STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2010
v	No. 283458 St. Clair Circuit Court
JESSICA STARR BARKLEY, Defendant-Appellant.	LC No. 07-000496-FH

ON REMAND

Before: SERVITTO, P.J., and O'CONNELL and ZAHRA, JJ.

PER CURIAM.

This case comes to us on remand from our Supreme Court for reconsideration in light of *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).[1] The Supreme Court had held this case in abeyance pending its *Feezel* decision. The Court issued its *Feezel* decision in June 2010, overruling in part *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006). At issue in both *Feezel* and *Derror* was whether the metabolite 11-carboxy-tetrahydrocannabinol (11-carboxy-THC) is a schedule 1 controlled substance within the meaning of MCL 257.625 and MCL 333.7212. Remarkably, *Feezel* held that 11-carboxy-TCH is not a schedule 1 controlled substance on the ground it is not a derivative of marijuana.[2] 486 Mich at 207. *Derror* held it is a derivative of marijuana. 475 Mich at 331. Because *Feezel* is the latest decision by our Supreme

[1] *People v Barkley*, ___ Mich ___; 789 NW2d 441 (2010).

[2] We assume the *Feezel* holding applies only to 11-carboxy-THC and not to other metabolites. If ingestion of a controlled substance such as cocaine or heroin produces identifiable metabolites, presumably a defendant could still be convicted under MCL 257.625(8) for operating a motor vehicle with such metabolites in his body.

Court, we would be constrained to apply its holding in the instant case if the case presented a *Feezel* issue. We conclude, however, that this case does not present a *Feezel* issue.[3]

Like defendant in the present case, the *Feezel* defendant was convicted under MCL 257.625(4) and (8) of operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death. The evidence against the *Feezel* defendant regarding the presence of a controlled substance was that the defendant had 11-carboxy-THC in his blood. 486 Mich at 189. Here, in contrast, the evidence against defendant included a positive THC screen of her urine and proof that a THC metabolite was in the blood of her friend Nichols, who was with her in the car and was killed in the crash. Nothing in defendant's trial presented a factual or legal issue concerning the presence or absence of 11-carboxy-TCH in defendant's blood. Accordingly, the *Feezel* holding has no impact on our prior decision in this case. We reaffirm our prior decision.

We agree with and adopt Justice Corrigan's statement in the remand order in this case:

> THE IMPACT OF *FEEZEL* HERE
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> This case well illustrates the potential confusion wrought by the *Feezel* decision. Defendant, who was driving with THC in her system, ran a stop sign and collided with a pick-up truck that had the right of way at the intersection. Two passengers in defendant's car—her six-year-old son and her adult friend—were killed. As a result, a jury convicted defendant of two counts of negligent homicide and one count of operating a motor vehicle and causing death while having a controlled chemical substance (marijuana) in her body, MCL 257.625(4) and (8). Under *Derror*, defendant's guilt of this last offense was clear. But *Feezel* attempts to distinguish one metabolite of marijuana, 11-carboxy-THC, and prohibit it from being dubbed a controlled substance. Accordingly, the nature of defendant's offense is now unclear. An expert testified that defendant's urine contained a sufficient amount of THC—at least 50 nanograms per milliliter—to test positive for the substance. But it is unclear from the record provided to this Court *which* metabolite or metabolites of THC were measured. All metabolites of THC indicate ingestion of marijuana, and defendant did not contest at trial which metabolite or metabolites appeared in her system.
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> Moreover, it appears that revisiting this question—which was unanticipated by the parties because it was invented by the *Feezel* Court after

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[3] *Feezel* actually presented two issues: (1) whether the trial court abused its discretion by refusing to admit evidence of the victim's blood alcohol content, 486 Mich at 191, and (2) whether 11-carboxy-THC is a derivative of marijuana. 486 Mich at 207. Neither issue is applicable to this case.

> defendant's convictions entered—would be unlikely to have any effect on this case. Not only did defendant fail to contest which metabolite or metabolites were in her system, but her primary argument on appeal would fail regardless of which metabolites were present. She argues that the record failed to show that she *knew* THC was still in her system, apparently because the record was silent with regard to whether she knew her driving was measurably impaired by marijuana. But the prosecutor was not required to prove that she knew she was impaired by a controlled substance; mere presence of "any amount" of the substance in a person's body is necessary for conviction. *Derror*, 475 Mich at 334.[2] The person's errant *driving*, not the person's impairment due to intoxication, must have caused the death. *Id.* at 333. Defendant effectively argues that she decided to gamble by driving after an indefinite period of time had passed since she ingested the marijuana but she should not be liable because, having not tested herself for THC before getting behind the wheel, she did not know with certainty whether THC remained in her system. This argument is irrelevant under the statute even in the wake of the *Feezel* decision. Finally, I note that defendant was paroled in June 2010 after serving her 2½-year minimum sentence. She is scheduled to be discharged from parole by December 2011. [*Barkley*, ___ Mich at ___; 789 NW2d 441 (Corrigan, J., dissenting), footnote omitted.]

The Supreme Court's remand order limited this Court's consideration to defendant's first issue on appeal. As Justice Corrigan points out, defendant argued in the first issue that the evidence was insufficient to establish that she voluntarily decided to drive knowing either that she had a controlled substance in her body, or that she might be intoxicated. We held, and we now reaffirm, that the prosecutor was not required to prove that defendant knew she might be intoxicated. We further concluded, and reaffirm, that the circumstantial evidence at trial was sufficient to allow the jury to find that a controlled substance (marijuana) was present in defendant's body.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra