

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE TOWNSHIP OF
BLOOMFIELD,

Plaintiff-Appellant/Cross-Appellee,

V

JORDAN KANE,

Defendant-Appellee/Cross-
Appellant.

FOR PUBLICATION
August 13, 2013
9:05 a.m.

No. 308241
Oakland Circuit Court
LC No. 2011-009457-AR

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court opinion and order dismissing the charge of operating a motor vehicle while intoxicated¹ in violation of MCL 257.625(1) and Bloomfield Township Ordinance 36-19. We reverse the judgment of the Oakland Circuit Court and remand this case to the 48th District Court for reinstatement of the charge and for proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY²

On October 6, 2010, Officer Steve Sherwood of the Bloomfield Township Police Department was informed of a disabled vehicle near Interstate I-75 at Opdyke Road. Upon arriving at the scene, the officer found defendant trying to start the vehicle, but there was extensive damage to the vehicle, including damage to the driver's side wheels. Defendant informed the officer that he was driving when he suddenly hit the guardrail. The officer noted

¹ A person is "operating while intoxicated" if he is "under the influence of . . . a controlled substance." *People v Koon*, 494 Mich 1, 6 n 14; 832 NW2d 724 (2013).

² An evidentiary hearing was not conducted in the lower courts, and a police report of the incident is not contained in the lower court record. Accordingly, the statement of facts was crafted based on facts found in plaintiff's brief on appeal, from the arguments made during the hearing on the motion to dismiss held in district court, and from defendant's affidavit. Defendant did not dispute the basic facts delineated in plaintiff's brief on appeal.

that defendant had difficulty maintaining his balance, and his speech was impaired. Defendant allegedly told the officer that he took Ritalin, and had not taken the drug in some time, but his mother had given him Xanax, which caused his driving accident. Defendant was transported to a hospital where a blood sample was taken. The lab results from defendant's blood sample indicated that 250ng/mL of Zolpidem, a sedative used to treat insomnia sold under the brand name Ambien, was detected. Defendant was initially charged with operating while intoxicated, MCL 257.625(8), but the charge was dismissed, and he was charged with operating while intoxicated, specifically while under the influence of a controlled substance, MCL 257.625(1). Defendant filed a motion to dismiss in district court, alleging that Zolpidem was not a controlled substance contained in schedules 1 to 5 of the controlled substances act, MCL 333.7101 *et seq.* In an affidavit, defendant further asserted that he mistakenly ingested Zolpidem, and therefore, he did not have the requisite mens rea to support the elements of the offense. The district court denied the motion to dismiss, holding that the regulation of Zolpidem by administrative rule was sufficient to support the elements of the offense and did not rule on the mens rea issue. On appeal, the circuit court reversed, holding that Zolpidem was not listed, by statute, as a controlled substance, and the offense at issue, MCL 257.625(1), did not incorporate the rules promulgated by the Board of Pharmacy; therefore, plaintiff could not establish the elements of the offense of operating a vehicle while under the influence of a controlled substance. We granted plaintiff's application for leave to appeal.³

II. STANDARD OF REVIEW AND STATUTORY CONSTRUCTION

The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *People v Zajackowski*, 493 Mich 6, 12; 825 NW2d 554 (2012). “[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes.” *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The intent of the Legislature is expressed in the statute's plain language. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Id.* If a statute specifically defines a term, the statutory definition is controlling. *People v Williams*, 298 Mich App 121, 126; 825 NW2d 671 (2012). When “terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used.” *Zajackowski*, 493 Mich at 13. However, technical words and phrases that have acquired a peculiar and appropriate meaning in law shall be construed and interpreted in accordance with that meaning. See MCL 8.3a; *Bylsma*, 493 Mich at 31. Additionally, when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). The court's reliance on dictionary definitions assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings. *People v Morey*, 461 Mich 325, 330-331; 603 NW2d 250 (1999). “However, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself.” *People v Stone*, 463 Mich 558, 563; 621 NW2d 702

³ *People v Kane*, unpublished order of the Court of Appeals entered September 28, 2012 (Docket No. 308241).

(2001). Despite the Legislature's failure to define a term, the intent may be determined by examining the language of the statutes themselves. *Id.*

When interpreting a statute, the court must avoid a construction that would render part of the statute surplusage or nugatory. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). "Generally, when language is included in one section of a statute, but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). "When the Legislature adopts or incorporates by reference a provision of an existing statute, regulation, or rule, the separate provision that is adopted or incorporated becomes part of the legislative enactment as it existed at the time of the legislation, and any subsequent amendment of the incorporated provision has no effect." *Jager v Rostagno Trucking Co, Inc*, 272 Mich App 419, 423; 728 NW2d 467 (2006). "The Legislature is presumed to act with knowledge of appellate court statutory interpretations, and silence by the Legislature for many years following judicial construction of a statute suggests consent to that construction." *People v Higuera*, 244 Mich App 429, 436; 625 NW2d 444 (2001) (citations omitted). When the construction of two statutes or provisions lends themselves to a construction that avoids conflict, that interpretation of the provisions is controlling. *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997).

Statutes that relate to the same matter are considered to be in *pari materia*. *People v Perryman*, 432 Mich 235, 240; 439 NW2d 243 (1989). "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007) (emphasis in original). The general rule of *in pari materia* requires courts to examine the context of related statutes. *Id.*

Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference on to the other. [*Detroit v Michigan Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965) (emphasis in original), overruled on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109, 120; 715 NW2d 28 (2006).]

When statutes relate to the same subject matter, they must be construed together for purposes of determining legislative intent. *Van Antwerp v State*, 334 Mich 593, 605; 55 NW2d 108 (1952). The objective of the *in pari materia* rule is to give effect to the legislative purpose as found in statutes addressing a particular subject. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). "Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies whenever possible." *Id.* at 416-417; *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010).

When the Legislature delegates power to a commissioner, the commissioner is authorized to adopt rules and regulations as the commissioner deems necessary to give effect to the purposes underlying the laws of this state. See *American Community Mut Ins Co v Comm'r of*

Ins, 195 Mich App 351, 360; 491 NW2d 597 (1992). These rules and regulations are promulgated in accordance with the provisions of the Administrative Procedures Act.⁴ *Id.* at 360-361. Each agency subject to the provisions of the Administrative Procedures Act shall adopt rules governing the procedures prescribed or authorized thereby. *New Prods Corp v State Hwy Comm'r*, 352 Mich 73, 79; 88 NW2d 528 (1958). “A rule adopted by an agency in accordance with the Administrative Procedures Act, MCL 24.201 *et seq.*, is a legislative rule that has the force and effect of law.” *Morley v Gen Motors Corp*, 252 Mich App 287, 290; 651 NW2d 808 (2002). “Since the adoption of a rule by an agency has the force and effect of law and may have serious consequences of law for many people, the Legislature has proscribed an elaborate procedure for rule promulgation.” *Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Servs*, 431 Mich 172, 177; 428 NW2d 335 (1988). Consequently, the rule making process includes “public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process.” *Id.* at 177-178. These requirements were imposed to account for the delegation by legislative bodies to administrative agencies the “authority to make public policy.” *Id.* at 178. Further, these requirements assure that the essential functions of the legislative process are not forfeited when agencies perform law-making functions previously conducted by the Legislature. *Id.* “In construing administrative rules, courts apply principles of statutory construction.” *Id.* at 185. According to the APA, “any statutory definitions of words, phrases, or rules of construction made applicable to all statutes also apply to rules unless it is clear that such definition or construction was not intended.” *Id.* at 185; see also MCL 24.232(1).

MCL 333.7201 *et seq.* of the Public Health Code governs controlled substances. MCL 333.7201 provides that the “administrator shall administer this article and may add substances to, or delete or reschedule all substances enumerated in the schedules in sections 7212, 7214, 7216, 7218, and 7220 [MCL 333.7212, 333.7214, 333.7216, 333.7218, and 333.7220] in compliance with the administrative procedures act of 1969 [MCL 24.201 *et seq.*].” (footnotes omitted). The “administrator” is defined as “the Michigan board of pharmacy or its designated or established authority.” MCL 333.7103(2); see also *People v Turmon*, 417 Mich 638, 645; 340 NW2d 620 (1983). When making a determination regarding the classification of a substance, the Board of Pharmacy’s decision evaluates: (1) the actual or potential for abuse; (2) the scientific evidence of its known effect; (3) the current scientific knowledge; (4) the history and pattern of abuse; (5) the scope, duration, and significance of abuse; (6) the risk to the health of the general public; (7) the potential for the substance to create dependence; (8) the substance is an immediate precursor to a classified controlled substance; and (9) whether the substance constitutes an imminent danger. MCL 333.7202(1), (2); *Turmon*, 417 Mich at 646. If the substance presents an imminent danger, the Board of Pharmacy may schedule or reschedule the substance by emergency rule. MCL 333.7203. A scientific commission advises and consults with the Board of Pharmacy with regard to the classification of substances as controlled substances. MCL 333.7206; *Turmon*, 417 Mich at 646. The classification of a substance as a controlled substance is premised on the possession of certain characteristics. *Turmon*, 417 Mich at 646. The Legislature created clear, detailed standards to guide the Board of Pharmacy and to facilitate

⁴ MCL 24.201 *et seq.*

judicial review. *Id.* at 647. Because new drugs are developed and introduced at a rapid rate and incredible ingenuity is utilized to discover new methods to abuse drugs, it is necessary to employ “a measure of flexibility in the area of drug regulation.” *Id.* at 647-648.

In *Turmon*, 417 Mich at 643, the defendant was charged with possession with intent to deliver 22 tablets of phemnetrazine and possession with intent to deliver 43 tablets of pentazocine. He pleaded guilty to the reduced charge of possession of pentazocine and was sentenced to two years’ probation. *Id.* On appeal, the defendant alleged that the Legislature’s delegation of authority to the Board of Pharmacy to schedule controlled substances was improper and further asserted that he was not given notice that possession of pentazocine was a criminal act. *Id.* Specifically, the defendant alleged that the Legislature could not delegate power to the Board of Pharmacy to create criminal offenses and administrative amendments to the controlled substances act deprived him of fair notice that possession of pentazocine was a criminal offense. *Id.* at 643, 649, 655. In a concise statement, our Supreme Court rejected the defendant’s challenges:

We hold that the Legislature’s delegation of authority to add controlled substances to pre-existing schedules in accordance with specific criteria is not an unlawful delegation of power despite the fact that penal consequences flow from violation of the board’s rules. The statute contains sufficient standards and safeguards to avoid infirmity under both separation of powers and due process challenges. Additionally, the board did not abuse its discretion in the promulgation of the rule. [*Id.* at 641-642.]

Our Supreme Court examined the Board of Pharmacy’s eight factor test to determine if a substance should be added, deleted, or reclassified among the controlled substances schedules in light of the fact that the board was assisted by a commission that included medical professionals. *Id.* at 646. Furthermore, the Board of Pharmacy had to examine each schedule and determine if a substance possessed certain characteristics found within that schedule. For example, a schedule 3 substance had to have less of a potential for abuse than schedules 1 and 2, must have a current acceptable medical use in treatment, and the abuse of the substance may lead to moderate or low physical dependence or high psychological dependence. *Id.* at 646-647. In light of these safeguards to agency action, the Court rejected the assertion that the board was permitted to act in an arbitrary or discriminatory manner. *Id.* at 647-648.

[T]he power to define crimes, unlike some legislative powers, need not be exercised exclusively and completely by the Legislature. Provided sufficient standards and safeguards are included in the statutory scheme, delegation to an executive agency is appropriate, and often necessary, for the effectuation of legislative powers.

Clearly, the controlled substances act is premised on a legislative design The Legislature formulated a comprehensive group of crimes dealing with controlled substances. An index of drugs adjudged dangerous or harmful was compiled, and the drugs were graduated according to potential for abuse. Penalties, including fines and incarceration, were coordinated to reflect the gravity of the offense and the seriousness of the controlled substance involved.

Finally, the Board of Pharmacy, an eight-member board consisting of six pharmacists and two public members, was given the strictly controlled authority to modify the controlled substances schedule to insure that it reflect current developments in the drug industry. . . . While it is true that more serious consequences flow from a felony conviction under the controlled substances act, we find no meaningful distinction between the delegation of power to make rules regarding misdemeanor offenses and the delegation of rulemaking relative to felony offenses. The severity of the penalty does not destroy the accountability of the Legislature nor the safeguards provided to protect the public. Therefore, the Legislature has not unconstitutionally delegated a nondelegable power. [*Id.* at 652-653.]

Our Supreme Court also rejected the defendant's claim that he lacked notice of the violation of law because the classification was contained in an administrative rule when the schedule statutes were not amended to reflect the inclusion of new controlled substances, *id.* at 655-657:

We do not find it unreasonable to expect the people of this state to acquire familiarity with its laws through reference to a compilation published by the state. References to the controlled substances act would lead the reader to conclude that the schedules are continually being modified by the Board of Pharmacy and that the agency's supplementation should be sought elsewhere. . . . [P]ublication of the rule in the administrative code provided sufficient notice that defendant's conduct was proscribed. [*Id.* at 657, 660.]

III. APPLICATION OF LAW TO THE FACTS

In the present case, defendant was charged with violating MCL 257.625(1). MCL 257.625 addresses offenses involving the operation of a vehicle while under the influence and provides in relevant part:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance or other intoxicating substance.

(b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

(8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

In the present case, defendant was ultimately charged with violating MCL 257.625(1)(a) for having Zolpidem in his system when he was involved in an accident. In order to evaluate the validity of defendant's claim, we must examine the motor vehicle code and the public health code in *pari materia* because they address the same subject matter. *Harper*, 479 Mich at 621. Although MCL 257.625(1)(a) does not define the term "controlled substance," MCL 257.8b of the Michigan Vehicle Code defines the term as "a controlled substance or controlled substance analogue as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws."⁵ MCL 333.7104(2) of the Public Health Code defines "controlled substance" as "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 [MCL 333.7201 *et seq.*]" (footnote omitted).

As previously noted, the Public Health Code governs controlled substances, MCL 333.7201 *et seq.* Although this code contains a list of scheduled drugs that are prohibited,⁶ Zolpidem, the substance ingested by defendant, is not found on schedules 1 to 5 as set forth in MCL 333.7201 *et seq.* However, our inquiry does not conclude with the examination of the schedules. Rather, the Motor Vehicle Code requires that for purposes of determining what constitutes a controlled substance, the health code must be examined, and the health code appropriately delegates classification of additional drugs through the use of administrative rules, and administrative rules have the force and effect of law. *Turmon*, 417 Mich at 652-653; *Morley*, 252 Mich App at 290. In the area of drug regulation, resort to the flexibility of administrative rules is necessary because new drugs are developed and introduced at a rapid rate coupled with the discovery of new methods to abuse drugs. *Turmon*, 417 Mich at 647-648. Therefore, the Legislature's delegation to the Board of Pharmacy to create penal consequences from board rules is not constitutionally infirm. Zolpidem is classified as a schedule 4 controlled substance pursuant to R338.3123(aaa). Accordingly, the circuit court erred by dismissing the charged offense.

Defendant contends that the plain language of MCL 257.625 demonstrates that the plaintiff cannot prove the elements of the offense. Specifically, defendant was originally charged with violating MCL 257.625(8) which contains an express reference to schedule 1 of the

⁵ Defendant contends that the motor vehicle code does not define "controlled substance." On the contrary, MCL 257.8b defines the term "controlled substance" by reference to the Public Health Code.

⁶ See MCL 333.7212, MCL 333.7214, MCL 333.7216, MCL 333.7218, and MCL 333.7220.

public health code as well as the rules promulgated under that section, however, MCL 257.625(1) contains no reference to the schedules or the administrative rules. Therefore, defendant submits that the doctrine of “expression unius est exclusio alterius” applies to exclude prosecution under MCL 257.625(1). The doctrine “expression unius est exclusio alterius” means that “the express mention in a statute of one thing implies the exclusion of other similar things.” *People v Jahner*, 433 Mich 490, 500 n 3; 446 NW2d 151 (1989). However, this maxim is merely an aid to interpreting legislative intent and cannot govern if the result would defeat the clear legislative intent. *American Federation of State, Co & Muni Employees v Detroit*, 267 Mich App 255, 260-261; 704 NW2d 712 (2005). We cannot apply this doctrine because it would render MCL 257.625(1) surplusage or nugatory. *Huston*, 489 Mich at 462. The plain language of MCL 257.625 indicates that MCL 257.625(1) governs operating a vehicle while intoxicated generally, but MCL 257.625(8) contains a specific provision relating to schedule 1 substances and interpretative administrative rules. The fact that MCL 257.625(1) fails to contain a reference to a schedule or administrative rules does not prevent criminal prosecution pursuant to the terms of the statute. Moreover, the Legislature was presumably aware of the decision in *Turmon*, but did not amend MCL 257.625(1) to include an express reference to the rules, and therefore, this silence suggests consent to the *Turmon* Court’s construction. *Higuera*, 244 Mich App at 429.

Next, defendant alleges that Bloomfield Township’s adoption of the entire motor vehicle code fails to provide notice of the crime that he was charged with, thereby depriving him of notice of the charged offense and impacting his ability to defend against the charge. We disagree. A review of the misdemeanor complaint reveals that defendant was charged with violating local ordinance as well as MCL 257.625(1). The adoption of the Motor Vehicle Code by local ordinance did not leave defendant left to wonder what violation was at issue because of the specific citation to the Motor Vehicle Code violation, MCL 257.625(1). Additionally, although defendant contends that he lacks notice of the requisite charge, his brief on appeal and lower court pleadings identified the statute at issue, alleged that the statute was inapplicable to the substance ingested, and contested whether he had the requisite mens rea. A party cannot claim lack of notice when the assertion is belied by the pleadings he has filed in the case. See *DeGeorge v Warheit*, 276 Mich App 587, 592-593; 741 NW2d 384 (2007). This claim of error is without merit.⁷

⁷ We also note that defendant contends that it is “undisputed” that he did not have the requisite mens rea to commit the offense. This issue was not ruled upon by the lower courts, and we are an error correcting court. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). “[U]nder MCL 257.625(1), OWI requires proof of three elements: (1) the defendant operated a motor vehicle (2) on a highway or other place open to the general public or generally accessible to motor vehicles and (3) while under the influence of liquor or a controlled substance, or a combination of the two, or with a blood alcohol content of 0.08 grams or more per 100 milliliters of blood.” *People v Hyde*, 285 Mich App 428, 447; 775 NW2d 833 (2009). The offense of operating a motor vehicle while under the influence is “not a specific intent crime.” See *People v Raisanen*, 114 Mich App 840, 844; 319 NW2d 693 (1982). “[U]nder the influence” effectively means that the defendant was “substantially deprived of normal control or clarity of mind.” See *id.* The elements of the offense do not contain a requirement that the

Reversed and remanded for reinstatement of the charged offense and for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

defendant knowingly ingest a controlled substance. However, we do not have undisputed record evidence to apply the above stated law to the facts of this case. The credibility of an assertion presents an issue for the trier of fact. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). In light of the limited record, we cannot analyze whether a mistaken ingestion occurred, an issue for the trier of fact, and whether the factual predicate of the defense of mistake could be supported at trial. Therefore, we do not resolve this issue.