In the Court of Appeal of the State of California,
Third Appellate District

The People of the State of California,	)	C057573
	)	
Plaintiff and Respondent,	)	Shasta County
	)	Superior Court
v.	)	No. 07F6265
	)	
Brian E. Counts,	)	
	)	
Defendant and Appellant.	)	
	)	
	)	

Appeal from the Judgment of the Superior Court
of the State of California for the
County of Shasta

Honorable Stephen H. Baker, Judge

Appellant's Opening Brief

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Statement of the Case

On August 20, 2007, the State of California filed an information charging Mr. Counts with three violations (CT at 14-15):

1. Driving while under the influence of alcohol (Cal. Veh. Code, § 23152, subd. (a));
2. Driving with a BAC of 0.08 percent or more (Cal. Veh. Code, § 23152, subd. (b)); and
3. Driving with a suspended license due to a prior DUI conviction (Cal. Veh. Code, § 14601.2, subd. (a)).

The information further alleged two enhancements (CT at 15-16):

1. A prior prison term one-year enhancement (Cal. Pen. Code, § 667.5, subd. (b)); and
2. Driving with a BAC greater than 0.20 percent (Cal. Veh. Code, § 23578).

Mr. Counts pled no contest to count 3. (CT at 25; RT at 54-57.) At trial, the jury found Mr. Counts guilty of the remaining counts and found enhancement 2 to be true. (CT at 144-147, 150; RT at 237-238.) Mr.

Counts waived jury trial on the prior prison term enhancement and the court found the allegation to be true. (CT at 150; RT at 233-236.)

On November 27, 2007, the court sentenced Mr. Counts to four years in prison—the upper term of three years on count 2; the upper term of three years concurrent (stayed pursuant to California Penal Code section 654) on count 1; and one year for the prior prison term enhancement. (CT at 168-169.) The court also imposed miscellaneous fines, fees, and penalties; revoked Mr. Counts's driving privilege under California Vehicle Code section 13352, subdivision (a)(7); and designated him a habitual traffic offender under California Vehicle Code section 13550, subdivision (b). (CT at 169-171.)

On November 29, 2007, Mr. Counts timely filed his notice of appeal. (CT 172.)

Statement of Appealability

This appeal is from a final judgment following a jury trial that finally disposes of all issues between the parties. This court has jurisdiction under California Penal Code section 1237.

Statement of Facts

Between 6:30 and 7 a.m. on the morning of May 18, 2007, Kary Calantropio looked out her large picture window and saw a truck stuck in the heavy ruts of Peppernut Road. (RT at 77-78, 84.) On the south side of the road was a one to two foot drainage swale, then an embankment angling up higher than the roof of the pickup before leveling off. (RT at 91-92, 105.) On the north side of the road was an embankment leading down 10 to 20 feet at a 45-degree angle. (RT at 91, 105.) Ms. Calantropio testified that there were no bars or liquor stores within 50 to 100 yards of the truck's location but that the gas station "by the freeway" sells "[w]ine and beer and liquor." (RT at 80-81.)

Ms. Calantropio looked more closely at the vehicle and saw Mr. Counts lying on the ground next to the truck. (RT at 77-78.) Believing that Mr. Counts was drunk and injured, Ms. Calantropio called the police at approximately 7:43 a.m. (RT at 78, 88.)

Officer James Lindquist arrived shortly before 8:00 a.m. (RT at 89.) He found Mr. Counts—a 300-pound man with bad discs in his back—supporting himself against his truck, his wheelchair in the truck bed. (RT at 90, 94-95, 97.) The officer could smell an alcoholic beverage when he got within 10 feet of Mr. Counts. (RT at 90.)

Mr. Counts told Officer Lindquist the solenoid on his truck went out, stranding him. (RT at 92.) Officer Lindquist determined that the truck was not damaged, its engine was cool to the touch (indicating it had been there "probably an hour or more"), the wheels were turned slightly into the drainage swale, and the truck was parked in a position that did not obstruct traffic. (RT at 97-98, 107-110.)

Officer Lindquist asked Mr. Counts when he drove and he replied that he drove while it was dark, but could not give a more accurate timeframe for his driving. (RT at 94.) Ms. Calantropio testified that she looked out the window overlooking Peppernut Road each night between 10 and 11 p.m. before going to bed. (RT at 79.) On the evening of May 17, 2007, she looked out the window but did not see Mr. Counts's truck across the street. (RT at 85.)

Mr. Counts told Officer Lindquist that he shared a 12-pack with a friend but did not specify when he last drank. (RT at 107, 117, 120.) The only statement Mr. Counts gave about when he drank was that he drinks "all the time." (RT at 93.) He also told Officer Lindquist he drank only beer. (RT at 164.) Mr. Counts never stated he drove with alcohol in his system. (RT at 120.)

Officer Lindquist searched the area 10 to 15 feet around the truck in an attempt to find evidence. (RT at 106.) He only found three to six empty beer cans in the cab and bed of the pickup. (RT at 90.)

Because Mr. Counts was unsteady on his feet, Officer Lindquist did not perform any field sobriety tests. (RT at 94.) Officer Lindquist arrested Mr. Counts. (RT at 95.) Officer Curtis Rhyne, another officer, arrived on scene to assist and transported Mr. Counts to the police station for a blood test. (RT at 116.) The blood test was performed at 9:40 a.m. (RT at 95, 99) and revealed that Mr. Counts had a blood alcohol level of 0.25 percent (RT at 127).

At trial, the state's blood alcohol expert, Thomas Vasquez, testified that one beer would increase the blood alcohol level of a man of Mr. Counts's size by 0.01 percent and that each hour the blood alcohol level would decrease by 0.02 percent. (RT at 133, 134.) Mr. Vasquez also stated that Mr. Counts's BAC at 7:00 a.m. was likely 0.29 percent, requiring at least 29 beers. (RT at 140, 162.)

Argument

1. There is no substantial evidence that Mr. Counts drove with alcohol in his system; the convictions in both counts and both enhancements violated Mr. Counts's 14th Amendment due process rights and must be reversed.

A. Introduction

Taking the evidence most favorably to the state, as Mr. Counts must, there is ample evidence that Mr. Counts drove *and* that he was drunk; however, there is no evidence that Mr. Counts drove *while* he was drunk (or over the statutory limit of 0.08 percent BAC). The only evidence is that Mr. Counts drove during the hours of darkness, drank beer, and had a 0.25 percent BAC at 9:40 a.m.

Without knowing when Mr. Counts drank, how much he drank, and when he drove, even the state's own blood alcohol expert was unable to determine whether Mr. Counts drove with *any* alcohol in his system—let alone an illegal amount. (See, e.g., RT at 139, 144-145, 148-152, 156, 160-162.)

Based on the lack of substantial evidence of DUI, this court must reverse the judgment as to counts 1 and 2 and as to both enhancements.

B. Standard of Review

The sufficiency of the evidence standards are well settled. "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citations.]" (*People v. Johnso*n (1980) 26 Cal.3d 557, 576-577; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) The review is

done in light of the whole record, and does not focus solely on isolated bits of evidence selected by the state. (*Ibid*.) Substantial evidence is evidence that is credible and of solid value and permits a rational trier of fact to find guilt beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) Surmise, conjecture, and speculation are insufficient. (*People v. Morris* (1988) 46 Cal.3d 1, 21; *People v. Massie* (2006) 142 Cal.App.4th 365, 373.) Additionally, convictions based on insufficient evidence violate a defendant's right to due process under the 14th Amendment to the United States Constitution. (See *Jackson v. Virginia*, *supra*, 443 U.S. 307, 319.)

To convict a defendant of any crime, the state has to prove each element of that crime beyond a reasonable doubt. (*People v. Acevedo* (2003) 105 Cal.App.4th 195, 197-198.) Therefore, to convict Mr. Counts of driving under the influence of alcohol in count 1, the prosecution had to show that Mr. Counts was (1) driving a vehicle and (2) that when he drove, he was under the influence of an alcoholic beverage. (Cal. Veh. Code, § 23152, subd. (a); RT at 201-202; CT at 136-137; see also, CALCRIM No. 2110 (rev. June 2007.)) A person is under the influence of alcohol if the alcohol has so affected the nervous system or "muscles as to impair to an appreciable degree *the ability to operate a vehicle* in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties." (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665, emphasis in original; see also, CALCRIM No. 2110 (rev. June 2007).) There was no dispute that Mr. Counts drove his truck. *The only question was whether Mr. Counts drove while under the influence of alcohol*.

To convict Mr. Counts of driving with a BAC of 0.08 percent or more in count 2, the prosecution had to show that Mr. Counts was (1) driving a vehicle and (2) that when he drove, his blood alcohol level was 0.08 percent or more by weight. (Cal. Veh. Code, § 23152, subd. (b); RT at 202; CT at 138; see also, CALCRIM No. 2111 (rev. June 2007).) There was no

dispute that Mr. Counts drove his truck. *The only question was whether Mr. Counts drove while his BAC was at least 0.08 percent*.

To convict Mr. Counts of either of these two charges, the state had to show the time when Mr. Counts drove, how much he drank, and when he last drank (i.e., that he had an illegal amount of alcohol in his system when he drove). The state failed to present substantial evidence of any of these three facets, let alone all of them as was required.

C. Discussion

The evidence shows that Mr. Counts drove sometime during the night and that he was drunk when the officers arrived just before 8 a.m.; however, it does not support convicting Mr. Counts of DUI. There is simply no substantial evidence that Mr. Counts drove with *any* alcohol in his system—let alone enough to rise to the level of a crime.

In this case, the state's own blood alcohol expert delineated the three pieces of evidence necessary to determining whether Mr. Counts's BAC was illegally high—or even whether he had *any* alcohol in his system at all—when he drove: (1) the time when Mr. Counts drove (RT at 148, 152), (2) the time when he last drank (RT at 144, 145, 148, 149, 150, 151, 152, 156, 160, 161, 162), and (3) how much he had to drink (RT at 139, 144, 148, 149, 150, 152, 156, 161, 162). Because none of these three pieces of information were available to the expert—nor was evidence of them admitted during trial—the blood alcohol expert repeatedly stated he did not have enough evidence to say that someone with the same traits and factual situation as Mr. Counts drove with an illegal amount of alcohol in his system. (See, e.g., RT at 139, 144-145, 148-152, 156, 160-162.) If the state's *expert* did not have enough information to say whether Mr. Counts

drove with alcohol in his system, the jury—with much less experience in determining BACs—would surely be unable to make that determination.

First, there was no evidence of when Mr. Counts *started* driving or *stopped* driving. The only evidence of Mr. Counts's driving was his own statement that he drove during the hours of darkness (RT at 94); the testimony of Ms. Calantropio who did not see Mr. Counts's truck at 11 p.m. but saw it at 6:30 a.m. the next morning (RT at 77-79, 85); and the officer who testified that the hood of the truck was cold, indicating it had been there "probably an hour or more" before the officer arrived on scene (RT at 107-110).

Because of the gap in the evidence, the jury could properly infer from the evidence that Mr. Counts arrived on scene between 11 p.m. (when the witness last noticed no vehicle present) and 6 a.m. the next morning[1]; however, without improper speculation, the jury could not have narrowed the time down any further. Given that the expert testified that knowing when Mr. Counts drove was required to determine his BAC and given that an element of the two counts was that Mr. Counts had alcohol in his system when he drove, the lack of substantial evidence of when Mr. Counts drove means no jury could have legally convicted Mr. Counts. In other words, the jury must have relied on improper speculation in determining that Mr. Counts had alcohol in his system when he drove. On *this* point alone, this court must reverse Mr. Counts's conviction.

[1] Taking the evidence most favorably to the state, the 11 p.m. time was calculated by taking Ms. Calantropio's testimony that she looks out her window each night sometime between 10 and 11 p.m. and taking the later time. The 6 a.m. time was calculated by taking the officer's vague estimate of how long the truck was parked (an hour *or more*) and, giving the state the benefit of the doubt, doubling it to two hours. Since the officers did not arrive on scene until just before 8 a.m., two hours earlier was 6 a.m.

Second, other than Mr. Counts's comment to police that he drinks "all the time," Mr. Counts made no other statements concerning his drinking and the police made no further efforts to ask him about his drinking. (RT at 93.) Additionally, Mr. Counts's comment cannot be literally construed. If it were, Mr. Counts would have had to be drinking when the neighbor saw him at 7 a.m. (he was not), when the police arrived (he was not), and in court (he was not). Since the comment cannot be taken literally, no inferences can be drawn from it. Any conclusions the jury drew from that statement about when Mr. Counts drank on that evening/early morning was purely speculative. Given that the expert testified that knowing when Mr. Counts drank was required to determine what his BAC was when he drove and given that an element of the two counts was that Mr. Counts had alcohol in his system when he drove, the lack of substantial evidence of when Mr. Counts drank means no jury could have legally convicted Mr. Counts. In other words, the jury must have relied on improper speculation in determining when Mr. Counts drank. On *this* point alone, this court must reverse Mr. Counts's conviction.

Third, the only direct evidence of how much alcohol Mr. Counts had to drink was his own statements to police that he drank only beer (RT at 164) and that he shared a 12-pack with a friend (RT at 107, 117, 120). Backing up his claim that he drank beer, the police found three to six empty beer cans in the bed of Mr. Counts's truck. (RT at 90, 106.)

The state's blood alcohol expert, however, said that it would be impossible for Mr. Counts to have a BAC of 0.25 percent by only drinking six beers—it would have required at least 25 beers. (RT at 134, 135, 149.) The state's expert went on to explain that the BAC of a person of Mr. Counts's stature would increase 0.01 percent with each can of beer while decreasing by 0.02 percent each hour. (RT at 133-134.) He further testified that it would be realistic—although not reasonable—for Mr.

Counts to have had no alcohol in his system as late as "3:00 to 4:00 o'clock [a.m.]" and still have a 0.25 percent BAC at 9:25 a.m. (RT at 161.) If he assumed a more reasonable rate of drinking, he said Mr. Counts could have had no alcohol in his system "between like 12:00 and 2:00 in the morning." (RT at 162.) The expert also stated that Mr. Counts's BAC at 7:00 a.m. was likely 0.29 percent, requiring 29 drinks to achieve. (RT at 140, 162.)

The state urged the jury to find that the only reasonable explanation for how Mr. Counts could have had 29 drinks in his system while only three to six cans were found on site was for him to have consumed at least most of the alcohol before he drove. (See, e.g., RT at 204.) In making this plea, the state pointed out that Mr. Counts had an injury to his back that limited his mobility and prevented him from getting to an establishment that sold alcohol after his truck died. (*Id*.) If Mr. Counts had been drinking on-scene after his car died, the logic goes, there would have had to be 29 cans found on scene—not just three to six. (*Id*.)

The problem with the state's argument is it failed to address significant gaps in the prosecution's case, using speculation to rule out other possibilities instead of confronting the other possibilities head-on. One substantial gap the state failed to address was why the officers did not do a more thorough search of the area. On the north side of the road on which Mr. Counts's truck was found, there was an embankment leading down 10 to 20 feet at a 45-degree angle. (RT at 91, 105.) On the south side of the road, there was a one to two foot drainage swale, then an embankment angling up higher than the roof of the pickup before leveling off. (RT at 91-92, 105. The embankment started two to three feet from the truck. (RT at 92.) Linquist testified that he did not do a complete search of the area because "there's no reason to." (RT at 106.) Rather, he did a search only within a 10 to 15 foot radius around the truck. Although he looked down

the embankment to the north, he did not go up the hill to the south. (RT at 92.)

If Mr. Counts had been drinking on scene, he could have thrown empty beer cans away from the truck, outside the 10 to 15 foot radius—including up and over the hill. Although Officer Lindquist testified that it did not look like Mr. Counts climbed the hill to the south, he did not explain why empty beers that Mr. Counts drank could not have been hidden from plain view on top of or on the other side of the hill. (RT at 111.)

The state simply ignored the officer's lackadaisical investigation in the interest of pointing the jury toward the state's belief that Mr. Counts drank all but three to six beers prior to driving. But to get to that conclusion, the state had to speculate that Mr. Counts drank before driving and that the only drinking that took place after he arrived on scene was the three to six beers the officers found in the truck.

In this case, we are not dealing with a situation involving competing *logical* inferences pointing in different directions. If we were, the jury could decide between the two (or more) inferences as it saw fit. (See, e.g., *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1291.) Here, there is no evidence pointing in *any* direction—just speculation. This situation means that there was no substantial evidence pointing to guilt.

Additionally, in this case, there is *no* evidence that would permit a logical (non-speculative) inference as to whether Mr. Counts drank all of his beer prior to driving, all of it after driving, or some combination of the two; in other words, there were no *non*-speculative conclusions the jury could have drawn from the evidence presented. In such a situation, there is no substantial evidence to support any conclusion, meaning the party with the burden of proof must fail on appeal. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487; *People v. Brown* (1989) 216 Cal.App.3d

596, 600.) Here, the state had the burden of proof and, thus, the state must fail on appeal.

This case is almost entirely circumstantial and has substantial gaps in the evidence. In cases like this one that do have significant gaps in proof, such as a time period in which there is no evidence (like the time period here from 11 p.m. to 6 a.m.), the underlying principles are a matter of common sense. They are akin to a missing link in a chain of circumstantial evidence. (See *People v. Redrick* (1960) 55 Cal.2d 282, 290.) "Circumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt. The strength of the links is for the trier of fact, but if there has been a conviction notwithstanding a missing link, it is the duty of the reviewing court to reverse the conviction." (*Id*. at 290; *accord People v. Mitchell* (1975) 53 Cal.App.3d 21, 25.)

When the missing link is an unknown period of time during which there is no way to know what happened, the evidence is insufficient to support a conviction. In *People v. Barnett* (1953) 118 Cal.App.2d 336, the defendant was with an informant for 90 minutes after a police officer gave the informant two marked bills. There was no evidence of what happened during that time. After the 90 minutes, the informant gave the police officer a package of heroin without further word. The officer searched the defendant's apartment, and found the two marked bills. Heroin was found in a common closet near the defendant's apartment. The court held this evidence was insufficient to convict the defendant of possession of heroin or of selling heroin. (*Id*. at 338-340.)

In *Barnett*, the state admitted evidence of what happened *before* the time gap and what happened *after* the time gap—and the time span was a mere 90 minutes. In contrast, here, the state only admitted evidence of what happened *after* the time gap and the time gap here was four and a half times longer than in *Barnett*. In other words, no evidence was admitted to

show what Mr. Counts was doing *before* Ms. Calantropio saw him laying on the ground next to his truck at 6 a.m. The lack of evidence preceding the time gap makes any attempt at ascertaining what happened mere speculation.

Without knowing when Mr. Counts started and stopped drinking and without knowing how much he drank, the expert's testimony as to rates of alcohol absorption and burn-off could not be applied. And, even if those two pieces of information were known (they were not known here), without knowing when Mr. Counts drove it would be impossible to determine whether his BAC was illegally high when he drove because the jury would not know how far back to extrapolate using the expert's testimony.[2]

Because there is no substantial evidence that Mr. Counts had *any* alcohol in his system when he drove, there is no evidence to support the enhancement that he had over 0.20 percent BAC when he drove. Additionally, because there is no evidence that he had any alcohol in his system when he drove and there was no substantial evidence that alcohol caused him to fail to drive as an ordinary person would,[3] his conviction for a violation of Vehicle Code section 23152, subsection (a), was not supported by the evidence either.

Based on the foregoing, there is no substantial evidence to support the judgment as to either count or either enhancement. Those convictions

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[2] For that matter, if the jury did not know when he drove, it is possible that he drove before he started drinking, making any application of the expert's burn-off rates useless.

[3] Other than one of his tires being slightly in the drainage swale—which an ordinarily prudent and cautious person in full possession of his faculties could easily have done in the dark on a narrow, highly rutted road—the condition of Mr. Counts's vehicle indicated he drove it well. There was no damage to Mr. Counts's vehicle. He pulled off the road as far as possible so as not to obstruct traffic. And, despite there being an embankment on the right side of the road, he did not hit it when he parked.

cannot stand under state law or the Fourteenth Amendment. (*People v. Johnson*, *supra*, 26 Cal.3d 557, 576-578; *Jackson v. Virginia*, *supra*, 443 U.S. 307, 319.) The judgment must be reversed.

2. In addition to having insufficient evidence to convict Mr. Counts of DUI, the state failed to show sufficient evidence of the corpus delicti of DUI, requiring a reversal of his convictions.

Even with evidence of Mr. Counts's statements concerning when he drove, what he drank, and when he drank, the state does not have sufficient evidence to prove Mr. Counts committed DUI. On top of that, without evidence of Mr. Counts's statements, the state cannot make a prima facie case that *any* crime occurred, let alone that Mr. Counts committed it, requiring reversal of Mr. Counts's convictions for failure to prove the corpus delicti.

The corpus delicti consists of (1) the fact of injury, loss, or harm, and (2) the existence of a criminal agency as its cause. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) In a DUI case, the first prong (the harm) is the driving of the truck and the second prong (the criminal agency) is driving while under the influence of alcohol or with a BAC of at least 0.08 percent.

Here, there simply was no evidence that anyone drove the pickup truck the police found on Peppernut Road while the driver was under the influence of alcohol or with a BAC of at least 0.08 percent. No one reported seeing the truck driving in a manner that indicated its driver was intoxicated, no one saw Mr. Counts inside his truck, the truck's engine was cool to the touch indicating it had been there an hour or more (RT at 108-110), no one saw Mr. Counts drink, and so on. The state simply had insufficient evidence of the corpus delicti of DUI.

In determining whether sufficient evidence of the corpus delicti has been presented, the defendant's extrajudicial statements cannot be considered. (*People v. Jennings, supra*, 53 Cal.3d 334, 364.) This exclusion means the state has to produce evidence other than the defendant's statements to make a prima facie showing from which a *reasonable inference the crime was committed could be drawn*. (*Ibid.*.)

In Mr. Counts's case, the reasonable inference that a crime was committed is where the state fails in satisfying the corpus delicti for the charged offenses. Just as with the insufficiency of the evidence argument, there are no logical inferences that can be drawn from the evidence—not even to satisfy a prima facie showing of the corpus delicti. And, where *no* logical inferences can be drawn from the evidence, the corpus delicti cannot be satisfied. (See *People v. Jennings, supra*, 53 Cal.3d 334, 364; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1291.)

At trial, the state proffered evidence of several statements attributed to Mr. Counts, including that he drank only beer (RT at 164), that he shared a 12-pack of beer (RT at 107, 117, 120), that he drove sometime while it was dark (RT at 94), and that he drinks all the time (RT at 92-93). Without evidence of those statements to support the corpus delicti, the jury was left only with evidence that:

- A truck was parked in a position that did not block the roadway or otherwise obstruct traffic on Peppernut Road (RT at 107);
- The truck was not damaged (RT at 97-98);
- Its engine was cool to the touch, indicating it had been there "probably an hour *or more*" (RT 111-112, emphasis added);
- The wheels were turned slightly into the drainage swale (RT at 98, 107);

- No truck was seen at that location between 10 and 11 p.m. (RT at 79, 85), but the truck was there the next morning at 6:30 a.m., a seven and a half to eight and a half hour time span (RT at 78);
- Within a 10 to 15 foot radius of the truck, there were three to six empty beer cans (RT at 90, 106);
- The police admitted that they may have missed a bottle in their search (RT at 168-169);
- Mr. Counts, a 300-pound man with bad discs in his back, was leaning against his truck when police arrived (RT at 94);
- Mr. Counts had minor cuts on his arm and knee and some blood was found on the ground next to his truck (RT at 94-95);
- A wheelchair was in the pickup truck's bed (RT at 94-95);
- The police could smell an alcoholic beverage when they were 10 feet away from Mr. Counts (RT at 90); and
- Nearly two hours after the police arrived, a blood draw revealed that Mr. Counts had a blood alcohol level of 0.25 percent (RT at 127).

These facts lend themselves well to the *speculative* conclusion that Mr. Counts was drunk when he drove his truck to that location and that he fell out of the truck when he opened the door, receiving cuts and leaving blood on the ground in the process. However, despite the state only having to make a prima facie showing that the corpus delicti was met, the state still cannot rely on speculation—it must rely on logical inferences. (See, e.g., *People v. Jennings*, *supra*, 53 Cal.3d 334, 364.)

Here, especially because the state cannot use evidence of Mr. Counts's statements to prove the corpus delicti, there is no evidence pointing in *any* direction—just speculation. This is not a case in which we are dealing with competing logical inferences pointing in different directions; if we were,

the jury could decide between the inferences as it saw fit and find the corpus delicti was satisfied. (See, e.g., *People v. Haynes*, *supra*, 61 Cal.App.4th 1282, 1291.) Because of the lack of evidence to support any logical inference that a crime was committed, the corpus delicti was not proven.

Additionally, without considering evidence of Mr. Counts's statements, there are substantial gaps in the evidence that can only be filled (improperly) with speculation. One gap in the evidence is the actual time period during which no evidence exists. Even without considering the evidence that Mr. Counts said he drove while it was dark, the jury still had the seven and a half to eight and a half hour time gap to consider—no truck was seen at Mr. Counts's location between 10 and 11 p.m. (RT at 79, 85), but a truck was there the next morning at 6:30 a.m. (RT at 78). A time gap of this size is insufficient to prove the corpus delicti because there is no evidence of what happened during that time span from which to draw a logical inference—the time gap can only be filled with improper speculation. (See, e.g., *People v. Barnett*, *supra*, 118 Cal.App.2d 336, 338-340.) For instance, the jury would have had to speculate on how the truck got there; who drove it; what condition the person was in while driving; whether the person drank before, during, or after driving (or a combination of the three); what the person did with the empty alcohol containers; and so on. With such a large time gap to fill, just about anything could have happened. And that is the problem—there are no logical inferences pointing in any direction—just speculation.

Another significant gap in the evidence is the inadequate investigation conducted by the police. The police only searched for bottles in a 10 to 15 foot radius around Mr. Counts's truck, but admit that they may have missed a bottle at the scene. (RT at 90, 106, 168-169.) Without evidence that Mr. Counts stated he drinks all the time (RT at 93) and drinks only beer (RT at

164), the fact that the police failed to do a more thorough investigation (as discussed in Section I, *supra*) has a much greater potential for serious errors.

Where evidence of Mr. Counts's statements are not admissible for purposes of proving the corpus delicti, the fact that the police may have missed a bottle is highly relevant and causes the jury's finding of corpus delicti to be based on speculation. Without Mr. Counts's statements, a logical inference from the evidence is that he could have been drinking hard alcohol and tossed the empty bottle outside the 10 to 15 foot radius (or on top of the hill the officer failed to search)—that empty bottle could have been the one bottle that the officers could have missed in their cursory search. The state simply ignored this gap in the evidence in the interest of pointing the jury toward the state's belief that the driver drank all but three to six beers prior to driving. But to get to that conclusion, the state had to speculate that the driver drank before driving and that the only drinking that took place after he arrived on scene was the three to six beers officers found in the truck. With the possibility that a bottle of hard alcohol was missed by the police, that conclusion becomes speculative.

In one of the prosecution's hypotheticals the expert said it would have taken as many as 29 drinks to get Mr. Counts to a 0.25 percent BAC at 9:40 a.m. due to the elimination of alcohol during the two hours Mr. Counts was with the police, not drinking. (RT at 162-163.) The expert defined one drink as one 12-ounce beer, one ounce of hard liquor, or 12 ounces of wine. (RT at 143.) With one ounce of hard alcohol being equal to one beer, it would only take one hard alcohol bottle of 23 ounces or more outside the 10 to 15 foot radius (or on top of the hill the officer failed to search) plus the six beers found on scene to draw the logical inference that Mr. Counts was drinking on site *after* he drove. (RT at 162-163; see also RT at 149.)

And, if he drank all 29 drinks *after* he drove, he could not have been DUI while he drove.[4]

As with the time gap discussed above, for the jury to decide that Mr. Counts necessarily drank the 29 drinks prior to driving was a speculative leap. The evidence the state presented at trial allowed only for speculation, was not adequate to draw any logical inferences, and, as such, the state failed to satisfy the corpus delicti.

For the reasons set forth in Section I and for the reasons highlighted above, the state failed to make a prima facie showing that the corpus delicti of the crimes it accused Mr. Counts of committing were actually conducted. This court must therefore reverse Mr. Counts's convictions on all charges and enhancements.

Conclusion

This court must reverse Mr. Counts's conviction on all counts and enhancements because the prosecution failed to show:

- when Mr. Counts drove;
- when he drank; and
- how much he drank.

Without that information, the jury could only resort to improper speculation in determining whether Mr. Counts's BAC was illegally high when he drove. Because there were no logical inferences that could be drawn from the evidence and because speculation is not a legal basis upon which a jury may render a verdict or find the corpus delicti satisfied, there was insufficient evidence to convict Mr. Counts and no corpus delicti was

[4] If he drank before driving and then drank 29 drinks on site, his BAC would have been higher than 0.29 percent. (See, e.g., RT at 161-163.)

proven. This court must reverse the jury's verdict on all counts and enhancements.

For the reasons above, Mr. Counts moves this court to set aside his conviction.

Dated July 11, 2008.

Respectfully submitted,

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Certificate of Length

I, Dave C. Jones, counsel for Brian E. Counts, certify pursuant to the California Rules of Court, that the word count for this document is 6,030 words, excluding the tables, this certificate, and any attachments permitted under rule 204, subdivision (d), of the Rules of Court. This document was prepared in Microsoft Office Word 2003 using Times New Roman 13-point font and this is the word count for this document generated by the program.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Olivehurst, California, on July 11, 2008.

_____

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Declaration of Service

I, undersigned, say:

I am over 18 years of age, employed in the County of Yuba, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 87, Olivehurst, California, 95961-0087. I served the *Appellant's Opening Brief* of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Department of Justice Office of the Attorney General P.O. Box 944255 Sacramento, CA 94244-2550	Central Calif. Appellate Program 2407 'J' Street, Ste. 301 Sacramento, CA 95816-4736
Mr. Brian E. Counts (F-99684) P.O. Box 3030 Susanville, CA 96127-3030	Shasta County Superior Court Honorable Stephen H. Baker 1500 Court Street, Room 219 Redding, CA 96001
Mr. Toby Powell, Dep. DA 1525 Court Street, 3rd Floor Redding, CA 96001	Mr. Ted Loos, Dep. Public Def. 1500 Court Street Redding, CA 96001

Each envelope was then sealed and with first-class postage thereon fully prepaid deposited in the United States mail by me at Sacramento, California, on July 11, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 11, 2008, at Sacramento, California.

_____

DAVE C. JONES
Attorney at Law