# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 20, 2012 |
| v | No. 305391<br>Barry Circuit Court |
| JUSTIN J. MALIK,<br><br>Defendant-Appellant. | LC No. 09-100048-FH |

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant Justin J. Malik appeals by right his jury convictions of operating a vehicle under the influence causing death, MCL 257.625(4) and (8), and operating a vehicle with a suspended or revoked license causing death, MCL 257.904(4). Because we conclude that there were no errors warranting relief, we affirm.

On October 17, 2008, at about 9:50 p.m., Malik was driving east on M-43 in Carlton Township. As Malik turned left, the driver of a westbound motorcycle struck him. The motorcyclist died. Amy Joy Wilinski was at a nearby house and came outside when she heard the accident. She talked with Malik to try and calm him down. She could smell alcohol on his breath and he told her he had had three or four beers. Trooper Michael Behrendt noticed defendant had glassy eyes and smelled of intoxicants. Malik told Behrendt that he had had three beers and that he had the last beer about 30 minutes before the accident.

Trooper Behrendt evaluated Malik with field sobriety tests. Malik did not indicate impairment in the horizontal gaze nystagmus test and he completed the "walk and turn" test and a "one leg stand" test without incident. Malik consented to a blood draw and told the trooper who took him to the hospital for the blood draw that he had smoked or consumed marijuana between 4:00 p.m. and 5:00 p.m. that day. The blood draw showed that Malik had .01 grams of alcohol per 100 milliliters of blood and 4 nanograms of THC and 15 nanograms of the THC metabolite.

Before trial, Malik challenged the constitutionality of MCL 257.625(4) and (8). The trial court found MCL 257.625(8) unconstitutional because it was fundamentally unfair, did not promote public safety and was not rationally related to a governmental interest. The prosecution appealed. After this Court heard oral arguments, our Supreme Court determined 11-carboxy-THC was not a schedule 1 substance. *People v Feezel*, 486 Mich 184, 210-212; 783 NW2d 67

(2010). Because Malik's arguments regarding constitutionality were primarily premised on 11-carboxy-THC, this Court reversed the trial court in light of *Feezel*.[1]

Malik now argues that his conviction of operating a motor vehicle and causing death with any amount of a schedule 1 controlled substance in his blood violated his due process rights. This Court reviews de novo challenges to the constitutionality of a statute. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007).

MCL 257.625(8) provides that a person shall not operate a motor vehicle "if the person has in his or her body any amount of a controlled substance listed in schedule 1 . . ." and MCL 257.625(4) provides that a person who operates a motor vehicle in violation of MCL 257.625(8) and causes death is guilty of a felony. MCL 333.7212 lists schedule 1 substances and includes marijuana.

On appeal, Malik argues that MCL 257.625 violates due process because it does not require a driver to know he has consumed a controlled substance and may be intoxicated. Our Supreme Court has already determined that the driver does not need to know he may be intoxicated: "[t]he plain language of MCL 257.625(8) does not require the prosecution to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated; it simply requires that the person have 'any amount' of a schedule 1 controlled substance in his or her body when operating a motor vehicle." *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006), overruled on other grounds *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).[2] Regarding defendant's claim that the statute is unconstitutional, the *Derror* decision also determined that MCL 257.625(8) was constitutional. *Id.* at 334-341. In *Feezel*, the majority declined to address whether the statute was constitutional in light of the interpretation provided in *Derror*. See *Feezel*, 486 Mich at 211-212 (opining that the majority's interpretation of MCL 257.625(8) "was probably unconstitutional", but declining to address the constitutional issues). As such, the portion of the *Derror* decision determining that the statute was constitutional remains binding on this Court. *O'Dess v Grand Trunk Western R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

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[1] *People v Malik*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2010 (Docket No. 293397).

[2] *Feezel* overruled *Derror* only to the extent *Derror* was inconsistent with the *Feezel* opinion. *Feezel*, 486 Mich at 205. Thus, *Derror* was only overruled as to the conclusion that 11-carboxy-THC was a schedule 1 controlled substance under MCL 333.7212.