only to those protections available to him under the federal constitution" (176 Mich App 524 (1989)).

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Creating a good faith exception to the exclusionary rule would recognize that the ascertainment of truth is a priority in the State's criminal justice system, reinstate public confidence in that system, and emphasize the rights of society over the rights of the criminal. As the U.S. Supreme Court concluded in *Leon*, "...the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion". The original purposes of the rule were to deter police misconduct and to educate the police, but the police are now familiar with proper search procedures and the need for a warrant, and there is clearly no misconduct to deter if an officer reasonably relies on a warrant that is subsequently determined to be defective, a statute that is subsequently invalidated, or a judicial precedent that is subsequently overruled. Instead, indiscriminate application of the rule merely serves to interfere with the truth-finding process and allow the guilty to go free. The rule rests on the proposition that a law enforcement error, no matter how technical, can justify throwing out an entire case, no matter how guilty the defendant or how heinous the crime. "Particularly when law enforcement officers have acted in objective good

faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system" (*Leon*). A good faith exception to the rule would facilitate the search for the truth and the conviction of the guilty.

### **Supporting Argument**

Based upon the anti-exclusionary provision of Article 1, Section 11 (discussed in BACKGROUND above), one could argue that the good faith exception already is available in Michigan in some cases. The Michigan Supreme Court and Court of Appeals have made it clear that Article 1, Section 11 does not impose a higher standard than that required under the Fourth Amendment to the U.S. Constitution, and that evidence seized under the anti-exclusionary provision in particular is subject only to Federal constitutional limitations. Because the good faith exception created in *Leon* limits the remedy available for Fourth Amendment violations, it should similarly apply to the seizure of evidence under the anti-exclusionary provision. Moreover, this being the case, any evidence should be subject to the good faith exception. As the Michigan Supreme Court said in *Nash*, "We have not...created any per se higher standard just because weapons and narcotics are not involved", and it would be "an incredible act of illogic" to apply a heightened standard of reasonableness in cases not involving weapons or narcotics just because there can be no heightened standard when weapons or narcotics are involved (emphasis added).

### **Opposing Argument**

The exclusionary rule is the only way to give meaning to the Fourth Amendment, which protects the individual's basic right to privacy. The rule also shows the public that this society values certain things more than simply getting convictions. As the Michigan Supreme Court stated in *Marxhausen*, "It ought not to be necessary to recall the fact that it is of the essence of a free government that the individual shall be secure in his person, his home and his property from unlawful invasion, from unlawful search, from unlawful seizure" (emphasis added). The U.S. Supreme Court in *Mapp v Ohio* also considered the rule "an essential part of the right to privacy". While the Court obviously has altered its perspective, *Leon* after all merely set a **bottom line** below which the states must not go. A state is free to retain or impose a higher standard.

**Response:** It is clear from Michigan appellate court decisions that this State is disinclined to adopt a higher standard. Furthermore, as the U.S.

Supreme Court pointed out in *Leon*, "The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands... The rule thus operates as `a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'"

### **Opposing Argument**

The bill would create an illusory standard of "objectively reasonable good faith belief". Despite the term "objectively", it still would be necessary for the trier of fact to look into the police officer's mind at the time he or she executed the warrant and determine whether the officer felt that he or she was behaving within the boundaries of the execution. Furthermore, the bill omits the objective criteria spelled out in *Leon* to determine when an officer would not be acting in good faith: the magistrate was misled by information in an affidavit that the affiant knew was false; the magistrate wholly abandoned his or her judicial role in issuing the search warrant under circumstances such that any reasonably well-trained officer should not rely on the warrant; the warrant was based on an affidavit so lacking in indicia of probable cause that belief in its existence by the affiant was entirely unreasonable; or, the warrant was so facially deficient that the executing officers could not reasonably presume it was valid. In addition, in cases following *Leon*, the Court has delineated other criteria that must be met if the good faith exception is to apply in certain situations. Since all of these criteria are missing from the bill, the proposed standard actually is a subjective one.

**Response:** Regardless of Michigan's adoption of a good faith exception, searches and seizures still would have to be constitutional under the Fourth Amendment as applied to State action by the Fourteenth Amendment. Any standards set forth by the U.S. Supreme Court to safeguard the Fourth Amendment also would apply to the State.

### **Opposing Argument**

By attempting to modify the exclusionary rule with a statutory amendment, the bill could pre-empt future court rulings. The rule was created by the judiciary in construing the Constitution. It is within the province of the Michigan Supreme Court to construe the State Constitution and dictate the practice and procedure in the courts of this State. Any limitations on the rule should come from the Court.

Legislative Analyst: S. Margules

### **FISCAL IMPACT**

The bill would have an indeterminate fiscal impact on the State and local criminal justice system. To determine whether the bill would have any impact, it would be necessary to know how many cases that excluded such evidence never went further in the justice process. Costs could be added as a result of trials that otherwise may not occur under present law.

Fiscal Analyst: L. Nacionales-Tafoya

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.