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COURT OF APPEALS NO. 69602-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D

JUN 28 2013

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON

V.

JOHN FRANCK, JR.,

Appellant.

REC'D
COURT OF APPEALS
STATE OF WASHINGTON
JUN 28 2013 PM 4:14

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jay White, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Pretrial Hearing</u>	2
2. <u>Trial Testimony</u>	9
C. <u>ARGUMENT</u>	11
1. THE STATE FAILED TO PROVE APPELLANT DROVE OR WAS IN ACTUAL PHYSICAL CONTROL OF A VEHICLE.....	11
2. THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING EMERGENCY RESPONSE COSTS	17
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Personal Restraint of Call,</u> 144 Wn.2d 315, 28 P.3d 709 (2001)	20
<u>State v. Aten,</u> 130 Wn.2d 640, 927 P.2d 210 (1996)	8, 11-12, 15
<u>State v. Barnett,</u> 139 Wn.2d 462, 987 P.2d 626 (1999)	19
<u>State v. Hamrick,</u> 19 Wn. App. 417, 576 P.2d 912 (1978)	8, 12-14, 17
<u>State v. Hendrickson,</u> 140 Wn. App. 913, 168 P.3d 421 (2007)	9, 15-17
<u>State v. Lung,</u> 70 Wn.2d 365, 423 P.2d 72 (1967)	12
<u>State v. Vangerpen,</u> 125 Wn.2d 782, 888 P.2d 1177 (1995)	11-12

TABLE OF AUTHORITIES (CONT.)

Page

FEDERAL CASES

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602,
16 L. Ed. 2d 694 (1966) 2

RULES, STATUTES AND OTHERS

Chapter 39.34 RCW 19

CrR 3.5 2, 7

1 McCormick on Evidence § 145
(John W. Strong ed., 4th ed. 1992) 11

RCW 38.52.430..... 18

RCW 46.61.502..... 18

RCW 46.61.502..... 13

RCW 46.61.520..... 18

RCW 46.61.522..... 18

RCW 47.68.220..... 18

A. ASSIGNMENTS OF ERROR

1. The state failed to prove the corpus delicti of felony driving under the influence.

2. The sentencing court acted outside its authority in imposing \$1,000.00 in emergency response costs.

Issues Pertaining to Assignments of Error

1. Whether the state failed to prove the corpus delicti of felony driving under the influence, where police responded to the scene of a ditched truck and encountered appellant but never observed him driving or sitting inside the truck and failed to check to see if any of keys located in appellant's pocket fit the truck's ignition, and where the state presented no evidence as to how long the truck had been ditched there?

2. Where the state failed to present the court with any information setting forth the expenses reportedly incurred by a public agency for its response to the incident, and the court failed to make any finding that such expenses were reasonable, did the court act outside its authority in imposing \$1,000.00 worth of emergency response costs as part of the judgment and sentence?

B. STATEMENT OF THE CASE¹

Appellant John Franck, Jr., is appealing from his conviction for driving under the influence (DUI) following a jury trial in King County Superior Court. CP 78, 89-90. Franck stipulated he had previously been convicted of an unnamed, prior qualifying offense at the time of the current charge, which elevated the offense to a felony. CP 34-35, 73; 5RP 51.

1. Pretrial Hearing

The defense moved pretrial to dismiss the charge on grounds the state could not establish Franck was the driver of the ditched truck police were dispatched to investigate. CP 9-13. A combined corpus delicti and CrR 3.5 hearing was held on October 22-23, 2012, to determine whether the state could prove the corpus of the crime, as well as the admissibility of Franck's statements to police, under Miranda v. Arizona.² 1RP; 2RP.

Federal Way police officer Bruce Hurst testified that at 12:30 a.m. on April 18, 2012, he was dispatched to the scene of a ditched

¹ This brief refers to the transcripts as follows: 1RP – 10/22/12; 2RP – 10/23/12; 3RP – 10/24/12; 4RP – 10/25/12; 5RP – 10/29/12; 6RP – 10/30/12; and 7RP – 11/16/12.

² Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

truck.³ 1RP 9-10, 17. The back end of the truck was still on the roadway, but the front end was in the adjacent ditch. 1RP 17. Hurst testified that when he arrived, Franck was standing outside the truck's driver's side door. 1RP 10, 17.

When asked where specifically Franck was standing, Hurst testified: "if you opened your car door, like if you were the driver and stepped out about two steps from the door." 1RP 10. When asked if Franck was standing in the swing of the door or just beyond it, Hurst was equivocal: "like if you – if he would have closed the door he probably would have had to step back just a little bit." 1RP 11.

Initially, Hurst testified it was a rural location with no one else around. 1RP 11. On cross, however, he acknowledged there was a nearby housing development and park and ride within walking distance, as well as driveways along the road where the truck had gone off the roadway. 1RP 19, 30; see also RP 41 (testimony of officer Gabriel Castro).

³ Pursuant to a defense motion in limine, the court subsequently excluded any hearsay regarding what the 911 caller reportedly observed. 2RP 61-65. The court also excluded the responding officers' statements to one another. 2RP 61-65.

Franck reportedly told Hurst he was uninjured and that he lost control of the vehicle in a curve. 1RP 13. Not seeing a curve, Hurst asked, which curve? 1RP 13. Franck said he just got new tires and lost control while on his way home. 1RP 13. 1RP 13. When Hurst asked where he was coming from, Franck reportedly said he was sorry, that he just lost control of the vehicle because of the new tires. 1RP 14.

According to Hurst, Franck had a thick northeastern accent. 1RP 14. Hurst couldn't tell if Franck had slurred speech or if it was the accent. 1RP 14. Hurst did not smell alcohol but claimed Franck was swaying slightly. 1RP 15.

When officer Gabriel Castro arrived, Hurst went to look inside the truck to make sure no one was inside. 1RP 15, 26-27. Hurst did not see anyone. 1RP 26-27.

Meanwhile, Castro contacted Franck. 1RP 37. Castro testified he noticed an odor of alcohol and asked if Franck had been drinking. 1RP 37. Franck reportedly said he had one drink but was not drunk. 1RP 37. According to Castro, however, Franck's speech was slurred and he was swaying slightly. 1RP 38. Castro testified Franck appeared to be under the influence. 1RP 38.

Hurst testified that when he re-contacted Franck, he smelled what he described as an overwhelming odor of alcohol. 1RP 15. This time, Hurst was standing downwind of Franck. 1RP 15. Hurst testified that at this point, he and Castro switched their attention from an accident investigation to a DUI investigation. 1RP 28. Hurst and Castro summoned officer Shaun Daniels, who was in his final stages of field training and needed more experience with DUI investigations. 1RP 16, 38. Franck was not free to leave, but neither officer advised Franck of his constitutional rights or that he was under arrest. 1RP 29, 44, 47.

While waiting on Daniels, the officers continued to speak to Franck. Franck told them he sold steaks for a company and that the truck belonged to the company.⁴ 1RP 33.

Officer Daniels arrived and, after conferring with Hurst and Castro, contacted Franck. 1RP 51-52. According to Daniels, Franck was avoiding eye contact. 1RP 53. After directing Franck to maintain eye contact, Daniels reportedly saw that Franck's eyes were bloodshot and watery. 1RP 53. Daniels reportedly smelled alcohol as well. 1RP 53.

⁴ According to Daniels, the truck bore the insignia, "Seattle Steakhouse." 1RP 51.

According to Daniels, Franck said he was driving and slipped off the roadway. 1RP 53. When asked if it was his truck, Franck reportedly said it was a work truck. When Daniels asked if he was driving, Franck reportedly said he was and that he was heading home. 1RP 54. When asked if he was drinking, Franck reportedly said he had one beer. 1RP 55.

Daniels asked if Franck would agree to undergo field sobriety tests. Franck declined. When Daniels asked a second time, Franck again declined. 1RP 58. At this point, Daniels advised Franck he was under arrest, handcuffed him and placed him in the back of his patrol car, where he read Franck his constitutional rights. 1RP 58.

During a search incident to arrest, Daniels found a set of keys in Franck's pocket. Daniels claimed they appeared to be vehicle keys, but did not test them in the truck to see if any fit the ignition. 1RP 60.

Daniels transported Franck to the station, where Franck declined to take a breathalyzer after being read the implied consent warnings. 1RP 64. Daniels tried to take a booking photograph, but Franck moved his head away from the camera. 1RP 65.

Steakhouse Steak manager William Darby testified for purposes of the corpus hearing. 2RP 3. He testified Franck is a salesman and delivery driver for the company. 2RP 4. Drivers are assigned trucks to use during the day, which they are allowed to take home overnight. 2RP 5. When shown a picture of the ditched truck, Darby testified it was assigned to Franck. 2RP 5. Darby testified that drivers are instructed no one else is supposed to drive the truck. 2RP 6. Darby acknowledged rules can be broken, however. 2RP 7.

For purposes of the CrR 3.5 hearing, the court held Franck's statements to Hurst and Castro – up until officer Daniels was summoned to respond – were voluntary and admissible in the state's case-in-chief. CP 36-41. However, the court ruled any statements made thereafter up until officer Daniels advised Franck of his constitutional rights would be admissible *solely* for impeachment, on grounds Hurst and Castro should have advised Franck of his constitutional rights once they decided to summon Daniels. CP 40; 1RP 139, 146; 2RP 58-59. The court therefore excluded Franck's refusal to undergo field sobriety tests. CP 40; 1RP 143; 2RP 58-59.

Regarding Franck's motion to dismiss, the defense argued the state failed to independently establish the corpus of the crime, i.e. that Franck drove or was in actual physical control of the vehicle.⁵ CP 9-13; 2RP 12-14. The defense pointed out Franck was outside the vehicle when officers arrived and that none of the officers observed Franck driving or inside the vehicle. 2RP 13-14. Moreover, the state presented no evidence of how long the truck had been there. 2RP 13-14. Although keys were located in Franck's pocket, the officers never checked to see whether any of them would actually start the truck. CP 13. Finally, Darby's testimony added nothing, as he was not present and did not know whether Franck violated company rules and allowed someone else to drive. 2RP 12. The defense therefore likened the circumstances to those in State v. Hamick, where applying the corpus delicti rule, the court found insufficient independent evidence to establish a prima facie case. CP 9-13; 2RP 14; State v. Hamick, 19 Wn. App. 417, 576 P.2d 912 (1978).

⁵ As discussed infra, under the corpus delicti rule, a defendant's confession is not admissible unless the state can independently establish a prima facie case that the crime was committed. See e.g. State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

The court denied Franck's corpus delicti motion on grounds the circumstances were more similar to those in State v. Hendrickson, 140 Wn. App. 913, 168 P.3d 421 (2007), where the court found sufficient independent evidence to establish the corpus delicti of the crime. CP 33; 2RP 22-23.

2. Trial Testimony

The officers testified essentially the same as they did at the pretrial hearing. 4RP 37-78 (Hurst); 4RP 95-116 (Castro); 5RP 5-44 (Daniels). For purposes of the corpus issue raised herein, only a portion of the testimony of Hurst and Darby are particularly relevant and will be repeated here.

Hurst testified he responded to the 2100 block of SW 344th Street in Federal Way around 12:30 a.m. on April 18, 2012, after someone called 911. 4RP 44. He was the first officer to arrive and got there within 1.5 minutes of the dispatch. 4RP 45. Hurst saw a truck in a ditch and Franck standing outside the truck. 4RP 45. Hurst never saw Franck inside the truck or driving the truck. 4RP 65. Rather, Franck was just outside the driver's side door "as if you stepped outside your vehicle and you're getting ready to close the door[,] in that area." 4RP 46.

When asked where in relation to the swing of the door Franck was located, Hurst responded: "Just on the outside of the swing I guess is the best way to put it. The – if you went to close your door, he would have to step back to close it." 4RP 46.

According to Hurst, it was a rural area, although there are houses along the road, and a driveway within 300 feet of the truck. 4RP 46, 61-66, 75. Although Hurst did not see other people or other vehicles in the immediate area, he also acknowledged there was a nearby housing development and park and ride within 1,000 feet of the truck.⁶ 4RP 47, 55-56, 62-63, 76.

Darby testified Franck worked for Steakhouse Steaks as a salesman and delivery driver. 4RP 84-85. Franck was good at selling steaks and would be rehired, according to Darby. 4RP 90.

According to Darby, Franck had an assigned truck he used for work and was allowed to drive home at night. 4RP 85. Darby testified employees are instructed not to allow a non-employee drive an assigned truck. 4RP 85. Yet, Darby acknowledged rules can be broken. 4RP 90.

When shown a picture of the ditched truck, Darby testified it appeared to be the vehicle he assigned Franck. 4RP 54, 87.

Darby picked up the truck the day after Franck's arrest from impound. 4RP 87.

C. ARGUMENT

1. THE STATE FAILED TO PROVE APPELLANT DROVE OR WAS IN ACTUAL PHYSICAL CONTROL OF A VEHICLE.

Corpus delicti means the "body of the crime" and must be proved by evidence sufficient to support the inference that there has been a criminal act. State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996) (quoting 1 McCormick on Evidence § 145, at 227 (John W. Strong ed., 4th ed.1992)). A defendant's incriminating statement alone is not sufficient to establish that a crime took place. Aten, 130 Wash.2d at 655–56, 927 P.2d 210; State v. Vangerpen, 125 Wash.2d 782, 796, 888 P.2d 1177 (1995). The State must present other independent evidence to corroborate a defendant's incriminating statement. Aten, 130 Wash.2d at 656, 927 P.2d 210. In other words, the State must present evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred.

⁶ In that same vein, Castro testified the area is residential not rural. 4RP 107-108.

In determining whether there is sufficient independent evidence under the corpus delicti rule, this Court reviews the evidence in the light most favorable to the State. Aten, 130 Wn.2d at 658. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement. Aten, 130 Wn.2d at 656. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a "logical and reasonable inference' of the facts sought to be proved." Aten, 130 Wash.2d at 656 (quoting Vangerpen, 125 Wash.2d at 796).

In addition to corroborating a defendant's incriminating statement, the independent evidence "must be consistent with guilt and inconsistent with a[] hypothesis of innocence." Aten, 130 Wn.2d at 660 (quoting State v. Lung, 70 Wash.2d 365, 372, 423 P.2d 72 (1967)). If the independent evidence supports "reasonable and logical inferences of both criminal agency and noncriminal cause," it is insufficient to corroborate a defendant's admission of guilt. Aten, 130 Wn.2d at 660. The rule is designed to protect against false confessions. State v. Hamrick, 19 Wn. App. 417, 419, 576 P.2d 912 (1978).

Proof of the corpus delicti of any crime requires evidence that the crime charged has been committed by someone. Hamrick, 19 Wn. App. at 418. Under RCW 46.61.502, it is unlawful for any person who is under the influence of or affected by the use of intoxicating liquor to drive or be in actual physical control of a vehicle. While the corpus delicti of most crimes does not involve the issue of identity, the corpus delicti for the offense of driving while under the influence of intoxicating liquor requires evidence that the defendant operated or was in actual physical control of a vehicle while he was under the influence of intoxicating liquor. Hamrick, 19 Wn. App. at 419.

As defense counsel argued below, the facts of this case are remarkably similar to those in Hamrick. There, a state patrol officer was investigating a two-car accident near Morton, Washington, on state route 12. The investigating officer testified that when he arrived at the scene of the accident, he found a pickup truck in a ditch south of the road, and a car 200 feet west of the pickup, on the north shoulder of the road. Both vehicles were damaged and skid marks led to the car. The officer testified that he contacted the defendant in the center of the roadway, where they had a discussion. The officer testified that he was unable to ascertain

whether defendant owned either the pickup or the car, but that the defendant admitted he had been driving the car. The officer also testified that he found an occupant in the car, but no mention was made of details such as the occupant's age, condition, or location in the car. A second trooper testified that while the defendant was in custody, he admitted driving the car. Hamick, 19 Wn. App. at 418.

On appeal, the court held the evidence was insufficient to independently establish the defendant had driven the car:

Exclusive of the defendant's admissions, the State's evidence establishes only that defendant was present when the officer arrived at the scene of the accident. There is no independent evidence or inference connecting defendant with control of the car. We do not have the slight evidence necessary to logically and reasonably deduct that defendant was driving the car. Because there is not sufficient independent evidence to allow consideration of defendant's admissions, the State failed to establish the corpus delicti and the trial court properly dismissed the matter.

Hamick, 19 Wn. App. at 420.

Similarly here, the state's evidence established only that Franck was present when the officers arrived at the scene of the accident. None of the officers observed Franck driving the truck or inside the truck. 4RP 65-67 (Hurst); 4RP 109 (Castro); 5RP 23-24 (Daniels). Although the door of the truck was open, Hurst testified

Franck would have had to step backward a couple of steps to shut the door. Accordingly, there can be no inference Franck had just stepped out of the truck. And while Franck was the only person present at the scene, it was a residential area with houses and a park and ride within walking distance. Although it was a company truck, someone else could have been driving it. In short, any corroboration is just as consistent with a hypothesis of innocence. Accordingly, it is insufficient to corroborate Franck's admissions. Aten, 130 Wn.2d at 660.

Contrary to the court's ruling, the facts of this case are distinguishable from those in Hendrickson. There, at about 1:30 a.m., on January 13, 2005, Deputy Steven Weigley was driving along State Route 302 when Hendrickson darted across the roadway, forcing Weigley to swerve to miss him. Weigley approached Hendrickson, who was on his knees crying. Hendrickson told Weigley that he had "crashed" and that he was by himself. Weigley called paramedics and the state patrol. Hendrickson, 140 Wn. App. at 916.

Hendrickson told Deputy Weigley and Trooper Jonathan Ames that he had been following a friend home and had lost control of his car and had driven off the road attempting to avoid an

oncoming car that was passing improperly. Hendrickson also admitted to Ames that he had been drinking, that he was intoxicated, and that he should not have been driving. Hendrickson, at 916-917.

The officers found the car Hendrickson had been driving at the bottom of a ravine; the keys were still in the ignition. At the scene, using the Department of Licensing database, Trooper Ames verified that Hendrickson was the owner of the car. Hendrickson, at 917.

On appeal, the court found the evidence clearly established the corpus of the crime:

The independent evidence here clearly provided prima facie proof of corpus delicti in respect to whether Hendrickson was driving the car; the car the officers found was registered to Hendrickson and Hendrickson was the only person in the area. Similarly, the evidence prima facie establishes that Hendrickson was intoxicated; the officers noted that Hendrickson smelled strongly of alcohol, that his eyes were bloodshot and watery, and that his face was flushed. Accordingly, the district court and superior court were both correct when they found that the State ultimately established corpus delicti.

Hendrickson, 140 Wn. App. at 920.

In contrast here, there was no evidence the truck had just crashed. The keys were not in the ignition. The officers never

even checked to see whether the keys found on Franck actually worked in the truck's ignition. Moreover, the state never offered any evidence regarding how long the truck had been in the ditch. It could have been there for hours. Although Franck was the only person around when officers arrived, it was a residential area with houses and a park and ride within a two-minute walk. Accordingly, the facts of this case are more like Hamick than Hendrickson and the court erred in denying the motion to dismiss.

2. THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING EMERGENCY RESPONSE COSTS.

At sentencing, the prosecutor requested the court impose costs, including: court costs, the victim penalty assessment, the DNA collection fee and an emergency response fee of \$1,000.00. 7RP 2. The state did not explain how it arrived at this fee at sentencing or in its sentencing paperwork. Supp. CP __ (sub. no. 80, State's Sentencing Memorandum, 11/16/12); Supp. CP __ (sub. no. 74, Presentence Statement of King County Prosecuting Attorney, 11/9/12).

The court found Franck indigent, indicated it was waiving all non-mandatory fees and accordingly, imposed the \$500 Victim Penalty Assessment and \$100 DNA collection fee. 7RP 12, 15. In

response, the prosecutor stated: "It looks like the \$1,000.00 emergency cost – response cost is not waivable." 7RP 15. The court then imposed the \$1,000.00 fee. 7RP 17; CP 81.

The Emergency Response Cost statute, RCW 38.52.430 provides:

A person whose intoxication causes an incident resulting in an appropriate emergency response, and who, in connection with the incident, has been found guilty of or has had their prosecution deferred for (1) driving while under the influence of intoxicating liquor or any drug, RCW 46.61.502; (2) operating an aircraft under the influence of intoxicants or drugs, RCW 47.68.220; (3) use of a vessel while under the influence of alcohol or drugs, RCW 79A.60.040; (4) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a); or (5) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), is liable for the expense of an emergency response by a public agency to the incident.

The expense of an emergency response is a charge against the person liable for expenses under this section. The charge constitutes a debt of that person and is collectible by the public agency incurring those costs in the same manner as in the case of an obligation under a contract, expressed or implied. Following a conviction of an offense listed in this section, and prior to sentencing, the prosecution may present to the court information setting forth the expenses incurred by the public agency for its emergency response to the incident. Upon a finding by the court that the expenses are reasonable, the court shall order the defendant to reimburse the public agency. The cost reimbursement shall be included in

the sentencing order as an additional monetary obligation of the defendant and may not be substituted for any other fine or cost required or allowed by statute. The court may establish a payment schedule for the payment of the cost reimbursement, separate from any payment schedule imposed for other fines and costs.

In no event shall a person's liability under this section for the expense of an emergency response exceed two thousand five hundred dollars for a particular incident.

If more than one public agency makes a claim for payment from an individual for an emergency response to a single incident under the provisions of this section, and the sum of the claims exceeds the amount recovered, the division of the amount recovered shall be determined by an interlocal agreement consistent with the requirements of chapter 39.34 RCW.

Emphasis added.

Under the emphasized language, the state must present the court with information setting forth the expenses incurred by the public agency for its emergency response to the incident. The court must find these expenses are reasonable before including them in the sentencing order. Neither of these statutory directives were followed here. The court therefore acted outside its statutory authority in imposing the \$1,000.00 fee. See e.g. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999) (a trial court may impose only a sentence which is authorized by statute); In re Pers.

Restraint of Call, 144 Wn.2d 315, 332, 28 P. 3d 709 (2001).

"Courts have the duty and power to correct an erroneous sentence upon its discovery").

D. CONCLUSION

Because the state failed to independently establish Franck was the one who drove the car, his conviction for driving while under the influence should be reversed. Alternatively, this Court should strike the condition that Franck pay \$1,000.00 in emergency response costs.

Dated this 28th day of June, 2013

Respectfully submitted

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