

KING COUNTY DISTRICT COURT
STATE OF WASHINGTON
BELLEVUE DIVISION

CITY OF BELLEVUE,

Plaintiff,

v.

C#'s BC 126416,
BC 122882, BC 126049
BC 127076, BC 12675I
BC 126752, BC 127097
BC 126344, BC 126975

JOSE AGUIRRE TINOCO,
ANTONIO AMAYA ONTIVEROS,
ASHLEY BERNARD, FARRAH DRAMMEH,
BRYANT PRYOR, SERGIO RENDON VALLE,
DANIEL SCOTT, CHRISTOPHER ZECH

Defendants.

COURT'S RULING ON
DEFENDANTS'
MOTIONS TO
SUPPRESS
POST- 10/04/00
BELLEVUE BAC
D/M #949235
RESULTS

This case having come on for hearing in this court on August 24, 2001, and this court having considered the evidence presented and the arguments and briefs of counsel Ted Vosk for the defendants, and counsel Jeff Torrey for the plaintiff, now makes the following:

I. FINDINGS OF FACT relevant to this ruling:

A. The Bellevue Police Department officers who administered the BAC in each of the above cases did so on BAC D/M # 949235 and did not record a specific temperature on the simulator solution, only that it was within +/- .2' of 34' C.

B. All of the above cases occurred post- 10/4/00 and pre- 4/20/01.

- C. On 6/27/00, the Washington State Toxicologist adopted a new protocol for the thermometer certification for use in the BAC (see attachment "A"). That protocol provided that a simulator solution thermometer would be deemed accurate if it tested within one-tenth of a degree of the reference thermometer.
- D. On 10/4/00, WSP breath test technician Trooper Kenneth Denton performed a Quality Assurance Procedure on Data Master #949235 at the Bellevue Police Department and installed a new BAC thermometer, "certified" under the 6/27/00 protocol.
- E. Based on the protocol of 6/27/00 adopted by the state toxicologist, and the installation of a new thermometer on the BAC at the Bellevue Police Department on 10/4/00, it is not possible to determine whether the simulator solution temperature on each of the BAC results in these cases was 34' centigrade, plus or minus .2 degrees centigrade.

II. ISSUES

- A. Can the City of Bellevue establish the foundational requirements necessary for admissibility at trial of the BAC results from breath tests administered on Data Master #949235 post- October 4, 2000, under the "*per se*" prong (RCW 46.61.502(l)(a)) of the DUI statute?
- B. Can the City of Bellevue establish the foundational requirements necessary for admissibility at trial of the BAC results from breath tests administered on Data Master #949235 post-October 4, 2000, under the "under the influence" prong (RCW 46.61.502(l)(b)) of the DUI statute?

III. ANALYSIS

A. Foundational Requirements for Admissibility at Trial of the BAC Results Under the “per se” Prong of the DUI Statute, RCW 46.61.502(l)(a)

RCW 46.61.502(l)(a) provides:

A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state and the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood made under RCW 46.61.506.

RCW 46.61.506 provides, in pertinent part:

(1) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person’s alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

(3) Analysis of the person’s blood or breath to be considered valid under the provisions of this section or 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(WAC) 448-13-040 provides, in pertinent part:

The following method for performing a breath test is approved by the state toxicologist pursuant to WAC 448-13-130 and includes the following safeguards to be observed by the operator prior to the test being determined.....

The temperature of the solution in the simulator prior to the start of the test must be thirty-four degrees centigrade plus or minus 0.2 degrees centigrade.....

Emphasis added.

WAC 448-13-060 provides, in pertinent part:

A test shall be a valid test and so certified, if the requirements of WAC 448-13-40, 448-13-050 and 448-13-055 are met.....

The analysis of the requirements of RCW 46.61.502(a) is, therefore, relatively straightforward. 46.61.502(l)(a) requires compliance with RCW 46.61.506. RCW 46.61.506(3) requires that procedures used in analyzing the person's blood or breath be performed according to methods approved by the state toxicologist. The requirements for the administration of a breath test in Washington are governed, in part, by WAC 448-13-040, which was promulgated by the state toxicologist. WAC 448-13-040 provides that "the temperature of the solution in the simulator prior to the start of the test *must be* thirty-four degrees centigrade plus or minus 0.2 degrees centigrade"(emphasis added).

In *State v. Garrett*, 80 Wn. App 651, 910 P.2d 552 (1996), the court held that although the State was able to demonstrate that the blood sample obtained from the defendant pursuant to a DUI investigation was unadulterated and although the State established a prima facie case that the sample obtained was scientifically valid, the failure of the state to comply with the mandatory WAC language of 448-14-020 ("Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme...") rendered the results inadmissible at trial. The court noted that

We are mindful of the State's concern that strict compliance with the administrative regulation may, on occasion, exclude accurate and relevant blood evidence. But we may not attribute to the words used in RCW 46.61.506 and WAC 448-14-020(3)(b) a meaning different than that which was obviously intended.

Garrett at 654.

In *Children's Hospital v. Department of Health*, 95 Wn.App 858, 975 P.2d 567 (1999), the court ruled that it would give no deference to an agency's interpretation of legislation where the language of the statute is unambiguous. *Children's Hospital* at 869. The court in that case also cited the case of *State v. McGinty*, 80 Wn. App. 157, 160, 906 P.2d 1006 (1995) for the rule that rules of statutory construction apply equally to administrative rules and regulations, and that statutes must be given a rational, sensible construction. Statutes must be read as a whole, and all parts harmonized, but statutory language that is plain and unambiguous according to its ordinary sense is not subject to judicial interpretation. *State v. Thorne*, 129 Wn.2d 736, 763, 921 P.2d 736 (1996), When the language of a statute is not ambiguous, it is unnecessary to engage in statutory construction since the court should assume that the legislature meant exactly what it said. *State v. McGraw*, 127 Wn.2d 281, 898 P.2d 838 (1995).

In the case before us, the clear language of WAC 448-14-030 is that the temperature of the simulator solution at the start of the test must be thirty-four degrees centigrade, plus or minus 0.2 degrees centigrade. The word "must" is clear and unequivocal and is therefore not subject to judicial interpretation. The court does not engage in statutory construction since it assumes the toxicologist meant exactly what he said when he originally promulgated this WAC requirement. This court does not recognize the legal authority of the Washington State Toxicologist to promulgate a new "protocol" in June of 2000, which attempted to amend a WAC provision which was clear on its face. As in *Garrett, supra*, the fact that the City is able to establish that the BAC reading is accurate, by either a prima facie standard, or as stipulated to and agreed by the parties, is not relevant, since the failure to comply with a mandatory WAC requirement renders the results of the test inadmissible. See *State v. Watson*, 51 Wn.App. 947, 949, 756 P.2d 177 (1988) ("However, before such (BAC) evidence is presented, the State must first establish the prima facie A(sic)missibility of the Breathalyzer results by demonstrating compliance with AC 448-12-015. The State failed to do so and the Breathalyzer results should not have been admitted.")

In the cases before this court, the City of Bellevue has not demonstrated that the BAC tests administered in each of these cases complied with the mandatory WAC 448-13-040 foundational requirement of the required simulator solution temperature and the results are therefore suppressed as evidence under the "per se" prong of the DUI statute, RCW 46.61.502(1)(a).

B. Foundational Requirements for the Admissibility at Trial of the BAC Results
Under the “under the influence” Prong of the DUI statute, RCW
46.61.502(l)(b)

RCW 46.61.502(l)(b) provides, in pertinent part:

A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state while the person is under the influence of or affected by intoxicating liquor or any drug.

RCW 46.61.502(4) provides that:

Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (l)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (l)(b) or (c) of this section.

Analyzing 46.61.502(4), the first part of the sentence refers only to subsection (l)(a) of the statute, and is not relevant in the analysis of a violation of subsection (l)(b), the “under the influence” prong. The second part of the sentence (“...and in any case in which...”) refers to any BAC reading higher than 0.00 and refers only to subsections (l)(b) and subsection (l)(c) of 46.61.502. The second part of 46.61.502(4) specifically provides that any breath or any blood sample analyses which show any alcohol level whatsoever (“higher than 0.00”) may be used in a prosecution for an individual under RCW 46.61.502(l)(b), the “under the influence” prong of that statute. There is no reference to any requirement in 46.61.502(l)(b) that the provisions of 46.61.506 apply to it.

RCW 46.61.506(3), however, provides in pertinent part the following:

Analysis of the person’s blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose.

Although RCW 46.61.502(4) allows for a blood or breath analysis over 0.00 to be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug, RCW 46.61.506(3) adds the additional requirement to that proffered evidence that the analysis of it will only be considered “valid” if performed according to methods approved by the state toxicologist, in other words, WAC 448-13-040 *et seq.* Failure to establish a proper foundation that the blood or breath analysis was done in accordance with the WAC’s, therefore, necessarily means that the test result will not be considered valid under 46.61.506(3). 46.61.506(3) specifically by its own terms governs all breath or blood tests used in cases charging 46.61.502 or 46.61.504.

There are two Washington cases which analyze the admissibility of blood or breath evidence which was not obtained in compliance with the WAC requirements of the state toxicologist: *State v. Donahue*, 105 Wn.App. 67(2001) and *State v. Curran*, 116 Wn.2d 174, 804 P.2d 558 (1991). In *Curran*, the defendant was charged with two counts of vehicular homicide under RCW 46.61.520 and two blood draws were taken from him. The defendant was charged under the “under the influence” prong of the vehicular homicide statute. The court relied on RCW 46.61.506(2) to allow evidence of a blood draw as “other competent evidence”, which was specifically allowed for by the provisions of that statute. *Curran*, however, was not subject to the restrictions of RCW 46.61.506(3) since *Curran* involved a charge of vehicular homicide, not driving under the influence, and 46.61.506(3) refers specifically to its requirements as applying only to 46.61.502 and .504. In addition, the *Curran* case, decided in 1991, never considered the impact of the requirements of 46.61.506(3) on the admissibility of the breath evidence.

In *State v. Donahue*, *supra*, the defendant was charged with one count of vehicular homicide which occurred in Washington, but which resulted in a blood sample being taken from him in Oregon. The blood sample was taken as a medical test at the hospital and was not taken in accordance with Washington state statute and WAC requirements which were approved by the Washington State Toxicologist. The court allowed the evidence to be admitted at trial, noting that although the “per se” violation of 46.61.502(1)(a) refers to specific standards or methods that must be complied with, 46.61.502(1)(b) does not contain that same requirement of specific standards or methods that must be complied with. The *Donahue* court analyzed the issue created by the language in 46.61.506(3) and in response to defendant Donahue’s argument

that although 46.61.502(l)(b) does not refer to the standards in 46.61.506(3), those standards should apply nonetheless, the court ruled that Donahue's sample was a "medical (blood) draw", done for treatment purposes at a hospital, as opposed to a "legal draw" done for purposes of criminal prosecution. The court in *Donahue* did not find that the requirements of 46.61.506(3) applied to 46.61.502(l)(b) because the blood sample obtained from the defendant was a part of a *medical* procedure, not a criminal investigation. In the case before this court, each of the breath tests was obtained pursuant to a criminal investigation and therefore the requirements of RCW 46.61.506(3) would apply, even if the prong that the City was proceeding under is the 46.61.502(l)(b) ("under the influence") prong.

IV. CONCLUSION AND RULING

This court finds that the foundational requirements of WAC 448-03-040 must be met for both the "per se" and the "under the influence" prongs of RCW 46.61.502 in order for the BAC in each of these cases to be admitted at trial. Since the City of Bellevue has been unable to meet the WAC foundational requirements by showing that the temperature of the simulator solution in each of these cases was thirty-four degrees centigrade, plus or minus 0.2 degrees centigrade, and since this court does not recognize the legal authority of the Washington State Toxicologist to issue new "protocols" which attempt to amend or modify a WAC which is clear on its face, as he did in June of 2000, the BAC result in each of these cases is suppressed.

Judge Linda K. Jacke
September 11, 2001
