

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 REPLY BRIEF

ORAL ARGUMENT REQUESTED

Respectfully Submitted,

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Dated: 3/15/2021

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STATEMENT OF FACTS

Ms. Stock relies on the Statement of Facts found in her Supplemental Brief on Appeal submitted to this Court on November 30, 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

Argument:

a. Ingested cocaine can be excreted through the urine as pure cocaine and the presence of cocaine metabolites is not evidence that cocaine is still in a person's system

The prosecutor in her Supplemental Brief argues that pure cocaine is almost never detected in the urine. (Prosecutor's Supplemental Brief page 17). Such an assertion is contrary to case law. In *People v Moore*, 189 Mich App 315, 317 (1991) a urine test came back as positive for cocaine and cocaine metabolites. In *People v. Warfield*, unpublished per curiam opinion of the Court of Appeals, issued [March 25, 2004] (Docket No: 245621), p 1, (attached as Appendix A) a urine test came back positive for both cocaine and cocaine metabolites. In *Fuller v. Muniz*, opinion of the United States District Court for the Northern District of California, issued May 14, 2019 (Case No 18-cv-06379-PJH), p 3., a urine sample tested positive for cocaine, cocaine metabolite, and marijuana. (Attached as Appendix B). In *US v. Justice*, opinion of the United States District Court for the Eastern District of Kentucky, issued January 30, 2012 (Case No: 6:10-CR-1-GFVT-2), p 1,3, a urine sample tested positive for cocaine and a subsequent test came back positive for cocaine metabolite. (Attached as Appendix C). Thus, pure cocaine can be excreted through the urine.

Moreover, contrary to the prosecutor's argument (Prosecutor's Supplemental Brief page 17), the presence of cocaine metabolites in Ms. Stock's system is not evidence that she also had cocaine in her system. As indicated in *State v. Newton*, 929 NW2d 250, 253 (Iowa, 2019),

cocaine metabolites can pool in a person's bladder and remain there for days. 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.* The prosecutor's bare assertion that the presence of cocaine metabolites indicated the presence of cocaine in Ms. Stock's system at the time of the crash (Prosecutors Supplemental Brief page 17) is unsupported by the evidence and the science. The science as indicated in *Newton* establishes that cocaine metabolites can remain in the bladder of Ms. Stock days after she ingested cocaine and days after the effects of the cocaine wore off. At most, the detection of cocaine metabolites in Ms. Stock's urine only establishes use at some unknown prior time.

Furthermore, one of the cases cited by the prosecutor in her Supplemental Brief supports Ms. Stock's position that the presence of cocaine metabolites only indicates past use of cocaine and is not evidence that at the time of the urine test that cocaine was still present in the person's system. In her Brief on Appeal the prosecutor cited *United States v. Ewing*, 749 Fed Appx 317 (2018) for the proposition that "the only way cocaine could ever usually express its presence in urine would be as a metabolite." (Prosecutor's Supplemental Brief page 22).

However, the key testimony in that case is actually that cocaine metabolites "in the urine shows only past or historical use and, unlike blood test results, does not reveal immediate past use. McCarty testified that drugs found in the urine have 'been in the body long enough to move into the urine, which is not immediate'; Ward added that urine tests give 'a historical perspective' and that substances ingested two or three days earlier can still show up in one's urine." *Id.* at 329.

Again, the science is not on the side of the prosecutor. The presence of cocaine metabolites in a urine test is not evidence or proof that at the time of the urine test that Ms. Stock

still had the presence of cocaine in her system. *State v. Newton*, 929 NW2d 250, 253 (Iowa, 2019); *United States v. Ewing*, 749 Fed Appx 317, 329 (2018).

At the time of the crash, Ms. Stock could have allegedly ingested the cocaine several days before. However, she was not charged with the use of cocaine but rather operating with the presence of cocaine in her system. The prosecutor failed to establish at trial that Ms. Stock had cocaine in her system at the time of the crash. The prosecutor's argument that because Ms. Stock had cocaine metabolites in her urine that she must have had cocaine still in her system at the time of the crash is nothing more than the prosecutor asking this Court to make that assumption without any evidence to support that assertion or without any science to support that assertion. The prosecutor has the burden of proof. It is the prosecutor who at Ms. Stock's trial had to produce evidence that Ms. Stock had the presence of cocaine in her system at the time of the crash. The prosecutor failed to do so as the prosecutor at trial could only provide evidence of cocaine metabolites in Ms. Stock's urine at the time of the crash.

The detection of cocaine metabolites alone is not sufficient evidence as the presence of cocaine metabolites cannot establish that a person still has the presence of cocaine in their system at the time of the urine test. This Court should not allow the prosecutor to make that assumption that the mere presence of cocaine metabolites in a urine test establishes the presence of cocaine in a person's system at the time of the urine test or allow such an assumption to be presumed. The science does not allow for such an assumption.

b. Metabolites are the what the body uses to break down cocaine in the body. Derivates of cocaine are essentially cocaine in a different form. Cocaine metabolites are not derivatives of cocaine

The prosecutor incorrectly identifies that a metabolite and a derivative are the same thing. (Prosecutor's Supplemental Brief on Appeal page 16). The prosecutor in her brief argued the

cocaine metabolite being present in Ms. Stock's urine fell under the MCL 333.7214(a)(iv) as a derivative of cocaine. This result is absurd. It is clear that the statute was referring to various derivatives of cocaine rather than the byproducts that form from metabolization. According to Oxford Languages, "a derivative is a substance that is derived chemically from a specified compound."¹ It then uses it in a sentence which reads "crack is a highly addictive cocaine derivative."¹ Further, Oxford Languages defines derive as "(of a substance) to be formed or prepared by (a chemical or physical process affecting another substance)."² Additionally, a drug derivative, sometimes referred to as a drug analog, is a drug that is developed to imitate a particular drug, but are not completely identical, and they can be made to be similar in chemical structure or similar in pharmacological effect to the original drug.³ Essentially, it is a drug that is made from another drug.⁴ This would mean that a derivative is something developed from cocaine sharing very similar properties and having similar effects as cocaine.

The prosecutor defines a metabolite as "a product of metabolism." It is clear that the definition provided above for derivative is nowhere near similar to the definition of metabolite. A metabolite is something that occurs as the drug breaks down in one's system, not something that is intentionally manufactured from the drug in order to imitate the original drug. The metabolite is the chemical that a person's body produces to process the cocaine, it is not a derivative of cocaine.⁵ As the prosecutor pointed out in her brief, the body cannot produce

¹ Oxford Languages provided by Google. Search "derivative" in Google.

² *Id.*

³ Very Well Mind. "Fentanyl Analogs and Derivatives in the Epidemic." Elizabeth Hartney, BSc., MSc., MA, PhD. April 9, 2020. Available at <https://www.verywellmind.com/fentanyl-analogs-and-derivatives-4165882>

⁴ *Id.*

⁵ University of Rochester Medical Center. Health Encyclopedia: Cocaine Screen. https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=167&contentid=cocaine_screen

cocaine Therefore, it is clear that a metabolite is **not** included in the statute listing it as a controlled substance which means there was not sufficient evidence to show the Ms. Stock had any amount of cocaine in her system at the time of the crash. Thus, Ms. Stock's convictions of operating under the influence causing death and operating under the influence causing serious injury must be vacated because the prosecution failed to meet all the elements of the crime.

c. Ms. Stock's interpretation of MCL 333.7214(a)(iv) that cocaine metabolites are not included in the statute is consistent with MCL 333.7214(a)(iv) as cocaine metabolites do no establish that a person has cocaine in their system at the time of the test

The prosecutor's argument that Ms. Stock's position that only undigested coca leaves in a person's system could be guilty under the statute is misplaced. (Prosecutor's Supplemental Brief page 18). Ms. Stock is merely arguing that cocaine metabolites are not a part of the definition of cocaine pursuant to the statute and that cocaine would need to show up in the drug screen to be able to convict Ms. Stock under that statute. Undigested coca leaves would never show up in a drug screen as cocaine is extracted from coca leaves, so the presence of the leaves would never show up.⁶ The purpose of a urine test, or a cocaine screen, is done to find out whether you have used cocaine recently rather than if you have cocaine in your system.⁷ The prosecutor fails to mention that cocaine can in fact show up as pure cocaine in one's system and has the ability to be detected for 12 hours in a person's blood.⁸ And as indicated above, a urine screen can detect pure cocaine in the urine. Thus, contrary to the prosecutor's assertion, Ms. Stock's interpretation

⁶ Partnership to End Addiction. Drug Guide: Cocaine. <https://drugfree.org/drugs/cocaine-crack/#nida2>

⁷ University of Rochester Medical Center. Health Encyclopedia: Cocaine Screen. https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=167&contentid=cocaine_screen

⁸ *Id.*

of the statute of MCL 333.7214(a)(iv) does allow for people to be convicted if pure cocaine shows up in either a urine test or blood test. However, the detection of cocaine metabolites is not enough by itself to establish that at the time of the test, a person has cocaine in their system. Such an interpretation is consistent with MCL 333.7214(a)(iv).

d. Feezel is directly on point

The prosecutor in her brief argues that *People v. Feezel*, 486 Mich 184 (2010) is factually distinguishable. (Prosecutor's Supplemental Brief page 19). *Feezel* is actually directly on point. *Feezel* overruled *People v. Derror*, 475 Mich 316 (2006) which held that a certain metabolite of marijuana, 11-carboxy-THC, was a derivative of THC and thus a schedule I controlled substance. *Feezel*, 486 Mich at 206-07. Interestingly enough, the same argument that this Court rejected in *Feezel*, the prosecutor is trying to make now, that the metabolite of cocaine is a derivative of cocaine. The prosecutor, however, in her brief, ignores what this Court did in *Feezel*, and that is an analysis of whether a metabolite of THC should be considered a controlled substance. That analysis done in *Feezel* should be done now to determine whether cocaine metabolites are a controlled substance and included in the definition of cocaine pursuant to MCL 333.7214(a)(iv).

In her Supplemental Brief to this Court, and as argued above, Ms. Stock argued that the metabolites of cocaine, most specifically, benzoylecgonine, has no pharmacological effect. (See Defendant's Supplemental Brief on Appeal page 8-10). As indicated in *Feezel*, because 11-carboxy-THC had no pharmacological effect, it thus had no potential for abuse or potential to produce dependence. *Id.* at 210. Moreover, as the prosecutor admits in her Supplemental Brief, a metabolite is a product of metabolism. (Prosecutor's Supplemental Brief page 17). As this Court indicated in *Feezel*, 11-carboxy-THC was a metabolite, a natural byproduct when the body

breaks down THC. The metabolite of cocaine, benzoylecgonine, is nothing more than the natural byproduct of when the body breaks down cocaine. *People v. Hardy*, 188 Mich App 305, 307 fn 1 (1991). Since it is nothing more than a byproduct of cocaine, and it has no pharmacological effect, and thus no potential for abuse or to produce dependence, cocaine metabolites should not be included in the definition of cocaine pursuant to MCL 333.7214(a)(iv).

Thus, *Feezel* is directly on point. The same analysis that this Court did in *Feezel* the Court should do in the present case, which is to determine if cocaine metabolites are included in the definition of cocaine pursuant to MCL 333.7214(a)(iv). *Feezel* provides an excellent roadmap to make that determination which the prosecutor wants this Court to ignore and rather have this Court seemingly rely on the reasoning from *Derror*. As indicated in her Supplemental Brief on Appeal and above, cocaine metabolites have no pharmacological effect, the statute MCL 333.7214(a)(iv) does not include the term cocaine metabolites or metabolites, nor does the relevant federal statute include the terms cocaine metabolite or metabolite, 21 USC §802(17)(C)&(D), and given that the cocaine metabolites are the byproduct of the body breaking down cocaine much like 11-carboxy-THC was the byproduct of the body breaking down THC, this Court should determine that cocaine metabolites are not a controlled substance and thus not included within the definition of cocaine pursuant to MCL 333.7214(a)(iv).

Contrary to the prosecutor's argument, *Feezel* is directly on point. Just because *Feezel* dealt with marijuana and its metabolites does not mean it does not apply to the present case. It does apply as it provides a roadmap to determine if cocaine metabolites are a controlled substance and included in the definition of cocaine pursuant to MCL 333.7214(a)(iv). Based on the above arguments, and pursuant to *Feezel*, this Court should determine the cocaine

metabolites are not a controlled substance and not included in the definition of cocaine pursuant to MCL 333.7214(a)(iv) and should vacate Ms. Stock's operating while intoxicated convictions.

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

Argument:

The prosecutor in her Supplemental Brief on Appeal argues that Ms. Stock's trial counsel was not ineffective for failing to make the novel argument that cocaine metabolites could not establish the presence of cocaine at the time of the crash. (Prosecutor's Supplemental Brief page 36, 38, 39). However, at the time of Ms. Stock's trial *Feezel* was well established and known law. Any reasonable attorney could have looked up *Feezel* and made the argument that this Court did in *Feezel* that a metabolite of cocaine, much like a metabolite of marijuana, is not a controlled substance. There would be nothing novel about that argument. Such an argument would use established case law from this Court to make the logical argument that since a metabolite of marijuana is not a controlled substance, then it would follow using the roadmap provided in *Feezel*, that cocaine metabolites are not a controlled substance either. Any reasonable attorney would have made such an argument. It was not novel argument and did not require as the prosecutor argued for Ms. Stock's trial counsel to be psychic. (Prosecutor's Supplemental Brief page 39). Thus, Ms. Stock's trial counsel in failing to argue that the presence of cocaine metabolites were insufficient to find her guilty of the operating while intoxicated charges constitutes ineffective assistance of counsel. Thus, Ms. Stock is entitled to a new trial on all charges.

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

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