

Attorney Robert W. Larin on the Motion to Disqualify Judge Kimberly Small from sentencing first offense drinking and driving cases

“Lawyer Objects to Judge's Sentencing”

By Jay Grossman, Birmingham Observer & Eccentric - August 21, 2011

Bloomfield Hills defense attorney Robert W. Larin is convinced he has a client who will end up in jail, regardless of the circumstances.

His client, Thomas Cygan, 67, was arrested in West Bloomfield for drunken driving. It is his first offense and he has no prior criminal record.

Larin nonetheless believes Cygan will end up in jail, because the case is assigned to 48th District Judge Kimberly Small. It's Larin's contention that Small is sentencing all first-time drunken driving offenders to jail, even if the circumstances might warrant a lighter sentence.

Earlier this month, he filed a motion in the 48th Court to have the case assigned to a different judge. In an interview with the Birmingham Eccentric, Larin explains why he thinks Small is wrong in her sentencing and how her approach is ruining reputations while having little effect on the problem of drunken driving:

Q: Part of your concern is that Judge Small is legislating from the bench. How is that so if she is working within the parameters of the law?

Larin: As the first attorney in the state to specialize in this area of law and having written and lectured extensively on the subject of the drinking driver, I feel a strong obligation to raise this issue and shed light on the dangers of legislating from the bench and on the laws which are in fact set up to protect us from this practice.

In Michigan, a sentence for a first-time drinking and driving conviction *can* include 0 days in jail to 93 days in jail. Judge Small almost always sentences drinking drivers convicted of a first offense to the maximum of 93 days in jail and from there, assigns them to actually serve 5, 10, 20 or more days in jail, holding the remaining days in abeyance (days to be served in jail if any probation violations are made thereafter).

The law requires a judge to consider the *entire* range of options and to individualize a sentence based on the merits of that particular case. They cannot pick and choose one portion of the sentencing parameters put in place by the legislature. Not only has Judge Small long set her sentencing minimums above that of the legislature and other judges, but claims “jail is the answer” for first-offense drinking drivers.

Due process is guaranteed under the Michigan and U.S. constitutions. Where a judge, because of bias or prejudice or strongly held personal beliefs, is unable or unwilling to exercise the degree of discretion required and unable or unwilling to individualize the sentencing process as required as to a particular class of cases, the judge is disqualified from presiding over any case within that class of cases.

Judge Small fails to exercise the discretion required by law. Instead, she's implementing her own unilaterally bench-legislated "minimum mandatory" program for all first time drunk drivers regardless of the minimums set forth by the legislature.

Q: Do you believe that judges are permitted to have their own philosophy on how they want to approach crime?

Larin: Judges are certainly entitled to have their own philosophy about crime as long as their statements and actions in and out of court do not reflect views that give an appearance of impropriety or reflect adversely on that judge's impartiality.

The Michigan Code of Judicial Conduct which regulates the actions of sitting judges says that “A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality” and “A Judge must avoid all impropriety and appearance of impropriety”.

However, at a recent MADD memorial, Judge Small was asked to read names from a list of those who've died and also stated, “We have to decide if we are going to get serious about this or not.” clearly reflecting adversely on her impartiality, especially when MADD publicly supports mandatory jail sentences for all individuals convicted of alcohol related offenses. This especially punitive view is in direct conformity with Judge Small's recited philosophy and at difference with the Michigan legislature.

Judges are not allowed to say things and engage in functions that give the appearance of impropriety. Our Michigan Court of Appeals has said even when a judge is personally convinced that he is impartial, disqualification is warranted “where there are circumstances of such a nature to cause doubt as to (the judges) partiality, bias or prejudice”. In other words, it is such an important part of our system that the standard is not whether the judge suffers from impropriety but whether she has the appearance of impropriety.

The courts will decide whether Judge Small’s statements and actions call into question a bias. The public must decide whether they are willing to pay the extensive costs, including the economic and psychological damages of first offense drinking drivers and their families, to promote Judge Small’s philosophy and unique sentencing practices which has been widely reportedly to be at odds with the experts, the sheriffs and the overwhelming majority of district judges across the state.

Q: Do you think it’s important for judges to send a message of deterrence to the community when it comes to crime?

Larin: Having represented over 5,000 drinking drivers, I have had many conversations with members of the judiciary and fully understand a judge’s obligation to the public. I have found that almost all judges are willing to negotiate a reasonable sentence taking into consideration their obligation to protect the public, to address possible addiction problems of the defendant, exercise restraint in the treatment of the defendant to avoid things like interfering with the defendant’s livelihood and ability to provide for their family who are blameless in the event, and to exercise restraint to avoid additional costs to taxpayers, as in the costs associated with jail.

In Judge Small’s court, it is my experience that the above considerations are of little or no importance. Appellate courts should interfere when citizens who’ve committed an identical criminal act are being treated in dramatically different fashion from one courtroom to another. After all, equal treatment under the law is a mainstay of our constitution.

Michigan’s drinking and driving laws are already tough and I’ve spoken to many judges who don’t agree with the penalties they’re required to impose on first offense drinking drivers because they are not always reflective of the cases that come before them. The general public is largely unaware of the many other options for punishing convicted first-time drinking drivers available to judges who, by and large exercise great discretion.

The most damaging and least utilized of the available punishments handed down by our state’s district judges is jail. Are we to be persuaded by Judge Small’s statements and practices that somehow the majority of our judges are misguided? These judges are likely aware that the National Highway Traffic Safety Administration (NHTSA) has found jailing to have zero impact on recidivism for this offense and top experts at the Alcohol Policy and Safety Research Center have spoken and their studies show that jail has no impact on whether a driver will commit the offense again. Recently, a first offense drinking and driving conviction now becomes a permanent part of a person’s driving record for life in Michigan. In comparison, the law allows a person convicted of breaking and entering or maiming another with a knife for example, to have that charge expunged after five years.

A first offense drinking and driving conviction has far-reaching current and future ramifications to employability, educational opportunities and overall potential productivity in society, especially with our young people. Also mandatory for first offenders is a loss of full license for 3-6 months, a barring from entering Canada for five years and fines and costs that can range from \$1500 to \$2000.

In addition to mandatory provisions a judge can assign a convicted driver to probation for up to two years at a cost of \$40-\$50 per month. They can also require daily testing for alcohol for the duration of probation, in-patient or out-patient treatment, attendance at MADD victims panels and Alcoholics Anonymous meetings. Judges can have interlock devices affixed to a probationer’s car before it can be utilized or order a variety of community service. Another effective punishment in Oakland County, is Sheriff Mike Bouchard’s state-of-the-art tether program where alcohol can be detected in a person and can pinpoint that person’s location within four square feet and even determine at what speed they are traveling in a car, 24/7.

To date, Judge Small has completely rejected this fine program because it does not require the degrading experience of being jailed.