

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 11, 2012

v

PAIGE LEAH KARSTEN,
Defendant-Appellant.

No. 307339
Berrien Circuit Court
LC No. 10-002230-FH

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent as I conclude that *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010) mandates reversal. In that case, our Supreme Court made three determinations each of which is relevant to our conclusion in this case. First, the Court held that the offense of OWI causing death, MCL 257.625 contains an element of causation. *Id.* at 192. Second, the Court held that gross negligence by the decedent may constitute an intervening superseding cause that severs the chain of causation necessary for conviction. *Id.* at 195. Third, the Court held that evidence that the decedent was intoxicated is admissible to support a claim of gross negligence where there is other evidence of gross negligence. *Id.* at 202. The Court explained that a victim’s intoxication is relevant to the issue of gross negligence because intoxication may affect the “ability to perceive the risks” posed by the surrounding environment and the potential to respond accordingly. *Id.* at 199.

In this case, the decedent was driving on a highway while under the influence of alcohol. Blood drawn from the decedent at the hospital one hour after the crash and after he had been supplied with intravenous fluids revealed a blood alcohol level of .06. An expert retained by the defense opined that given the passage of time and the hydration, the decedent’s blood alcohol level at the time of the crash was between .075 and .082. Under *Feezel*, the hospital blood test result and the expert’s extrapolation based upon it would be admissible if there is other evidence giving rise to a question of fact as to gross negligence on the part of the decedent. *Id.* at 202.

Such evidence was present. The police testified that when questioned at the scene, defendant stated that the decedent’s car had suddenly slowed or stopped immediately before the

accident.¹ In addition, defendant asserts that officers in the on-scene video recording stated that the victim appeared intoxicated. There was also evidence suggesting that the decedent was not wearing his seatbelt at the time of the accident and while that would not on its own rise beyond ordinary negligence, it has to be considered along with the evidence that the decedent suddenly slowed or stopped.

As defense counsel did not seek to admit evidence of the decedent's blood alcohol level at trial, the issue must be considered within the confines of a claim of ineffective assistance of counsel. "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

The first question is whether trial counsel's failure to present the expert's retrograde extrapolation to the trial court was objectively unreasonable. *Werner*, 254 Mich App at 534. I would conclude that it was objectively unreasonable. Well before trial and before the defense had consulted an expert, the prosecution brought a motion in limine to exclude any evidence that the decedent was under the influence of alcohol. The motion was heard on March 3, 2011. During the argument, the trial court noted that .06 was not an unlawful level of blood alcohol and defense counsel responded by informing the court that it intended to obtain expert testimony on the actual blood alcohol level at the time of the crash: "we intend to bring an expert on this issue . . . to testify as to the issue of the blood alcohol content and the effect of that." The trial court characterized the issue as "as close a call as it is." The court concluded that based on the evidence presently before it, it would not permit introduction of the decedent's blood alcohol level.

However, the trial court made explicit that its ruling granting the prosecution's motion in limine would be reconsidered if trial counsel presented evidence that the victim's blood alcohol was in fact at .08 or higher at the time of the crash. The court noted that the defense intended to obtain an expert's opinion and stated:

[T]hat testimony may come in at a future date. . . . [I]n the event there is expert testimony—because it's so close, obviously, .06 to .07 – but, in the event that there is some expert testimony, that, in fact, because of the IV and because of the metabolic rate and the time from the accident to the blood draw, that his blood alcohol level was more likely at the time of the collision .08 or .075. Again, that's one factor to put into that balancing test. I'm not certain that's, in and of itself, is going to be enough to shift the balance to the defense. But, clearly, as the trial progresses, I'll let you revisit this issue if you can develop additional facts

¹ While the statement was made by defendant it was nonetheless valid evidence supporting her argument regarding the victim's alleged gross negligence and was properly admitted as it was introduced by the prosecution under MRE 801(d)(2).

Defense counsel then promptly obtained an expert review as to the decedent's blood alcohol level. The expert opined that at the time of the accident, decedent's blood alcohol level was between .075 and .082. But despite the court's expressed willingness to revisit the motion in limine and the court's indication that evidence that the level was closer to .08 would be a significant factor, defense counsel did not ask the court to revisit the question based on this new evidence.

The sole defense in this case was that the decedent's driving was grossly negligent, breaking the chain of causation. Evidence that the decedent was intoxicated would obviously have strengthened that defense and presented no disadvantages for the defense. Thus, there is no strategic reason for choosing not to inform the trial court of the expert's conclusions and moving to admit those conclusions.² I would conclude that trial counsel's performance in this regard was objectively unreasonable.

The second question is whether proper action by defense counsel would have reasonably likely resulted in a different outcome. I would conclude that this standard was met since evidence that the decedent was intoxicated would have bolstered the evidence that he acted with gross negligence because of a diminished ability to perceive the risks posed by the surrounding environment and his actions. Thus, there is a reasonable probability that, but for trial counsel's error, the result of the proceedings would have been different. *Werner*, 254 Mich App at 534.³

I would reverse and remand for a new trial.

/s/ Douglas B. Shapiro

² If the trial court had declined to admit the evidence, it would have been reversible error.

³ I respectfully disagree with the majority's characterization of the evidence concerning causation and believe the interpretation of those facts are best left to a jury. The majority asserts that given the physical evidence in this case, it would have been "impossible" for the victim's vehicle to have stopped or sharply slowed immediately before the accident. But, as the majority correctly observes, an expert testified that the change in velocity of defendant's vehicle was consistent with hitting a wall. In other words, the change in velocity of defendant's vehicle was consistent with striking a fully stopped vehicle, which contradicts the majority's assertion that dangerous or grossly negligent driving by the victim was "impossible." Certainly, a reasonable jury could conclude that stopping on an interstate highway indicates gross negligence just as walking in the middle of a dark roadway was evidence of gross negligence in *Feezel*.