66201-5

66201-5

NO. 66201-5-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

DAVID P. OLSON,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable JOHN M. MEYER, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

On October 2, 2008, David P. Olson, drove his vehicle after consuming alcohol. Mr. Olson turned into oncoming traffic, causing a collision with a motorcycle on Burlington Boulevard, in Burlington, Washington. David Zinkand sustained injuries when he was hit and knocked off of his motorcycle by Mr. Olson driving his SUV after having consumed alcohol. Mr. Olson submitted to field sobriety tests which led the officer to believe Mr. Olson was under the influence of alcohol. Mr. Olson later submitted to a blood draw at the hospital for DUI purposes. The blood test revealed a blood alcohol level of .22.

The vial of blood was labeled as evidence and sent to the state crime lab for testing. Brianne O'Reilly, Toxicologist, testified that she tested the vial of blood, that it had, at a minimum, 25 milligrams of enzyme poison and 20 milligrams of anticoagulant per the manufacturer's specifications. Judge Meyer ruled that the State had met its prima facie case of showing sufficient levels of enzymes and anticoagulants to preserve the blood in this case, specifically the enzyme of sodium fluoride.

Mr. Olson was convicted at trial of Vehicular Assault, the jury finding that Mr. Olson was operating a motor vehicle while under the

influence of intoxicating liquor. RCW 46.61.522(1)(b). Judge Meyer properly admitted the blood evidence in this case after hearing testimony and arguments regarding the sufficiency of the enzymes to meet the strict WAC standards, and the trial court's decision should be affirmed.

II. ISSUES

1. Judge Meyer did not abuse his discretion when he determined the State had met its prima facie evidentiary standard of sufficient enzyme poisons present in the blood vial to preserve the blood for testing.
2. The strict evidentiary requirements under WAC 448-14-020(3)(b) regarding preservation of blood for admissibility were met. The WAC is promulgated by the toxicology lab and should remain undisturbed.

III. STATEMENT OF THE CASE

1. Statement of Procedural History

[1]The State filed an Information charging Vehicular Assault against Mr. Olson on November 26, 2008. (CP 1-2) Mr. Olson was

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[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

"DATE RP NAME OF HEARING.

tried before the Honorable John M. Meyer on September 13, 2010. (RP 3) Mr. Olson filed a Motion to Suppress the blood alcohol test on October 30, 2009. (CP 52, 9-51 and 3-8) The blood suppression issue was heard during the course of trial. (CP 3-8; 9/14/10 RP159-160, 190) The Honorable John M. Meyer denied the Motion to Suppress and admitted the blood evidence. (9/16/10 RP21) Mr. Olson was found guilty of Vehicular Assault on September 17, 2010. (CP 1275) There was a jury interrogatory submitted and the jury returned that they unanimously found that Mr. Olson had operated a vehicle while under the influence of intoxicating liquor (CP 1275) but that the jury was not unanimous as to Mr. Olson driving with disregard for the safety of others. (RP Vol. 5, 5).

2. Statement of Facts

I. The Collision.

David Zinkand was operating a motorcycle, heading South, on Burlington Boulevard, in Burlington, Washington on October 2, 2008. (9/15/10 RP130) Mr. Zinkand does not recall specifics of the Collision, but only remembers that he changed lanes from the outside lane into the inside lane, and then remembers feeling the motorcycle moving a bit and seeing headlights at his shoulder. (9/15/10 RP130) Mr. Zinkand only has memory of an EMT speaking to him after the

collision and being in a lot of pain. (9/15/10 RP133) Mr. Zinkand testified that he still has ongoing problems with pain and had to take off work for eight weeks due to the collision. (9/15/10 RP133-139)

John Hagen was driving south on Burlington Boulevard about two car lengths behind David Zinkand. (9/13/10 RP 24) Mr. Hagen was driving at or under the posted speed limit and was traveling in the inside lane behind the motorcycle. (9/13/10 RP 24-26, 29) As Mr. Hagen and Mr. Zinkand were traveling south, the lights were green in front of them. (9/13/10 RP 24-25) Mr. Hagen saw a Dodge Durango sitting in the northbound lane, waiting to turn left, into the mall. (9/13/10 RP 25) The Dodge Durango pulled into the lane of traffic where the motorcycle was and struck the motorcycle about mid-line of the motorcycle, causing the motorcycle to go down. (RP Vol.1, 25) Mr. Hagen assisted Mr. Zinkand with his injuries until aid arrived. (9/13/10 RP 26) The left front quarter panel of the Dodge Durango struck the motorcycle at mid-line, damaging the Durango. (9/13/10 RP 30, 56) The motorcycle and the Dodge Durango were in the inside lane closest to the turning lane at the collision site. (9/13/10 RP 30)

II. DUI Investigation.

Officer Todd Schwiesow arrived on the scene of the Collision after being dispatched by 911. (9/13/10 RP 45-46) Upon arrival, the Dodge Durango was in the middle of the intersection, with front end damage, and the motorcycle was on its side. (9/13/10 RP 46) Upon contacting Mr. Olson, driver of the Durango, Officer Schwiesow noticed an odor of alcohol and that Mr. Olson's eyes were bloodshot and watery. Officer Schwiesow also noted that Mr. Olson's speech was not clear and distinct as a sober person's speech would be. (9/13/10 RP 49) Mr. Olson admitted to Officer Schwiesow that he had been drinking and that he had just left the Sports Keg and was headed to Applebees to get something to eat. (9/13/10 RP 49) Mr. Olson also told Officer Schwiesow that he thought he had a green arrow to make the left hand turn that he was making when he struck the motorcycle. (9/13/10 RP 50) Mr. Olson agreed to perform field sobriety tests with Officer Schwiesow. (9/13/10 RP 50) Officer Schwiesow performed the Gaze Nystagmus Test, the Stand and Balance Test, and the Walk and Turn test. (9/13/10 RP 50) Officer Schwiesow observed signs of intoxication by Mr. Olson while performing all three tests and placed him under arrest for DUI. (9/13/10 RP 51-55)

Officer Schwiesow, after photographing the scene of the collision and returning to his office to pick up a DUI report and grey top vials, transported Mr. Olson to the hospital to have a blood draw performed. (9/13/10 RP 57-58) Mr. Olson admitted to Officer Schwiesow that he had no physical impairments or limitations, that his vehicle is working fine, that he drank alcohol at the Sports Keg approximately 30 minutes prior to the Collision, and that he was headed to Applebees for food when he struck the motorcycle. (9/13/10 RP 60-65) It was Officer Schwiesow's opinion that alcohol had impaired Mr. Olson's ability to drive a motor vehicle and proceeded with the blood draw. (9/13/10 RP 65)

III. The Blood Draw.

Officer Schwiesow observed Mr. Olson's blood draw performed by Ruth McDonough at the hospital. (9/13/10 RP 70) Officer Schwiesow saw that there was white powder in the gray top vials utilized for the blood draw of Mr. Olson. (9/13/10 RP 71) Ruth McDonough used SEP, a chemical to sterilize your skin, prior to inserting the needle into Mr. Olson. (9/13/10 RP 70, 9/14/10 RP111) Ms. McDonough waited three to four minutes for the SEP to dry. (9/14/10 RP116-117) Officer Schwiesow took the gray top vials with Mr. Olson's blood from the hospital and secured them in the back of

his trunk. (9/13/10 RP 72) Officer Schwiesow then took the blood vials, placed them inside a plastic baggy, sealed it, initialed it, placed them in a styrofoam container, and placed it in the evidence room to be stored by the evidence technician on October 2, 2008. (9/13/10 RP 74, Vol. 2, 79) Jane Burt, evidence technician, sent the blood vials to the Washington State Crime Lab for testing on October 7, 2008 via certified mail. (9/14/10 RP123)

IV. Crime Lab Testing.

The blood vials containing Mr. Olson's blood were delivered to the Washington State Crime Lab on October 9, 2008 via the United States Postal Service. (9/14/10 RP144) The blood vials were placed in an evidence locker at the crime lab. (9/14/10 RP144) Brianne O'Reilly, forensic toxicologist, tested the vials of Mr. Olson's blood on October 14, 2008 for the presence of alcohol. (9/14/10 RP158) The grey top vials with Mr. Olson's blood contain anticoagulant and an enzyme poison. (9/14/10 RP157) Tyco Healthcare issues a certificate of compliance that the grey top vials have sufficient enzymes and anticoagulants to comply with the regulations. (9/14/10 RP157) The nominal amount of enzyme poison is 25 milligrams and the nominal value for the anticoagulant is 20 milligrams of potassium oxalate to meet the regulations. (9/14/10 RP158) Ms. O'Reilly did

not see any clots in the vials of Mr. Olson's blood, noting that there had to be anticoagulant present as well. (9/14/10 RP157) Ms. O'Reilly was of the opinion that there was sufficient enzyme and anticoagulant in the vials of Mr. Olson's blood to preserve the blood per the sample sizes of the vials. (9/14/10 RP158) Mr. Olson's blood alcohol level was reported to be at 0.22 grams of alcohol per 100 milliliters of blood, which is over the 0.08 legal limit of blood alcohol level. (Ex. 46, 9/14/10 RP160) Ms. O'Reilly went through all the standard procedures required in testing blood. (9/14/10 RP167) Ms. O'Reilly indicated that sodium fluoride is the enzyme poison that is present in the grey top vials. (9/14/10 RP177) Ms. O'Reilly had no question that the test results of Mr. Olson's blood were accurate. (9/14/10 RP164, 167)

Ms. O'Reilly acknowledged that there are various treatises and articles for training purposes suggesting that, in order to be sufficient, there needs to be a greater number of enzymes in the vials to preserve the blood. (9/14/10 RP172-182) Ms. O'Reilly's training by the Borkenstein Institute taught her that there should be different nominal amounts of enzyme to be considered a sufficient amount depending on whether the specimen came from a living subject or a deceased subject. (9/14/10 RP184-185) Ms. O'Reilly testified that

the reason enzyme poisons are necessary in the blood vials is to prevent bacteria from creating alcohol out of glucose that is found in the blood. (9/14/10 RP168) After going through the various treatises presented, Ms. O'Reilly still maintained her professional opinion that the enzymes present in the sample of Mr. Olson's blood were sufficient to preserve the blood. (9/15/10 RP108)

V. Admission of Blood Alcohol Evidence.

Judge Meyer ruled, at the conclusion of testimony, that the State had met its prima facia case, finding that there was sufficient anti-coagulant and enzyme poison present to prevent clotting and stabilize the alcohol concentration, specifically that there was sodium fluoride present, and admitted the blood alcohol test. (9/16/10 RP20-21)

IV. ARGUMENT

1. The trial court did not abuse its discretion by admitting the blood alcohol evidence at trial.

A trial court's ruling on the admission of a blood alcohol test result is reviewed for an abuse of discretion. *State v. Brown,* 145 Wn. App. 62, 69, 184 P.3d 1284 (2008); *State v. Hultenschmidt,* 125 Wn. App. 259, 264; 102 P.3d 192 (2005). A defendant challenging admission of the test result bears the burden of showing an abuse of discretion.

Brown, 145 Wn. App. at 69; *State v. Sponburgh,* 84 Wn.2d 203, 210, 525 P.2d 238 (1974). "The trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence." *Brown,* 145 Wn. App. At 69 (citing *State v. Bosio,* 107 Wn. App. 462, 468, 27 P.3d 636 (2001)).

"Prima facie evidence" is defined under the driving under the influence of an intoxicant statute as "evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved." RCW 46.61.506(4)(b). To determine the sufficiency of the evidence of foundational facts, the court must assume the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. *State v. Brown, Id.*

In order to admit blood alcohol test results, "the State must present prima facie proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results." *State v. Clark,* 62 Wn. App. 263, 270, 814 P.2d 222 (1991). "[A] blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC [Washington Administrative Code] requirements." *Hultenschmidt, 125 Wn. App. at 265.*

The WAC requires:

"Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate."

WAC 448-14-020(3)(b).

The purpose of requiring the use of anticoagulants and enzyme poison in the blood sample is to prevent clotting and/or loss of alcohol concentration in the sample. *Clark*, 62 Wn. App. at 270. Fulfillment of the requirements of WAC 448-14-020(3)(b) is mandatory, notwithstanding the State's ability to establish a prima facie case that the sample was unadulterated. *Bosio*, 107 Wn. App. at 468; *State v. Garrett,* 80 Wn. App. 651, 654, 910 P.2d 552 (1996). Once a prima facie showing is made, it is for the jury to determine the weight to be attached to the evidence. RCW 46.61.506(4)(c); *Hoffman v. Tracy*, 67 Wn.2d 31, 35, 406 P.2d 323 (1965).

State v. Brown, 145 Wn. App. at 69-70 (footnote omitted).

In the present case, Judge Meyer, considered the following evidence:

1) Officer Schweisow testified that there was white powder in the gray top vials utilized for the blood draw of Mr. Olson. (9/13/10 RP 71);

2) The phlebotomist used SEP to sterilize Mr. Olson's skin prior to drawing his blood, waiting three to four minutes for the SEP to dry. (9/13/10 RP 70, 9/14/10 RP111, 116-117);

3) Ms. O'Reilly testified that the grey top vials with Mr. Olson's blood contain anticoagulant and an enzyme poison based upon her verifying the certificate of compliance from Tyco Healthcare, manufacturer of the vials. (9/14/10 RP157) The nominal amount of enzyme poison is 25 milligrams and the nominal value for the anticoagulant is 20 milligrams of potassium oxalate to meet the regulations. (9/14/10 RP158);

4) Ms. O'Reilly followed all testing procedures as outlined in the WAC, did not see any clots in the vials of Mr. Olson's blood, and testified that there was sodium fluoride present in sufficient quantities to preserve Mr. Olson's blood. (9/14/10 RP157, 158, 177) Mr. Olson's blood alcohol level was reported to be at 0.22 grams of alcohol per 100 milliliters of blood, which is over the 0.08 legal limit of blood alcohol level. (Ex. 46, 9/14/10 RP160) Ms. O'Reilly further had

no question that the test results of Mr. Olson's blood are accurate and reliable. (9/14/10 RP164, 167) WAC 448-14-020(3)(b).

Every detail of the WAC was met in the present case, satisfying Judge Meyer that there was sufficient evidence for admissibility of the blood draw of Mr. Olson." *State v. Clark,* 62 Wn. App. 263, 270, 814 P.2d 222 (1991), *State v. Hultenschmidt,* 125 Wn. App. 259, 264; 102 P.3d 192 (2005). It is then up to the jury to determine the weight to give such evidence. *State v. Brown,* 145 Wn. App. At 69 (citing *State v. Bosio,* 107 Wn. App. 462, 468, 27 P.3d 636 (2001)).

Judge Meyer did not abuse his discretion when he found that the testing of Mr. Olson's blood was performed according to the WAC and there was sufficient evidence based upon testimony of an expert in the field of toxicology that the WAC requirements were met, and admitted the blood draws into evidence.

2. The State met its "prima facie" evidentiary standard required to admit blood alcohol test results. While there are varying opinions among scientists as to sufficiency, the WAC outlines the procedures to be followed for admission of the blood draws and should not be changed.

In *Brown,* the court explained that the WAC regulation does not require anyone with firsthand knowledge to testify as to what was

contained in the vials used for a blood sample prior to the blood draw. *Id.* at 71. Instead, the regulation requires only that the blood samples "'be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration.'" *Id.* (quoting WAC 448-14-020(3)(b)). Further, there is a relaxed standard for foundational facts under the blood alcohol statute in that the court assumes the truth of the State's evidence and all reasonable inferences from it are viewed in a light most favorable to the State. *Id.* (citing RCW 46.61.506(4)b)).

The regulations require that any testing method must meet "strict standards for precision, accuracy, and specificity." *State v. Schulze*, 116 Wn.2d 154, 167, 804 P.2d 566 (1991). If the testing method meets the requirements of the WAC regulations, "there is sufficient assurance of accuracy and reliability of test results to allow for general admissibility of test results." *State v. Straka*, 116 Wn.2d 859, 870, 810 P.2d 888 (1991). "Compliance with the regulations in WAC 448-14 meets the requirements of RCW 46.61.506(3), and a 'cookbook' detailing of every step of the authorized testing procedure is not necessary." *Schulze*, 116 Wn.2d at 166, 804 P.2d 566 (1991).

Ms. O'Reilly, the State Toxicologist, testified that the procedures promulgated by WAC 448-14-020(3)(b) were followed,

that there was sufficient enzyme poison and anticoagulants to preserve the blood alcohol and to prevent clotting in the sample tubes of Mr. Olson's blood, specifically, sodium fluoride. Judge Meyer properly admitted the blood vials into evidence after finding the State met its prima facie evidence of meeting the WACs. *State v. Brown*, *Id.* It is then the jury's duty to make the determination of weight to be given to the evidence.

Judge Meyer's ruling is also consistent with other cases upholding admission of forensic blood test results based upon a toxicologist's knowledge regarding expected contents of standardized vials in conjunction with other factors to establish a prima facie case. *See State v. Wilbur-Bobb,* 134 Wn. App. 627, 631-32, 141 P.3d 665 (2006); *State v. Barefield*, 47 Wn. App. 444, 458, 735 P.2d 1339 (1987), *aff'd,* 110 Wn.2d 728, 756 P.3d 731 (1988).

In our case, we do not have an absence of enzymes, but rather the argument is being made that there needs to be a specific number (a quantifying amount) of enzymes to be sufficient under the WAC. There is no case law or authority that adds this additional requirement of a definitive amount to be deemed "sufficient." While there have been numerous treatises presented, Ms. O'Reilly still maintained that there are different opinions within the scientific field,

and she testified as an expert that in this case, there were sufficient amounts of enzyme poisons to satisfy the WAC. There is nothing further required under WAC 448-14-020(3)(b), nor should there be. The State Toxicologist is required to approve the methods of obtaining blood alcohol evidence to be used to prove alcohol intoxication under RCW 46.61.502. RCW 46.61.506(3). The term "sufficient" here has been met by evidence of no clotting in the blood sample and Ms. O'Reilly's expert opinion, as an employee of the State Toxicologist.

The State does not have a burden, absent a change in legislation, to provide more than it has already done in this case to meet its prima facie burden under the WAC. RCW 46.61.506(4)(b).

The verdict should remain undisturbed.

3. Should the Court decide there is not sufficient evidence to admit the blood draw, it would not rise to require reversal of conviction.

Evidence that is admitted in error is only reversible error if it results in prejudice to the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is only prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected but for the error. *Bourgeois*, at 403. If the error is

of minor significance in reference to the overall, overwhelming evidence as a whole, then the error is harmless. *Bourgeois*, at 403.

Defendants cite *Watson* to support their argument. *State v. Watson*, 51 Wn. App. 947, 756 P.2d 177 (1988). In the Watson case, the Court was asked to determine whether the State complied with the administrative regulations for testing the breathalyzer machines. Watson, 51 Wash. App. At 948, 756 P.2d 177. The appellate court reversed Watson's conviction, finding that there was not compliance with the regulation regarding breathalyzer machine maintenance. *Watson*, 51 Wash. App. at 951, 756 P.2d 177.

The *Watson* case has been distinguished by the *Walker* case. *State v. Walker,* 83 Wash. App. 89, 920 P.2d 605 (1996). In *Walker*, there **was** compliance with the administrative regulations, and they found that *Watson* case was not persuasive because that case did not speak to the admissibility of evidence that satisfies the substantive standard. RCW 46.61.506; *Walker, Id., emphasis added.*

Our case is similar to *Walker* in that the substantive requirements of the evidence have been met and there was no error in admitting the blood draw of Mr. Olson. Should this Court find error in the admission of the blood draw, there is ample evidence within the case for the jury to have found Mr. Olson guilty of Vehicular Assault under

the "DUI" prong of RCW 46.61.522(1)(b). The jury was given evidence of:

1. The collision;
2. Officer Schweisow's testimony of the odor of alcohol on Mr. Olson's breath;
3. Failure of the field sobriety tests by Mr. Olson;
4. Mr. Olson's admissions of just drinking at the Sports Keg ½ hour prior to the collision.

That evidence would have been sufficient for the jury to have reached their conclusion absent a blood draw in this case. Again, the jury verdict should be upheld.

V. CONCLUSION

The State has met its burden in this case. There was sufficient evidence presented by the State to show that there was sufficient enzyme poisons and anticoagulants present in Mr. Olson's blood draw to meet the WAC requirements. Judge Meyer did not abuse his discretion in finding, after hearing the evidence, that the blood vials should be introduced into evidence, and that the State had met its prima facie evidence to meet the WAC requirements. There was no error in the admission of the blood draw; if this Court

determines that there was error, it was not prejudicial to require a reversal. The Appeal should be denied and the jury verdict should remain undisturbed.

DATED this 5th day of December, 2011.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Ryan Boyd Robertson and Theodore W. Vosk, addressed as 800 Fifth Avenue, Suite 4000, Seattle, WA 98104. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 5th day of December, 2011.

Karen R Wallace
KAREN R. WALLACE, DECLARANT