

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

RONAYNE KRAUSE, P.J. and CAVANAUGH and SHAPIRO, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

v.

KELLIE NICHOLE STOCK

Defendant-Appellant

Supreme Court No. 160968

Court of Appeals No. 340541

Wayne County Cir. No. 17-3509-FC

DEFENDANT-APPELLANT KELLIE STOCK'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully Submitted,

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STATEMENT OF JURISDICTION

Ms. Stock was found guilty by a jury of 8 counts on July 24, 2017. She filed her Brief on Appeal on December 7, 2018 and the Court of Appeals vacated two convictions but affirmed the remaining convictions on December 26, 2019. Ms. Stock filed an in pro per application for leave to appeal to the Michigan Supreme Court on February 18, 2020. This Court has jurisdiction pursuant to MCL 600.215; MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I. Whether the prosecutor failed to present sufficient evidence that Ms. Stock had cocaine in her system at the time of the crash as the evidence only showed she had the presence of a cocaine metabolite in her system which pursuant to *People v. Feezel*, 486 Mich 148 (2010), is not enough to sustain her operating while intoxicated convictions?

Defendant-Appellant answers “Yes”

Plaintiff-Appellee answers “No”

Trial Court answers “No”

Court of Appeals answers “No”

II. Whether the failure of Ms. Stock’s trial counsel to challenge the use of cocaine metabolites to establish intoxication constitutes ineffective assistance of counsel?

Defendant-Appellant answers “Yes”

Plaintiff-Appellee answers “No”

Trial Court answers “No”

Court of Appeals answers “No”

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Ms. Stock was originally charged with 9 counts. (65a-66a). They were Second Degree Murder, Reckless Driving Causing Death, Operating While Intoxicated Causing Death, Operating License Suspended, Revoked, Denied Causing Death, Fleeing and Eluding First Degree, Fleeing and Eluding Second Degree, Reckless Driving Causing Serious Impairment of Body Function, Operating While Intoxicated Causing Serious Injury, and Operating License Suspended, Revoked, Denied Causing Serious Injury. (*Id.*) The jury would find her not guilty of Murder but guilty of the remaining counts. (526a-527a). The Court of Appeals vacated the Operating License Suspended, Revoked, Denied Causing Death and Operating License Suspended, Revoked, Denied Causing Serious Injury convictions. (20a). Ms. Stock now brings this supplemental brief addressing the issues in this Court's October 2, 2020 order.

This case involves the Detroit Police Department deciding to effectuate a traffic stop on the vehicle driven by Ms. Stock for going the wrong way down a one-way street. (292a; 297a). There would be testimony that a semi-marked police car with its lights and sirens on, attempted to effectuate a traffic stop on the vehicle driven by Ms. Stock but that she did not pull over and instead drove off at a high rate of speed and allegedly ran a red light crashing into a truck. (297a-303a). The driver of the truck, Mr. Sims, died as a result of the crash. (359a-366a). Also injured was the passenger in the vehicle driven by Ms. Stock. (286a-287a).

Ms. Stock would be taken to the Henry Ford Hospital. (222a, 387a). Detective Schwab obtained a search warrant for Ms. Stock's medical records which included the toxicology report. (23a-49a; 391a). Detective Schwab agreed that he would not know if Ms. Stock was under the influence of cocaine at the time of the crash. (392a-393a). The admitted toxicology report indicated Ms. Stock had the presence of cocaine metabolites in her urine. (23a-49a; 392a)

At the close of proofs, the prosecutor would argue in his closing arguments that Ms. Stock had cocaine in her system in support of his argument that she was guilty of Second-Degree Murder, Operating While Intoxicated Causing Death, Operating While Intoxicated Causing Serious Injury, Reckless Driving Causing Death, Reckless Driving Causing Serious Impairment of a Body Function. (438a, 446a, 448a). He argued that Ms. Stock drove while voluntarily intoxicated with cocaine in her system. (446a, 448a). He argued that driving with cocaine in your system creates a very high risk of death or great bodily harm. (448a). In his rebuttal argument, the Prosecutor again argued that Ms. Stock had cocaine in her bloodstream. (458a). Ms. Stock's trial attorney did not object to the Prosecutor's arguments during closing. (432a-449a; 457a-461a).

After closing arguments, the jury would find Ms. Stock not guilty of Murder but guilty of the remaining counts. (526a-527a). Ms. Stock filed an appeal and as part of that appeal, filed a Motion for New Trial and Request for *Ginther* hearing in the trial court which was held on August 24, 2018. (537a). At the *Ginther* hearing, Ms. Stock's trial counsel gave testimony as to his strategy on the operating while intoxicated charges. Ms. Stock's trial counsel testified that the prosecutor's theory was that she had cocaine in her system. (554a). Trial counsel further testified that he reviewed the medical records on the case as part of his investigation into that charge and based on his review she had cocaine along with some other drugs in her system. (page 555a-556a). However, upon further review trial counsel agreed that the records indicated it was not cocaine but cocaine metabolites in her system or urine. (558a). Trial counsel admitted he did not research what a cocaine metabolite was, and he did not know if there was a difference between cocaine and a cocaine metabolite. (*Id.*).

Ms. Stock's trial counsel also testified that he was not concerned about the operating while intoxicated charges because his only concern was the murder charge, and he argued that

Ms. Stock was not acting in a willful or wanton manner then she could not be guilty of murder or manslaughter and would have only been found guilty of the lesser offenses. (561a-562a; 573a).

During the *Ginther* hearing, there was a break where apparently trial counsel engaged in some research about cocaine and cocaine metabolites. (582a). Based on his brief research, cocaine comes out of the urine as a metabolite and cocaine and cocaine metabolite stays in the system for 24 hours. (583a). He further indicated based on his research that after 24 hours the cocaine becomes something else which stays in the system for 5 days. (*Id.*). At the conclusion of the *Ginther* hearing, on this issue, the trial court stated that any difference between cocaine and the cocaine metabolite would not have made any difference at trial. (643a). The trial court then denied the motion for new trial. (654a).

Ms. Stock then filed her Brief on Appeal with the Michigan Court of Appeals. The Michigan Court of Appeals vacated her operating while license suspended, revoked, denied convictions but affirmed the remaining convictions. (20a). The majority opinion also indicated that they presumed cocaine metabolites were not a listed schedule I or II controlled substance but stated that was not relevant to their inquiry. (5a) Judge Shapiro did file a concurring and dissenting opinion in which he indicated he would also vacate the operating while intoxicated charges too indicating the prosecution has the burden of proof to establish intoxication or that the cocaine metabolite was a controlled substance. (21a). Ms. Stock filed a pro per application for leave to appeal with this Court on February 18, 2020. Ms. Stock now brings this supplemental brief addressing the issues outlined in this Court's order of October 2, 2020.

ARGUMENT

I. THE PROSECUTOR FAILED TO PRESENT SUFFICIENT EVIDENCE THAT MS. STOCK HAD COCAINE IN HER SYSTEM AT THE TIME OF THE CRASH AS THE EVIDENCE ONLY SHOWED SHE HAD THE PRESENCE OF A COCAINE METABOLITE IN HER SYSTEM WHICH PURSUANT TO *PEOPLE V. FEEZEL*, 486 MICH 148 (2010), IS NOT ENOUGH TO SUSTAIN HER OPERATING WHILE INTOXICATED CONVICTIONS

Issue Preservation:

There is no requirement that this issue be preserved. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987).

Standard of Review:

The standard of review is *de novo*. *People v Erickson*, 288 Mich App 192; 793 NW2d 120 (2010).

Argument:

A conviction lacking sufficient evidence violates a defendant's right to due process under the Fourteenth Amendment of the United States Constitution. *Jackson v Virginia*, 443 US 307, 316; 99 S Ct 2781; 61 L Ed 2d 560 (1979) (explaining that an "essential" guarantee of due process is the protection against conviction except where there is "evidence . . . to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense"). So unless "sufficient evidence" against the defendant has been introduced, a "judgment of acquittal should be entered." *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

A conviction lacks sufficient evidence if, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could not find that "the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The mere fact that there is "some evidence" against the defendant, however, does not necessarily imply that there is also proof beyond a reasonable doubt. *See Hampton*, 407 Mich.at

368 (holding that a court may grant a directed verdict of acquittal even where “some evidence” has been admitted).

In the present case, Ms. Stock was convicted of Operating a Motor Vehicle while Intoxicated Causing Death, MCL 257.625(4) and Operating a Motor Vehicle While Intoxicated Causing a Serious Impairment of a Body Function, MCL 257.625(5). To prove the offense of operating a motor vehicle while intoxicated causing death, MCL 257.625(4)(a), the prosecution has to establish that: “(1) the defendant was operating his or her motor vehicle in violation of MCL 257.625(1), (3), or (8); (2) the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and might be intoxicated; and (3) the defendant's operation of the motor vehicle caused the victim's death.” *People v. Schaefer*, 473 Mich 418, 434; 703 NW2d 774 (2005). The Michigan Model Jury Instructions for the offense, M Crim JI 15.11a indicate the elements as follows:

- (1) The defendant is charged with the crime of operating a motor vehicle with a controlled substance in [his / her] body causing the death of another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
- (2) First, that the defendant was operating a motor vehicle on or about [state date] in the [county / city] of [state jurisdiction]. Operating means driving or having actual physical control of the vehicle.
- (3) Second, that the defendant was operating the vehicle on a highway or other place that was open to the public [or generally accessible to motor vehicles, including any designated parking area].
- (4) Third, that while operating the vehicle, the defendant had any amount of [state specific schedule 1 controlled substance or controlled substance in MCL 333.7214(a)(iv) alleged by the prosecutor] in [his / her] body.
- (5) Fourth, that the defendant voluntarily decided to drive knowing that [he /she] had consumed or used a controlled substance.

(6) Fifth, that the defendant's operation of the vehicle caused the victim's death. To "cause" the victim's death, the defendant's operation of the vehicle must have been a factual cause of the death, that is, but for the defendant's operation of the vehicle the death would not have occurred. In addition, operation of the vehicle must have been a proximate cause of death, that is, death or serious injury must have been a direct and natural result of operating the vehicle.

The elements for operating a motor vehicle while intoxicated causing serious impairment of a body function are essentially the same with the only difference being the operation of the vehicle caused a serious impairment of a body function. MCL 257.625(5)(a) The Michigan Model Jury Instructions for the offense, M Crim JI 15.12a indicate the elements as follows:

(1) The defendant is charged with the crime of operating a motor vehicle with any amount of a controlled substance causing serious impairment of a body function to another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was operating a motor vehicle on or about [*state date*] in the [county / city] of [*state jurisdiction*]. Operating means driving or having actual physical control of the vehicle.

(3) Second, that the defendant was operating the vehicle on a highway or other place that was open to the public [or generally accessible to motor vehicles, including any designated parking area].

(4) Third, that while operating the vehicle, the defendant had any amount of [*state specific schedule 1 controlled substance or controlled substance in MCL 333.7214(a)(iv) alleged by the prosecutor*] in [his / her] body.

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he / she] had consumed or used a controlled substance.

(6) Fifth, that the defendant's operation of the vehicle caused¹ a serious impairment of a body function² to [*name victim*]. To "cause" such injury, the defendant's operation of the vehicle must have been a factual cause of the injury, that is, but for the defendant's operation of the vehicle the injury would not have occurred. In addition, operation of the vehicle must have been a proximate cause of the

injury, that is, the injury must have been a direct and natural result of operating the vehicle.

This Court in *People v. Feezel*, 486 Mich 184; 783 NW2d 67 (2010) held that 11-carboxy-THC, which is a byproduct of metabolism when the body breaks down the psychoactive ingredient of marijuana, is not a schedule 1 controlled substance pursuant to MCL 333.7212. *Id.* at 204. As such, a person cannot be prosecuted for having any amount of 11-carboxy-THC in their system pursuant to MCL 257.625(8). *Id.* at 204-05. This Court in *Feezel* then vacated the defendant's convictions that were under MCL 257.625(4) and MCL 257.625(8). *Id.* at 217. This Court should do the same in the present case as Ms. Stock tested positive for a cocaine metabolite (23a, 29a) and the prosecutor failed to present any evidence it was listed as a schedule I or II controlled substance or had any intoxicating effects.

In the present case, as in *Feezel*, the prosecution only presented evidence that Ms. Stock had a metabolite of the intoxicating substance in her system. *Feezel* held 11-carboxy-THC was not listed as a Schedule 1 substance because it is not a derivative of marijuana. *Id.* at 204-212. The metabolite in Ms. Stock's case (23a; 29a) is not a derivative of cocaine for the same reasons 11-carboxy-THC is not a derivative of marijuana. First, MCL 333.7212 and 333.7214 do not list the metabolite of cocaine as a schedule 1 or II substance. MCL 333.7214(a)(iv) defines cocaine as the following:

Coca leaves and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances do not include decocainized coca leaves or extraction of coca leaves which extractions do not contain cocaine or ecgonine. The substances include cocaine, its salts, stereoisomers, and salts of stereoisomers when the existence of the salts, stereoisomers, and salts of stereoisomers is possible within the specific chemical designation.

The is nothing in definition of cocaine that indicates that it encompasses the metabolite of cocaine. The definition does not even use the word metabolite either. The Federal government in their definition of cocaine does not include metabolite either and its definition is as follows: “Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed...Cocaine, its salts, optical and geometric isomers, and salts of isomers.” 21 USC §802(17)(C)&(D).

As in *Feezel*, the Public Health Code in this case should be interpreted to be “consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency.” *Feezel*, 486 Mich at 208. As also indicated in *Feezel*, if the Legislature intended to use the term metabolite, it would have included it. *Id.* at 211. If the Legislature wanted to include cocaine metabolite in its definition of a schedule I or II offense it would have said so in the definition. Since the state Public Health Code on this issue follows the definition in the Federal statutes, and in order to have consistency between state and federal laws, this Court should hold as it did in *Feezel* with 11-carboxy-THC, that the cocaine metabolite in this case was not intended to be included in the definition of a schedule I or II controlled substance.

Moreover, cocaine metabolites do not have any known pharmacological effect. In *Feezel*, this Court found it highly relevant that the metabolite of 11-carboxy-THC had no pharmacological effect and as such should find it highly relevant here too. Ms. Stock relies on an Arizona case, *Leon v. Marner*, 244 Ariz 465; 421 P3d 664 (App, 2018) in support of her argument that cocaine metabolites have no pharmacological effect. In *Leon*, the defendant was arrested and charged for driving under the influence when a blood draw came back that indicated zero presence of alcohol but positive for the marijuana metabolite Carboxy-THC and BE, a metabolite of cocaine. *Id.* at 467. The state conceded in that case that BE was a non-impairing

metabolite but argued the offense was a strict liability offense under their relevant statute and distinguishable from the marijuana metabolite carboxy-THC which the Arizona Supreme Court found in *State v. Harris*, 234 Ariz 343; 322 P3d 160 (2014) to be a non-impairing metabolite of marijuana. *Id.* at 468.

At trial in *Leon*, a forensic scientist for the Arizona Department of Public Safety testified that BE was one of the main metabolites of cocaine but that its an inactive metabolite which means that it has no effect on the body. *Id.* at 468. The court in *Leon* ultimately held that BE was a non-impairing metabolite of cocaine. *Id.* at 469. Since it was a non-impairing metabolite of cocaine the prosecutor failed to present sufficient evidence to sustain the conviction. *Id.* at 471. Moreover, the court in *Leon* held that their opinion in *Harris* should not be so narrow or only pertain to the marijuana metabolite Carboxy-THC. *Id.*

Ms. Stock further relies on the Georgia case of *Head v. State*, 303 Ga App 475; 693 SE2d 845 (2010) in support that cocaine metabolites have no pharmacological effect. In *Head*, the defendant's blood draw indicated the presence of alprazolam and benzoylecgonine, a metabolite of cocaine. *Id.* at 476. At the defendant's trial, the defendant had elicited expert testimony that benzoylecgonine was not "indicative of impairment because it is an after effect" of cocaine. *Id.* at 477. Finding that there was no evidence presented that benzoylecgonine caused the defendant to be impaired, or that alprazolam caused any impairment, the court in *Head* vacated the defendant's conviction for the driving under the influence offense which required as an element a showing that the defendant was impaired or under the influence. *Id.* at 476-477.

Ms. Stock further relies on the Mississippi case of *Irby v. State*, 49 So3d 94 (Miss, 2010) in support that cocaine metabolites have no pharmacological effect. In *Irby*, the defendant was charged with and convicted of a driving under the influence offense. *Id.* at 96. At the

defendant's trial, Dr. Laura Labay, a forensic toxicologist with NMS labs did a quantitative analysis of the defendant's blood which found in part that it contained 410 nanograms per milliliter of the cocaine metabolite benzoylecgonine along with hydrocodone and alprazolam. *Id.* at 98. Dr. Labay further testified that "benzoylecgonine in and of itself would have had no pharmacological activity or effect." *Id.*

Ms. Stock further relies on the Iowa case of *State v. Newton*, 929 NW2d 250 (Iowa, 2019) in support that cocaine metabolites have no pharmacological effect. In *Newton*, the defendant was charged with and convicted of a driving under the influence offense in which the defendant's urine sample contained cocaine metabolites amongst other drugs. *Id.* at 252. At trial, the State criminologist who tested the urine testified in part that metabolites can pool in a person's bladder and remain there for days. *Id.* at 253. As such, the metabolites of the drugs detected in the urine could have been consumed many days prior to the sample being taken and long after the effects of the drugs have dissipated. *Id.* Another toxicologist also testified consistently with the State criminologist in *Newton*. *Id.*

Turning back to the present case, this Court in *Feezel* found it highly relevant that 11-carboxy-THC had no pharmacological effect. *People v. Feezel*, 486 Mich 184; 208-210; 783 NW2d 67 (2010). While it is true there is no expert opinion in Ms. Stock's case, she does present the above numerous cases from other states wherein experts testified that the cocaine metabolite of benzoylecgonine has no pharmacological effect. Ms. Stock is aware that the cocaine metabolite in her case was not specified. (23a, 29a). However, based on the above, benzoylecgonine is the main cocaine metabolite. Moreover, no one testified on behalf of the prosecution in the present case that the cocaine metabolite found in Ms. Stock's urine had a pharmacological effect. The prosecution bears the burden of proof on that issue. See M Crim JI

3.2(2) (“Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his / her] innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.”).

Moreover, as in *Feezel*, there is no indication that the metabolite of cocaine, or benzoylecgonine, should be listed as a schedule I or II controlled substance. As indicated above, numerous experts in other states have testified that benzoylecgonine, or the metabolite of cocaine, has no pharmacological effect and is also the after effect of cocaine. Since it has no pharmacological effect and is the after effect of cocaine, there is no evidence to suggest that benzoylecgonine, or cocaine metabolites should be classified as a schedule I or II controlled substance following this Court’s reasoning in *Feezel* on whether 11-carboxy-THC should be classified as a schedule I or II controlled substance. *Feezel*, 486 Mich at 209-210; MCL 333.7213; MCL 333.7202.

Following the reasoning in *Feezel*, this Court should conclude here as it did in *Feezel* that the Legislature did not intend to include cocaine metabolites or benzoylecgonine as a schedule I or II controlled substance. *Feezel*, 486 Mich at 211-212. Since the Legislature did not intend to include cocaine metabolites as a schedule I or II offense, the prosecutor failed to present sufficient evidence to sustain the convictions as the presence of the cocaine metabolite alone cannot sustain the convictions. See M Crim JI 15.11a & 15.12a. Thus, this Court should vacate the convictions for Operating a Motor Vehicle while Intoxicated Causing Death, MCL 257.625(4) and Operating a Motor Vehicle While Intoxicated Causing a Serious Impairment of a Body Function, MCL 257.625(5).

II. THE FAILURE OF MS. STOCK'S TRIAL COUNSEL TO CHALLENGE THE USE OF COCAINE METABOLITES TO ESTABLISH INTOXICATION CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

Issue Preservation:

This issue was preserved by Ms. Stock filing a Motion for New Trial in the circuit court alleging ineffective assistance of counsel and holding a *Ginther* hearing. (537a).

Standard of Review:

Following a *Ginther* hearing, an appellate court reviews the trial court's findings of fact for clear error; and reviews the trial court's ultimate conclusions *de novo*. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

Argument:

Every defendant in a criminal case is guaranteed the right to effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and pursuant to Article I section 20 of the Michigan Constitution. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Armstrong*, 490 Mich 281; 806 NW2d 676 (2011); *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). In order to prevail on a claim that a defendant's Sixth Amendment rights were violated a defendant must satisfy the test as outlined in *Strickland*.

Under the test set forth in *Strickland*, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance so prejudiced the defendant as to deny him a fair trial. *Strickland*, 466 US. at 687-88.

Michigan case law on Sixth Amendment violations follow *Strickland*. Pursuant to *People v. Armstrong*, 490 Mich 281, 289-90; 806 NW2d 676 (2011), a defendant must show two things:

First, the defendant must show that counsel 's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel 's deficient performance, a different result would have been reasonably probable.

Deficient performance is whenever an attorney performs below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 US at 687-88. To establish prejudice, the “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Wiggins v Smith*, 539 US 510, 534; 123 S Ct 2527; 156 L Ed 2d 471 (2003). A defendant meets the prejudice burden "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 US at 694. The United States Supreme Court has defined reasonable probability as a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 US at 694. Reasonable probability is a standard below that of preponderance of evidence. *Magana v. Hofbauer*, 263 F3d 542, 550 (CA 6, 2001).

A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make "an independent examination of the facts, circumstances, pleadings and laws involved..." *Von Moltke v Gillies*, 332 US 708, 721; 68 S Ct 316; 92 L Ed 309 (1948). This includes pursuing "all leads relevant to the merits of the case." *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). “This duty includes the obligation to investigate all witnesses who may have information concerning his or her client’s guilt or innocence.” *Towns v Smith*, 395 F3d 251, 258 (CA 6, 2005).

Though counsel's strategic decisions are entitled to deference, counsel's strategy must be based on reasonable investigative decisions. *Strickland*, 466 US at 691; *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). Even if a decision made by a defense attorney was strategic, such a finding cannot defeat a claim of ineffective assistance of counsel in every instance. Counsel will still be found ineffective despite a "strategic" decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 574; 419 NW2d 609 (1988). A finding that counsel was operating according to a "strategy" does not insulate his decisions from review; only *sound* strategic decisions, i.e. those decisions based on proper investigation of the applicable law and/or a proper factual investigation, will be given the benefit of the doubt. *Strickland*, 466 US at 668; *Wiggins*, 539 US at 510.

In the present case, Ms. Stock's trial counsel's strategy was not based on a reasonable investigative decision nor was his strategy in defending Ms. Stock against the operating while intoxicated charges a sound or reasonable strategic decision. At the *Ginther* hearing, trial counsel testified as to the operating while intoxicated charges that the prosecutor's theory was that she had cocaine in her system. (554a). Trial counsel further testified that he reviewed the medical records on the case as part of his investigation into that charge and based on his review she had cocaine along with some other drugs in her system. (555a-556a). However, upon further review trial counsel agreed that the records indicated it was not cocaine but cocaine metabolites in her system or urine. (558a). Trial counsel admitted he did not research what a cocaine metabolite was, and he did not know if there was a difference between cocaine and a cocaine metabolite. (*Id.*).

Ms. Stock's trial counsel also testified that he was not concerned about the operating while intoxicated charges because his only concern was the murder charge, and he argued that Ms. Stock was not acting in a willful or wanton manner then she could not be guilty of murder or manslaughter and would have only been found guilty of the lesser offenses. (561a-562a, 573a).

During the *Ginther* hearing, there was a break where apparently trial counsel engaged in some research about cocaine and cocaine metabolites. (582a). Based on his brief research, cocaine comes out of the urine as a metabolite and cocaine and cocaine metabolite stays in the system for 24 hours. (582a). He further indicated based on his research that after 24 hours the cocaine becomes something else which stays in the system for 5 days. (*Id.*). At the conclusion of the *Ginther* hearing, on this issue, the trial court stated that any difference between cocaine and the cocaine metabolite would not have made any difference at trial. (page (643a).

Arguing that Ms. Stock only had cocaine metabolites in her system would have made a difference at trial. As argued above, cocaine metabolites are not listed as a schedule I or II controlled substance. The jury instructions themselves indicate that Ms. Stock must have the presence of a schedule I controlled substance or a controlled substance in MCL 333.7214(a)(iv) which identifies cocaine as a schedule II controlled substance. See M. Crim JI 15.11a & 12a. If cocaine metabolites are neither a schedule I or schedule II controlled substance then by the very language of the criminal jury instructions, Ms. Stock is not guilty of either operating while intoxicated offenses as there would be no evidence that she had the presence of a schedule I or II controlled substance in her system. Thus, it was imperative for trial counsel to argue there was a difference between cocaine metabolites and cocaine as it goes to what the prosecutor has to prove which is that Ms. Stock had the presence of a schedule I or II controlled substance in her system at the time of the crash.

Since cocaine metabolites are neither a schedule I or schedule II controlled substance, any reasonable attorney would have argued the distinction to the jury. The failure to do so prejudiced Ms. Stock as it left her without a defense to the charge, that she did not have a schedule I or II controlled substance in her system at the time of crash.

Trial counsel was further ineffective in failing to challenge the use of cocaine metabolites to establish intoxication as a rebuttal against the prosecutor's argument that Ms. Stock was

intoxicated on cocaine. During closing, the prosecutor made it a point that Ms. Stock had cocaine in her system in support of his argument that she was guilty of Second-Degree Murder, Operating While Intoxicated Causing Death, Operating While Intoxicated Causing Serious Injury, Reckless Driving Causing Death, and Reckless Driving Causing Serious Impairment of a Body Function. (438a, 446a, 448a). He argued that Ms. Stock drove while voluntarily intoxicated with cocaine in her system. (446a, 448a). He argued that driving with cocaine in your system creates a very high risk of death or great bodily harm. (448a). In his rebuttal argument, the Prosecutor again argued that Ms. Stock had cocaine in her bloodstream. (458a).

The arguments made by the prosecutor were never rebutted by trial counsel or challenged by trial counsel. (432a-449a; 457a-461a). Trial counsel let the prosecutor argue that Ms. Stock was intoxicated by cocaine and drove with cocaine in her system. Instead of just letting the prosecutor argue Ms. Stock was intoxicated, her trial counsel should have argued that she did not have cocaine in her system but rather cocaine metabolites and that the prosecutor failed to present any evidence that cocaine metabolites cause intoxication. Such an argument would have severely undercut the prosecutor's case on not only the operating while intoxicated charges but on the reckless driving charges as well as it would have undercut the argument Ms. Stock was driving with willful or wanton disregard. See M. Crim JI 15.16 & 15.17.

Any reasonable attorney in response to the prosecutor's argument that Ms. Stock was intoxicated on cocaine would have argued that the evidence that was presented at trial actually indicated she had the presence of cocaine metabolites in her system and that there is no proof that metabolites caused Ms. Stock to be intoxicated which would undercut the prosecutor's argument as to the reckless driving charges that she was intoxicated on cocaine. The failure to challenge those assertions prejudiced Ms. Stock as it left her without any argument that she did

not in fact have cocaine in her system but rather cocaine metabolites and that there was no evidence that she was intoxicated on the cocaine metabolites.

Based on the above arguments, Ms. Stock is entitled to a new trial. Since Ms. Stock being intoxicated on cocaine was central to the prosecutor's case, she should be given a new trial on all the remaining charges. In the alternative, Ms. Stock should be given a new trial on the operating while intoxicated charges and the reckless driving charges as those charges were tied into arguments about Ms. Stock's cocaine intoxication.

RELIEF REQUESTED AND REQUEST FOR ORAL ARGUMENT

For the reasons stated above, this Honorable Court should vacate Ms. Stock's convictions for Operating While Intoxicated Causing Death and Operating While Intoxicated Causing Serious Injury or order a new trial and award any other relief this Court deems appropriate. Ms. Stock requests oral argument

Respectfully Submitted,

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