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# State v. Stark Appellant's Reply Brief Dckt. 39885

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

GEIRROD DETLOPH STARK,

Defendant-Appellant.

Case No.: 39885-2012

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District, County of Ada

Hon. Kathryn A. Sticklen, Senior District Judge, Presiding

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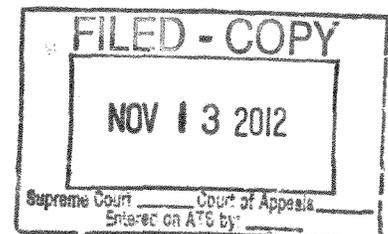


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## COURSE OF PROCEEDINGS

The course of proceedings in this case is adequately described in the Appellant's Brief. One element of the course of proceedings which was not discussed in the Respondent's Brief, and which remains critical to this appeal, is the actual ruling of the trier of fact. Many times, in a jury trial, there is no explanation of the reasoning of the jury. In this case, the course of proceedings is critical, because this was a court trial, and there is an explanation of the evidence, or lack thereof, that the trier of fact relied upon. In ruling, the court noted that “**certainly there is a question**” as to whether Mr. Stark was under the influence of drugs. Tr. p. 82. **Instead of reaching a finding of innocence due to the presence of reasonable doubt**, the trial court found that the impairment was due to the ingestion of drugs. *Id.* A judgment of conviction was entered. R. p. 39.

### Statement of Facts

The facts were adequately explained in the Appellant's Brief, and to the extent necessary, are reviewed in the argument portion of this brief.

## ARGUMENT

### **There was No Substantial, Competent Evidence to Support the Trial Court's Verdict.**

In Appellant's Brief, Stark outlined the reasons why the guilty verdict here is not supported by substantial, competent evidence. In Respondent's Brief, the State concedes that substantial, competent evidence is required, and then outlined several pieces of evidence that the State contends provide the substantial, competent evidence needed to support guilt. In reviewing the State's argument, this Court must keep in mind that the charge against Stark was not reckless driving, a traffic violation, use of profanity, or failure to cooperate with law enforcement. The charge against Stark was driving while under the influence of drugs or an intoxicating substance in violation of Idaho Code §18-8004(1)(a).

Also keep in mind that scientific tests for the presence of intoxicating substances were all negative. A breath test was performed for the presence of alcohol. **Results of the test were 0.0.** (Tr. p. 25, L. 1). The state also conducted a blood test. **Results of the blood test showed no presence of intoxicating drugs of any kind, no presence of any level of the psychotropic medications Stark admitted he had taken five days before the traffic stop, and no presence of THC, the active ingredient that would have been present had Stark smoked marijuana on the day he was driving. (R. Ex. 1).**

A brief review of Idaho case law involving this Idaho Code section, where the prosecution relied upon the totality of the circumstances, does not reveal even one case where the defendant's behavior was the only proof of intoxication. For example, in one case the State relies upon, *State v. Lesley*, 133 Idaho 23, 81 P.2d 748 (Ct. App. 1999), the defendant was in a motor vehicle accident, smelled of alcohol, admitted using alcohol before the accident, admitted smoking marijuana the day before, the officer found marijuana in the car, and a urine test revealed the presence of marijuana and a central nervous system stimulant in the defendant's system. Despite this proof of many intoxicating substances in the defendant's system, the Court of Appeals stated that the evidence was not overwhelming, but was enough to uphold the verdict. In *State v. Barker*, 123 Idaho 162, 845 P.2d 580 (Ct. App. 1992), also cited by the State, the defendant was found behind the wheel of a parked car, with a strong odor of alcohol, a cup of bourbon and 7 – up between his legs. He took breath tests and tested at .10 and .10. There was substantial, competent evidence that the defendant was under the influence.

In many reported cases the defendant admitted to having ingested intoxicating substances. In other cases, a breath test or blood test revealed the presence of intoxicating substances. In this case, both a breath test and a blood test were performed, and both were negative for the presence of intoxicating substances. So the evidence that the prosecution in this case relies upon is this:

- **Violating a one-way traffic rule.** The State would have this Court accept the premise that each time a driver drives the wrong way down a one-way street, that is evidence of intoxication. The observed behavior was only driving the wrong way. (Tr. p. 11, Ll. 10-13; p. 30, Ll. 22-25) The officer did not see any erratic driving, weaving, speeding, or other behavior, other than the action described above. (Tr. p. 30, Ll. 16-25.) Wrong way driving is so common that transportation entities study the problem and make plans to try to prevent it. See e.g. <http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/0-4128-S.pdf> . Mistakes in driving are a common occurrence. Such driving may constitute a crime resulting in charges of failure to yield, reckless driving or other types of charges. However, in order to find a defendant guilty of driving under the influence, there must be some evidence that the reason for the bad driving was that the defendant actually was under the influence of an intoxicating substance. That proof cannot be a “guess” based solely upon erratic driving.
- **Belligerence.** The State would have the Court believe that each time a person is belligerent in response to a traffic stop, the presence of intoxicating substances should be presumed as the cause.
- **Refusal to follow instructions.** An uncooperative attitude can occur even in those who are not under the influence of any substances.
- **Appearance of physical impairment.** The State relies upon vague testimony of the arresting officer that Stark was dropping his head to his chest and bobbing his head around appeared dazed and apparently unable to keep his eyes open. (Tr. p. 15, Ll. 9-17, 25; p. 16, L. 8). There was never any connection between this behavior and any intoxicating substances. For example, the officer did not smell alcohol and quickly

concluded that alcohol was not the cause of the behavior, but administered a breath test anyway, and the results were 0.0. Tr. p. 25, L. 1.

- **Refusal of DRE examination.** Even though the State argues that the refusal of a DRE exam is evidence of guilt, this argument must be removed from the mix, because it would be unconstitutional to consider this as evidence of guilt, as addressed below.

Respondent's Brief p. 6.<sup>1</sup> With the behaviors that the State relies upon to show substantial, competent evidence, there are multiple possible explanations, and no proof that the existence of intoxicating substances was the cause of the behavior. This is the quintessential definition of reasonable doubt, preventing a criminal conviction. The presence of intoxicating substances is an essential element of the crime. All of the other type of evidence usually relied upon in this type of case was absent here.

The officer in this case, after a negative blood test, assumed that the behavior was the result of intoxicating drugs other than alcohol, so he administered a blood test, and the results of the blood test did not show the presence of any intoxicating drugs: not prescription medications, not illegal drugs, not even THC, the active ingredient in marijuana. The State admits that the only substance present in the blood test, Carboxy-THC, is **not** an intoxicating substance.

Respondent's Brief, p. 6. See *In Re: Driver's License Suspension of Reisenauer*, 145 Idaho 948, 188 P.3d 890 (2008).

So where is the proof that the behavior was a result of intoxication, and not some other cause, such as psychological disturbance, inattentiveness, reckless driving, etc.? To draw an inference based on pure speculation would not be consistent with proof beyond a reasonable doubt.

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<sup>1</sup> The State also mentioned the presence of a "baggie" in defendant's possession, and pointed out the allegation that such baggies are used to transport drugs. The Court could take judicial notice of the commonly known fact that baggies are also used to transport sandwiches and other common items. The officer testified below that there were no narcotics in the baggie, no flecks of any sort of drug, Stark was not charged with possession of paraphernalia and no testing was done on the baggie. This red herring is thus not part of any substantial competent evidence of intoxication, because it is simply no proof of anything at all. Tr. p. 34, L1.8-25.

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Perhaps the trial court said it best when he said: “**certainly there is a question**” as to whether Mr. Stark was under the influence of drugs. Tr. p. 82. If there is a question, the State has not proven guilt beyond a reasonable doubt. The prosecutor argued in this case that it was “possible” that there were some effects of the medication still in blood stream. Tr. P. 70, Ll. 13-16. The State’s case here invited the court to “guess” at whether intoxicating substances were present, and what the intoxicating substance was. Tr. P. 71. Even the trial court raised a question, indicating he did not know what intoxicating substance Stark was under the influence of. “Mr. Stark was impaired, he was under the influence of something. And the question becomes then, what? And my view of the evidence in this case is that although there certainly is a question, I’m satisfied that the State has proven beyond a reasonable doubt that the impairment was due to the ingestion of drugs.” Tr. p. 62, Ll. 11-18. The trier of fact, in this case the trial court, admitted that there was no way to determine what intoxicating substance Mr. Stark was under the influence of. Tr. p. 82. In its closing argument, the State appeared to concede its lack of evidence that Mr. Stark’s impairment was the result of drugs or intoxicating substances. The State admitted, *inter alia*, as follows:

I guess the point I would make in this case...there is not a drug recognition evaluator that performed an evaluation. If there had been...if the Defendant had submitted to that, then we would be able to tie those two together (drugs and impairment). (Tr. p. 79, ll. 5-16).

A judgment of conviction must be overturned on appeal where the state did not produce admissible evidence upon which the trier of fact could have found that the State sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Cortez*, 135 Idaho 561, 562, 21 P.3d 498, 499 (Ct.App.2001). With a negative breath and blood test, and no other evidence of intoxicating substances, the trier of fact could not have found guilt

beyond a reasonable doubt, and this Court must overturn the trial court's verdict. *State v. Anderson*, 175 P.3d 788, 792 (Idaho 2008).

The State in this case asks the court to uphold a conviction for a crime merely on the premise that the defendant "acted guilty." That is a slippery slope, and would violate the constitutional right of defendants to proof of the crime beyond a reasonable doubt.

## **II. The Refusal of Mr. Stark to Cooperate with the DRE Evaluation Cannot Be Used as Evidence of Guilt, and Does Not Excuse the Absence of Substantial, Competent Evidence**

The State makes the bold assertion in the Respondent's Brief that the refusal to submit to a drug recognition expert (DRE) examination is like an admission of guilt. The State relies upon *South Dakota v. Neville*, 459 U.S. 553 (1983), arguing that the refusal of a DRE exam is circumstantial evidence of a consciousness of guilt. But a close review of the *Neville* case reveals the reason for such a ruling: a breath test is physical evidence, and not "communication" evidence that would be prevented by the Fifth Amendment right against compulsory self-incrimination. But a closer look at the substance of a DRE examination reveals that critical elements of that examination include interrogation of the suspect. In *State v. Baity*, 991 P.2d 1151 (WA 2000) the court outlined the DRE protocol standard across the country. It involves twelve steps:

- (1) breath (or blood) alcohol concentration;
- (2) interview of the arresting officer;
- (3) preliminary examination;
- (4) eye examinations;
- (5) divided attention tests;
- (6) vital signs examination;
- (7) darkroom examination of pupil size;
- (8) examination of muscle tone;
- (9) examination of injection sites;
- (10) statements, interrogation;
- (11) opinion;
- (12) toxicology analysis.

*Id.* at 1155. The court pointed out that the protocol requires that all twelve steps be completed, and the evaluation must be based upon all twelve steps. Steps number 3 and 10 require interrogation of the suspect, gathering information from the suspect on medical history, drug and

alcohol history, and any admissions they might make about their behavior leading up to the arrest. *State v. Baity*, p. 1155. See also *State v. Daly*, 775 N.W2d 47 (NE 2009) (The DRE examination includes at least two interviews of the suspect, where the suspect is required to provide information about medical or mental or physical status, then submit to a final interrogation concerning the behavior and possible causes of the behavior.); *State v. Klawitter*, 518 N.W.2d 577, 580 (Minn. 1994)(DRE involves questioning of the suspect in which the officer should suggest that the officer knows the suspect has used certain drugs). Because completion of a DRE exam requires communication from the suspect, and in fact includes an element of attempting to force the defendant to admit the use of illegal drugs, refusal to participate cannot be used as consciousness of guilt without violating the Fifth Amendment.

There is no other case in our system of criminal justice where a court found the defendant guilty, and the verdict was upheld on appeal, where the defendant merely “looked guilty” or “acted guilty.” A defendant should not be found guilty of murder if he merely “acted guilty.” There are too many possible explanations of the type of behavior noted in this case, and the presence of other rational explanations require the conclusion that there is a reasonable doubt as to guilt. A court cannot convict of a crime in the face of positive proof that no crime was committed, merely on the assumption that the defendant must have done something wrong, because he looked guilty.

**III. The Issue of a Requirement of Connecting Intoxicating Substances to the Behavior through a DRE or other Testimony has Been Adequately Raised in this Case.**

The State takes issue with Stark’s argument that DRE evidence would have been required to prove the crime in this case. The State argues that this argument was waived because it was not raised until a reply brief in the district court. Stark’s argument about the necessity of DRE evidence relates to the lack of any other evidence to support the presence of intoxicating

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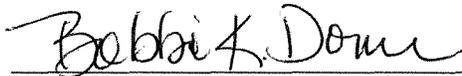
substances. Stark has argued throughout this case that the proof offered falls far short of the substantial competent evidence required. The testimony and evidence provided does not allow the types of inferences required where the scientific tests are negative. In any case, the State has had ample opportunity in this appeal to brief and argue this issue, thus there should be no concern about considering the impact of the lack of some kind of expert testimony to prove that intoxicating substances were actually present here.

**CONCLUSION**

**With respect to drugs or intoxicating substances, the State proved through the forensic blood test results that there were no drugs or intoxicating substances in Mr. Stark's blood at the time the blood sample was drawn. The test results were negative!**

Given the complete absence of any competent substantial evidence that marijuana, drugs or any intoxicating substances were present, and the cause of erratic or unusual behavior, Mr. Stark's conviction must be reversed.

RESPECTFULLY SUBMITTED this 13 day of November, 2012.



Bobbi K. Dominick  
Attorney for Appellant



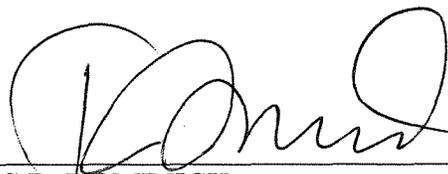
Thomas B. Dominick  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13 day of November, 2012, I served the foregoing document by having a true and complete copy personally delivered or by facsimile and/or by depositing the same in the United States Mail, postage prepaid thereon, and addressed to:

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