

69602-5

69602-5

NO. 69602-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN FRANCK, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

**BRIEF OF RESPONDENT**

2013 APR 29 PM 3:01  
STATE COURT CLERK  
KING COUNTY

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**A. ISSUES PRESENTED**

1. To protect a defendant from being unjustly convicted based on his confession alone, the State must produce *prima facie* evidence that the crime described by the defendant actually occurred to establish *corpus delicti*. Franck was charged with felony driving under the influence. The State presented evidence that when officers responded to the scene of a single-truck collision into a ditch, Franck was the only person in the area, he was standing next to the open driver's-side door of the company truck assigned to him, there were no passengers in the vehicle nor signs indicating that a person had fled the area, Franck showed multiple signs of impairment, he had vehicle keys in his front pocket, and Franck was uncooperative with police by refusing to participate in field sobriety tests or have his blood alcohol content tested. Viewing the evidence in the light most favorable to the State, did the trial court properly deny Franck's motion to dismiss?

2. The trial court ordered Franck to pay \$1000 in mandatory emergency response costs without any objection from Franck. There is no record setting forth the expenses incurred by the public agency for its response to Franck's criminal incident. Should this Court accept the State's concession of error and remand this case

to the trial court for additional evidence to be presented to allow the court to make a finding that the expenses are reasonable or to strike the emergency response cost imposed?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant John Franck, Jr. was charged by Amended Information with felony driving under the influence (DUI) and reckless driving. CP 7-8. The DUI was elevated to a felony due to Franck's prior conviction for vehicular homicide. CP 7. At trial, Franck stipulated that he had previously been convicted of a predicate offense for felony DUI. 5RP<sup>1</sup> 51; CP 34-35. The jury convicted Franck of felony DUI.<sup>2</sup> CP 78; 6RP 7.

The trial court imposed a standard-range sentence of seventeen months of incarceration. CP 80, 82. The trial court found Franck to be indigent and waived all non-mandatory legal financial obligations. CP 81; 7RP 15. The court imposed mandatory emergency response costs in the amount of \$1000.

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<sup>1</sup> There are 7 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Oct. 22, 2012); 2RP (Oct. 23, 2012); 3RP (Oct. 24, 2012); 4RP (Oct. 25, 2012); 5RP (Oct. 29, 2012); 6RP (Oct. 30, 2012); and 7RP (Nov. 16, 2012).

<sup>2</sup> The reckless driving charge was not submitted to the jury for consideration.

CP 81; 7RP 15. Franck did not object to the imposition of emergency response costs. 7RP 15.

## 2. SUBSTANTIVE FACTS.

At 12:30 in the morning on April 18, 2012, Federal Way Police Officer Bruce Hurst was dispatched to a rural road after a 911 caller reported that a truck was in the ditch at that location with a single occupant in the driver's seat. 1RP 7-10. Officer Hurst arrived at the scene approximately a minute and a half after the 911 call. 1RP 10. When Officer Hurst arrived, Franck was standing outside the driver's-side door of the vehicle. 1RP 10. The back wheels of the truck were on the shoulder of the road with the front wheels down the embankment; the car was almost perpendicular to the roadway. 4RP 44-45. There was no one else in the area and there were no other occupants inside the vehicle. 1RP 11, 13.

When Officer Hurst first contacted Franck, Franck confirmed that he had not been injured and did not need medical attention. 1RP 13. Franck stated that he had lost control of the vehicle in the curve of the road. 1RP 13. However, the area of the road around where Franck's vehicle was in the ditch was straight. 1RP 13. Officer Hurst asked Franck to explain which curve he was referring

to; Franck responded that he had just put new tires on his truck and had lost control. 1RP 13.

Franck spoke with a thick accent and Officer Hurst noted that Franck's speech was slurred. 1RP 14. Officer Hurst could not tell if Franck's speech was slurred due to his accent or intoxication. 1RP 14. Franck was stumbling on the road and having trouble standing. 4RP 50. Upon repositioning himself downwind of Franck, Officer Hurst detected an overwhelming smell of alcohol on Franck's breath. 4RP 50. When asked where he was coming from, Franck at first did not respond and then stated, "Man, I'm sorry, I just lost control." 4RP 50.

Officer Gabriel Castro also responded to the scene. 1RP 34-36. He noticed a "pretty strong odor" of alcohol coming from Franck. 1RP 37. He also observed Franck's slurred speech and difficulty maintaining his balance. 1RP 38. Franck told Officer Castro that he had consumed only one drink. 1RP 37.

Officer Shaun Daniels was called to the scene because he was in training with an emphasis on DUIs. 4RP 51. When Officer Daniels contacted Franck, Franck refused to make eye contact with him. 5RP 12. Officer Daniels could smell alcohol coming from Franck, observed him swaying, and eventually saw that Franck's

eyes were bloodshot, watery, and droopy. 5RP 12. Franck said he “slipped off” the roadway while driving his work truck. 1RP 54-55. Franck refused to take any field sobriety tests. 1RP 58. After Franck was arrested, Officer Daniels located vehicle keys in Franck’s pocket.<sup>3</sup> 1RP 60. At the precinct, after being advised of the consequences for refusal, Franck refused to have his blood alcohol content tested. 1RP 64.

William Darby is the manager at Steakhouse Steaks. 2RP 3. Darby confirmed that Franck worked for him as a salesperson and delivery driver. 2RP 4. Franck had worked for Darby for approximately six months; during that time, Darby noticed that Frank’s speech did not regularly slur and that he did not have difficulty maintaining his balance when standing. 4RP 86. Steakhouse Steaks employees are assigned trucks for work that they may take home at night. 2RP 5. Pursuant to company policy, only employees are allowed to drive the company trucks. 2RP 6. Two days after Franck was arrested, Darby recovered the company truck that had been assigned to Franck from the Federal Way tow locker. 4RP 87. When Darby drove it away, he did not notice any

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<sup>3</sup> Officer Daniels did not put the keys from Franck’s pocket into the ignition of Franck’s truck; however, he noted that they appeared consistent in appearance with keys for Franck’s type of truck. 1RP 60.

issues with the vehicle or its tires that affected the operation of the vehicle.

**C. ARGUMENT**

1. SUFFICIENT INDEPENDENT EVIDENCE  
CORROBORATES THE CRIME OF FELONY  
DRIVING UNDER THE INFLUENCE.

Franck argues that the State failed to establish *corpus delicti* for the crime of DUI. Franck's claim fails. Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, the State produced sufficient evidence to establish that Franck committed felony DUI.

To establish *corpus delicti*, the State must present independent evidence that corroborates the defendant's confession to having committed the crime charged. State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2007). *Corpus delicti* can be proved by either direct or circumstantial evidence. State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). The purpose of the rule is to protect a defendant from being unjustly convicted based on a confession alone. State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). The doctrine stems from judicial concerns that a defendant's confession might be misconstrued, coerced, or false,

and that the jury might accept it uncritically. Aten, 130 Wn.2d at 656-57.

The State must produce *prima facie* evidence that the crime described by the defendant actually occurred. Id. at 656. The independent evidence need not establish the crime beyond a reasonable doubt, or even by a preponderance of the evidence. Id. Rather, the evidence is sufficient if it supports a “logical and reasonable inference” that the crime occurred, and is inconsistent with a hypothesis of innocence.<sup>4</sup> Brockob, 159 Wn.2d at 328-29. On appeal, the reviewing court considers all of the evidence presented at trial in the light most favorable to the State, drawing all reasonable inferences therefrom. Id. at 328; Aten, 130 Wn.2d at 658; State v. Dodgen, 81 Wn. App. 487, 492-93, 915 P.2d 531 (1996).

To establish *corpus delicti* in this case, the State had to produce *prima facie* evidence that Franck operated or was in actual physical control of a vehicle while he was under the influence of or affected by the use of intoxicating liquor or any drug. RCW 46.61.502; State v. Hamrick, 19 Wn. App. 417, 419, 576 P.2d 912

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<sup>4</sup> Washington courts have declined to adopt the more relaxed federal standard, which requires only that the independent corroborating evidence “tend to establish the trustworthiness of the confession.” Aten, 130 Wn.2d at 662-63.

(1978). However, for the crime of DUI, it is not “necessary that the evidence excluded every reasonable hypothesis consistent with [the defendant] not driving a car.” Bremerton v. Corbett, 106 Wn.2d 569, 578-79, 723 P.2d 1135 (1986).

Here, the trial court properly found that the State satisfied its burden based on the facts presented to the trial court. 2RP 17-23. Officer Hurst was dispatched to a single-vehicle collision shortly after midnight due to a 911 caller’s report that a truck with a single occupant was in a ditch. 1RP 7-10. When Officer Hurst arrived, Franck was standing next to the driver’s side door of the truck, a company-issued vehicle assigned to Franck. 1RP 10; 4RP 87. Franck was the only person in the area and there was no indication that anyone had fled from the area. 1RP 11, 27, 31. Franck had vehicle keys inside his pocket that were located upon arrest. 1RP 60.

Additionally, Franck exhibited multiple signs of intoxication. He had slurred speech and bloodshot eyes, he smelled of alcohol, and he had difficulty maintaining his balance while standing. 1RP 14, 15, 37-38, 53-54. Darby, Franck’s manager, testified that Franck did not normally slur his speech or have difficulty maintaining his balance. 4RP 86. Franck was also uncooperative

with officers by refusing to make eye contact, participate in field sobriety tests, or have his blood tested for alcohol. 1RP 58, 64; 4RP 50; 5RP 12.

Given the record and the case law, the trial court properly analogized this case to State v. Hendrickson, 140 Wn. App. 913, 168 P.3d 421 (2007) and denied Franck's motion to dismiss based on *corpus delicti*. 2RP 22. In Hendrickson, officers found a single car in a ravine, the defendant was the only person in the area, the car was registered to the defendant, and officers noted that the defendant smelled of alcohol, had bloodshot eyes, and his face was flushed. Id. at 916-17. The court in Hendrickson found that this evidence established the *corpus delicti* for the crime of DUI. Id. at 921. Here, like the facts in Hendrickson, Franck was the only person in the area of a single-car collision, he showed multiple signs of intoxication, and Franck's truck was assigned to him from work, similar to the car being registered to the defendant in Hendrickson.

Franck renews his argument on appeal that the facts here are similar to Hamrick. 19 Wn. App. 417. This argument was properly rejected by the trial court. 2RP 19. In Hamrick, an officer arrived at the scene of a two-car collision where he contacted the

defendant in the center of the roadway and was unable to determine which vehicle belonged to the defendant. 19 Wn. App. at 418. The car suspected of causing the accident had an additional occupant inside, but the officer did not describe the occupant's age, condition, or location in the car. Id. The court in Hamrick found that, "[e]xclusive of the defendant's admissions, the State's evidence establishes only that [the] defendant was present when the officer arrived at the scene of the accident." Id. at 420.

Unlike the facts in Hamrick, Officer Hurst arrived at the scene of a single-car collision involving Franck's company-issued vehicle, Franck was the only person in the area and there was no indication that anyone had fled from the area. 1RP 10-11; 2RP 5-6. Further, unlike the limited facts in Hamrick, Franck showed multiple signs of alcohol impairment, had vehicle keys in his pocket, and was uncooperative with officers. 1RP 15, 53-54, 58, 60, 64. Noting the lack of factual similarities between the facts in Hamrick and the facts here, the trial court noted that in this case the facts *link Franck to the commission of the crime* and do not merely show that *somebody* committed the crime. 2RP 18-19.

Here, because the trial court properly denied Franck's motion to dismiss for lack of *corpus delicti*, this Court should affirm his conviction for felony DUI.

2. THE STATE CONCEDES THAT INFORMATION MUST BE PRESENTED TO THE COURT TO JUSTIFY EMERGENCY RESPONSE COSTS.

Franck claims that \$1000 in emergency response costs was improperly imposed where there is no record justifying the expenses incurred by the responding public agency. The State concedes that information must be presented to the trial court detailing the expenses and the court must make a finding that the expenses are reasonable. However, here, because Franck did not object to the public response costs at sentencing, the proper remedy is to remand to the trial court for additional evidence to be presented to allow the court to make a finding or strike the emergency response costs.

The Emergency Response Cost statute provides, in part, that:

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 under the influence of intoxicating liquor or

any drug, RCW 46.61.502, ...is liable for the expense of an emergency response by a public agency to the incident. ...

Following a conviction for 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.

RCW 38.52.430 (emphasis added).

Here, at sentencing, the court found Franck indigent and waived all non-mandatory legal financial obligations. CP 81; 7RP 15. The court imposed mandatory emergency response costs in the amount of \$1000. CP 81; 7RP 15. Franck did not object to the imposition of emergency response costs. 7RP 15. Although the court presided over testimony at trial detailing the emergency response by the Federal Way Police Department, no information was provided on how the \$1000 amount was reached. 1RP 9, 15, 36; 4RP 87; 7RP 2, 15.

Franck contends that the proper remedy is for the trial court to strike the emergency response costs because the State did not

present information setting forth the \$1000 in expenses incurred by the public agency. Franck's argument should be rejected. The State should be permitted to present new evidence upon remand because the court's imposition of emergency response costs was unchallenged by Franck at the sentencing hearing.

Analogously, cases are remanded for new evidence to be presented if an offender score determination is based on insufficient evidence and the defendant did not object. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). The case will be remanded for resentencing and the State is permitted to introduce new evidence, "if the state allege[d] the existence of prior convictions at sentencing and the defense fail[ed] to 'specifically object' before the imposition of the sentence." Id. (quoting State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002)).

Given Franck's failure to object before the trial court, the emergency response costs should not simply be stricken upon remand. Rather, the State should be permitted to provide additional evidence in support of the expenses previously imposed by the court. The trial court should then enter a finding that the emergency response expenses are reasonable or strike them.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Franck's conviction. Regarding the imposition of emergency response costs, the State respectfully asks this Court to remand to the trial court for additional evidence to be presented before the trial court enters a finding or strikes the imposition of emergency response costs.

DATED this 29 day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

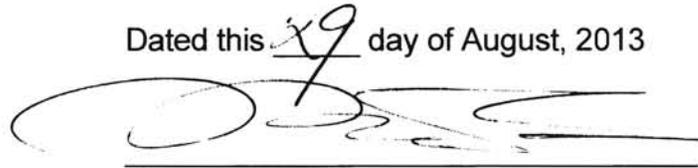
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JOHN FRANCK, JR., Cause No. 69602-5 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of August, 2013



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Name  
Done in Seattle, Washington

2013 AUG 29 PM 3:02  
STATE OF WASHINGTON  
COUNTY OF KING