

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**(On appeal from the Michigan Court of Appeals)**

**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff/Appellee**

**v.**

**S.Ct. No. 138031**

**C.App. No. 276959**

**C.Ct.No. 05-1254-FH**

**GEORGE EVAN FEEZEL,**

**Defendant/Appellant**

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**DEFENDANT GEORGE EVAN FEEZEL'S**

**REPLY BRIEF**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

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**TABLE OF CONTENTS**

Index of Authorities.....ii

**Arguments**

I. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING THE EVIDENCE OF THE VICTIM'S BLOOD ALCOHOL CONTENT.....1

II. THE JURY DID NOT UNDERSTAND THAT PROXIMATE CAUSE WAS AN ELEMENT LEAVING THE SCENE CAUSING DEATH WHEN AT FAULT OR OPERATING WITH CONTROLLED SUBSTANCE IN BODY CAUSING DEATH .....3

III. DEFENDANT WAS TRIED AND CONVICTED FOR THE PRESENCE OF CARBOXY-THC.....5

IV. DERROR DID NOT DECIDE THE CONSTITUTIONAL ISSUES PRESENTED.....6

Relief Requested.....8

Signature.....8

## Table of Authorities

### Cases

<i>People v Childs</i> , 243 Mich App 360 (2000) .....	1
<i>People v Derror</i> , 475 Mich 316; 715 NW2d 822 (2006) .....	5,6,7
<i>People v Gardner</i> , 482 Mich 41; 753 NW2d 78 (2008) .....	7

### Statutes

MCL 257.617(3).....	3,4
MCL 333.7212.....	6,7
MRE 702.....	6

## ARGUMENTS

### I

#### **THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING THE EVIDENCE OF THE VICTIM'S BLOOD ALCOHOL CONTENT**

Defendant Feezel maintains that he won the issue of proximate cause at trial when the jury acquitted him of the only charge to which the jury was properly instructed on that element. (See II below). Even without evidence of the victim's high level of intoxication, the jury believed the victim's conduct was an intervening cause of the accident. However, if the Court for any reason intends a remand for trial, the parties will benefit from a decision on the admissibility of the BAC evidence.

The blood alcohol content of the victim was as relevant as the darkened street, the fierce rainstorm and the time of day. As the dissent below said, the victim's "severe intoxication directly affected his ability to perceive and avoid a substantial risk or injury, which goes directly to whether he was grossly negligent..."

Presumably, the prosecution would agree that intoxication would be relevant to determining a surgeon's gross negligence in operating or a hunter's gross negligence in using a firearm. The intoxication of the surgeon or the hunter would be considered direct evidence of gross negligence, if not the sole distinction between negligence and gross negligence. Indeed, in *People v Childs*, 243 Mich App 360 (2000), it was alleged that it was gross negligence to cook while intoxicated. *Id.* at 362-363.

Would a person be grossly negligent to attempt to swim from Detroit to Windsor, which has been done before? Probably not. But would it be grossly negligent, i.e., a wanton regard of one's safety to attempt that swim intoxicated?

In these examples a person's inability to recognize and react to potential risks because of intoxication elevates negligent conduct to gross negligence. The same analysis applies to the jaywalker who walks the dark street in a rainstorm in small hours of morning with a blood alcohol content of 0.23.

The prosecution poses a hypothetical of an intoxicated person and a sober person jaywalking together and being struck by a car. The prosecution claims it would be "logically unacceptable that the defendant would be convicted for killing the sober person and acquitted for killing the intoxicated person." (Appellee's Brief, page 15). The hypothetical helps illustrate the causal issue under the conditions at the time of the accident in this case. The sober person would have stayed on the sidewalk, seen the headlights of cars in the road, or faced oncoming traffic instead of turning his back, all steps that would have avoided the accident. In short, the sober person would have recognized the difference between crossing a well-lit dry street and walking it in the dark and rain. Again, the intoxication is as relevant a condition as the storm than blinded drivers on the road.

Repeatedly, the prosecution's argument on this issue ignores the conditions at the time of the accident. True, it is not "abnormal or uncommon" to "encounter pedestrians regularly crossing the road outside of marked crosswalks." (Appellee's Brief 15-16). But generalities do not work well in deciding issues of proximate cause, which must always be decided case-by-case. It is decidedly "abnormal or uncommon" to find a

person unable to protect himself due to intoxication in the middle of the road when rain and darkness prevent any driver from seeing a pedestrian.

Finally, the prosecution derides the defendant's motive for seeking admission of the BAC evidence as "a responsibility-shifting mechanism placing the victim at fault..." (Appellee's Brief, page 19). That was his defense, permitted under the law and certainly undeserving of the prosecution's derision. The jury should have been permitted to hear evidence of the victim's intoxication. It would have helped them decide who was responsible for the accident. Assigning responsibility is simply another way of saying proximate cause.

Gross negligence involves a wanton disregard for the consequences of an act. Here, it was grossly negligent to endeavor, while drunk, to cross a road with extremely poor visibility. At a minimum, deciding whether the intoxicated act was more dangerous than the sober act was a proper and relevant subject for the jury to consider.

## II

### **THE JURY DID NOT UNDERSTAND THAT PROXIMATE CAUSE WAS AN ELEMENT OF LEAVING THE SCENE CAUSING DEATH WHEN AT FAULT OR OPERATING WITH CONTROLLED SUBSTANCE IN BODY CAUSING DEATH**

Defendant Feezel has argued the trial court erred by failing to instruct the jury as to proximate cause in connection with the two felonies on which he was convicted. The Court of Appeals majority agreed with Defendant on the operating with a controlled substance causing death charge, but found the error harmless because sufficient evidence existed on the issue. The dissenting judge disagreed that the error was harmless. On the leaving the scene count, however, the entire panel held that proximate cause was not an element of MCL 257.617(3).

As an initial matter, the prosecution expressly states its agreement with defendant's position that proximate cause is an element of MCL 257.617(3). However, the prosecution has maintained the jury was sufficiently instructed on proximate cause and understood it to apply to all three felony counts.

In its response, the prosecution cites a note from the jury regarding the causal element of MCL 257.617(3) as support for its position. The note states, "Request for Clarification: Element 7 of Count 2 [MCL 257.617(3)], does the driver need to be 100 percent at fault to have caused the accident or does 'majority' at fault warrant causality?" (Appellee's Appendix, page 78b). Contrary to the prosecution's belief, if the note shows anything, it shows the jury's deliberations had strayed far from proximate cause. Moreover, since the jury referred to the causing "the accident" instead of the death, the note seems to relate to deliberations on the leaving the scene charge.<sup>1</sup>

The properly given instruction on proximate cause provided:

To determine if the defendant's operation of the motor vehicle was a proximate cause of the death, ask yourself the following question: was there an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken.

(Appellee's Appendix, page 56b).

Instead of considering proximate cause, it appears the jury was engaging in a comparative negligence analysis. Nothing in the instructions dealt with percentage of fault and, lacking sufficient instruction, the jury was struggling to determine whether defendant had caused the accident. Quite clearly, repetition of the proximate cause

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<sup>1</sup> Deciding legal issues by interpreting brief questions from the jury seems as reliable as reading tea leaves or tarot cards. Nonetheless, the prosecution has rested two of its main arguments on speculation as to the meaning of jury questions.

instruction—or at least some indication in the oral and written instructions sent into the jury room that proximate cause was an element of all three felonies—was required.

The prosecution asserts the jury instructions were presented so that it was clear proximate cause applied to all three felonies. That simply is not true. The proximate cause instruction was given in the body of the instruction on intoxicated driving causing death. The instructions never refer to proximate cause in the two remaining felonies. And that error is compounded, not cured, by giving the jury written copies of the instruction. Is proximate cause such a simple issue that a jury should have been expected to understand that it applied to all of the felonies? The jury's weighing of percentages suggests not.

### III

#### **DEFENDANT WAS TRIED AND CONVICTED FOR THE PRESENCE OF 11-CARBOXY-THC**

The felony information in this case was amended only after this Court's ruling in *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006). The amended information, the trial court's reading of the charge to the jury, (Appellant's Supplemental Appendix page 139a, transcript of Jury Trial, January 16, 2007, page 23), and the arguments of the prosecutor at trial, (Appellee's App., page 39b), all refer to the presence of the metabolite instead of THC. For the first time ever, the prosecutor now claims the conviction should stand because a minute amount of THC—below the reportable level under Michigan State Police protocol—was found in Defendant's blood. (Appellant's Appendix p 84a-85a)(Appellee's Brief, page 33).

The prosecution claims that because of the finding of a non-reportable level of THC the constitutional issues raised need not be heard. (Appellee's Brief, page 34). To

Defendant, however, it seems like the rules are being rewritten. The prosecution had the opportunity to try the case on THC and did not. That charge could have been authorized at the initial stages of the case and Defendant would have had ample opportunity to confront the evidence on grounds never discussed in this case.

For instance, as the expert for the prosecution testified, the amount of THC was not reported because the science gives “the benefit of doubt...to the person whose blood is being tested.” (Appellant’s Supplemental Appendix page 140a, Trial Transcript, January 18, 2007, page 142). That fact alone suggests that MRE 702 might require suppression because the results were not “based on sufficient facts or data” and was not the “product of reliable principles and methods.” MRE 702.

Defendant Feezel was not charged with driving with the presence of THC in his body. The amended information charged him in count seven with operating with the presence of a controlled substance in his body, to wit “11-THC-COOH” (carboxy THC). (Appellant’s Appendix at 3a)

#### IV

#### ***DERROR DID NOT DECIDE THE CONSTITUTIONAL ISSUES PRESENTED***

The prosecution’s argument that the constitutional issue raised here was decided in *Derror, supra*, is incorrect. In the first paragraph of *Derror, supra*, Justice Corrigan wrote:

In these consolidated appeals, we are called upon to determine whether 11-carboxy-THC, a “metabolite” or byproduct of metabolism created when the body breaks down THC (tetrahydrocannabinol), the psychoactive ingredient of marijuana, is a schedule 1 controlled substance under MCL 333.7212 of the Public Health Code.

*Derror*, at 319-320.

The majority concluded that carboxy-THC was a derivative of THC and therefore a controlled substance under the Public Health Code. *Id.* The majority opinion only discussed the constitutional issue in response to the dissent's assertion that the majority's construction of the statute was unconstitutional. Accordingly, this Court is not bound by *Derror* in considering the constitutional issues raised here; it is a matter of first impression.

However, under the analysis of *stare decisis* set forth in *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), nothing prevents this Court from ignoring the constitutional issue altogether and simply overruling *Derror's* principal holding. In *Gardner, supra*, this Court overruled its own precedent approving a single-transaction method of counting prior felonies for purposes of the habitual offender statute. The *Gardner* Court justified the decision to overrule the holdings of two prior opinions because they "directly contradict[ed] the plain text of the statutes [involved]." *Id.*, at 44.

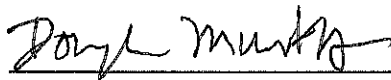
As argued in Appellant's Brief, identifying carboxy-THC as a controlled substance "directly contradicts" the plain text of MCL 333.7202, which describes the properties of a controlled substance. Furthermore, the majority in *Derror* also disregarded the plain language of MCL 333.7212(1)(d), which was aimed at substances produced synthetically, not by metabolic process within the human body itself. (See Appellant's Brief, pages 38-40).

**RELIEF REQUESTED**

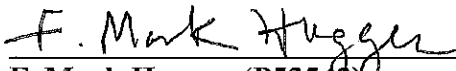
Wherefore, based upon the foregoing, Appellant requests that this Court vacate his conviction.

**RESPECTFULLY SUBMITTED**

**Dated:** 9-14-09



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