

**IN THE KING COUNTY DISTRICT COURT
RENTON DIVISION, STATE OF WASHINGTON**

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 vs.)
)
SEAN SACKETT)
 Defendant.)

NO. C427506
 AMENDED¹
MEMORANDUM OPINION
[ACETONE CHALLENGE]

I. AGREED STIPULATION OF FACTS:

1. WAC 448-13-110 requires that every DataMaster undergo a Quality Assurance Procedure (QAP) at least once a year in order for the machine to be approved for use in this state.
2. The protocols governing the performance of the QAP are found in the Breath Test Policy and Procedure Manual.
3. The QAP requires a series of tests to be performed on the DataMaster to ensure that it is functioning as designed.
4. Part of the QAP requires the technician to perform a series of tests using simulator solutions that had predetermined concentrations of ethanol and water (i.e., .04, .08, .10, and .15g/210 L).
5. Later in the QAP, the technician is required to run an “Interferent Detector Test”. The protocol in effect prior to May 8, 2002, stated that this test was to be performed by the technician “add[ing] approximately 0.5 ml of acetone to the same 0.08 g/210L solution used in steps C through J”. “Steps C through J” are the calibration tests noted in paragraph 4 above. [On May 2, 2002, new protocols were adopted which put into writing the actual practice of the Breath Test Section (in King County). The new protocol states that the technician is to “add approximately 0.5 ml of acetone to a simulator containing an approximate 0.08g/210L solution.”].
6. Instead of following the written protocol requiring use of the same simulator solution utilized in the earlier .08 calibration test, King County technicians were trained to make a separate simulator solution containing a .08 ethanol/water concentration along with approximately .5 ml of acetone. This solution was then used to perform the “Interferent Detector Test”.
7. Although not in conformance with the required protocol, the State’s witnesses would testify that the procedure utilized by the Breath Test Section in King County was scientifically sound.

¹ This Amended Order is issued to clarify that the Order of Suppression would cover all BAC tests conducted prior to May 8, 2002, when the new protocols were adopted, AND until a NEW QAP was performed on the particular machine consistent with the new protocols. This Order further corrects the reference to WAC 448-13-050 and .060 to reflect the current WACs. REM.

8. The State's witnesses would also testify that the procedure utilized by the Breath Test Section in King County resulted in the calibrated DataMaster instruments accurately detecting interferent as designed.

II. APPLICABLE STATUTES/WACs: [Emphasis supplied].

1. RCW 46.61.506(3): 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. 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 analysis, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

2. WAC 448-13-020. Approval of breath test instruments. Pursuant to RCW 46.61.506, the BAC Verifier DataMaster is *the only infrared breath test instrument approved by the state toxicologist as a device for the measurement of alcohol in a person's breath.* A simulator filled with a certified simulator solution will be attached to each instrument to provide a known external standard as defined in WAC 448-13-030(13). The simulator used must be on the National Highway Traffic Safety Administration (NHTSA) conforming products list. Any agency, group, or individual seeking approval or certification from the state toxicologist for the use of other breath test instruments for evidential breath testing programs in the state of Washington should contact the state toxicologist at the address given in WAC 448-13-210.

3. WAC 448-13-050: Test defined. The test of a person's breath for alcohol concentration using the DataMaster shall consist of the person insufflating end-expiratory air samples at least twice into the instrument, sufficient to allow two separate measurements. There will be sufficient time between the provision of each sample to permit the instrument to measure each sample individually. The two valid breath samples will constitute one test.

The DataMaster will perform this test according to the following protocol when being employed to measure an individual's breath alcohol concentration. *Any test not performed according to the following protocol is not a valid test. Successful compliance with each step of this protocol is determined from an inspection of the breath test document.* These steps are necessary to ensure accuracy, precision, and confidence in each test.

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| Step 1. | Data Entry. |
| Step 2. | Blank test with a result of .000. |
| Step 3. | Internal standard verified. |
| Step 4. | First breath sample provided by subject. |
| Step 5. | Blank test with a result of .000. |
| Step 6. | External Standard simulator solution test. The result of this test must be between .072 and .088 inclusive. |
| Step 7. | Blank test with a result of .000. |
| Step 8. | Second breath sample provided by subject. |
| Step 9. | Blank test with a result of .000. |
| Step 10. | Printout of results on a breath test document. |

4. WAC 448-13-060: Validity and certification of test results. A test shall be a valid test and so certified, if the requirements of WAC 448-13-040, 448-13-050 and 448-13-055 are met, and in addition the following criteria for precision and accuracy, *as determined solely from the breath test document*, are met:

- (1) The internal standard test results in the message "verified."
- (2) In order to be valid, two breath samples must agree to within plus or minus ten percent of the their mean. This shall be determined as follows:
 - (a) The breath test results shall be reported, truncated to three decimal places.

- (b) The mean of the two breath test results shall be calculated and rounded to four decimal points.
 - [c] The lower acceptable limit shall be determined by multiplying the above mean by 0.9 and truncating to three decimal places.
 - (d) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.
 - (e) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.
- (3) The simulator external standard result lies between .072 to .088 inclusive.
 - (4) All four blank tests give results of .000.

If these criteria are met, then these and no other factors are necessary to indicate the proper working order of the instrument, and so certify it, at the time of the breath test.

(5). These criteria have changed over time, and the criteria applied to determine the validity of any test and so certify it, should be those provisions of the Washington Administrative Code in effect at the time the test is administered.

5. WAC 448-13-110: Quality assurance program. Technicians authorized per WAC 448-13-170 and 448-13-180 shall carry out on a regular periodic basis a quality assurance program which shall include recalibration, and checks of components and function of every BAC Verifier DataMaster instrument used for evidential breath testing purposes in the State of Washington. *The protocol which shall be followed for quality assurance will be that protocol currently approved and authorized by the state toxicologist pursuant to WAC 448-13-130.*

Upon successfully meeting all the requirements of the quality assurance program, the instrument is approved by the state toxicologist for use over a period of not more than one year, or until such time as one of the following operations is required: Replacement of the central processing unit (CPU) board, replacement of the infrared detector, replacement of the infrared detector block, replacement of the infrared detector board, replacement or updating of the software, disassembly and then reassembly of the sample chamber, or recalibration. ON successful completion of the quality assurance procedure the instrument is approved for use for a further one-year period. As the quality assurance procedure includes all the elements of the procedure previously known as "certification," the use of BAC Verifier DataMaster Certification documents described in CrRLJ 6.13 is recommended by the state toxicologist to indicate compliance with this quality assurance program.

6. WAC 448-13-130: Review, approval, and authorization of protocols of procedures and methods by the state toxicologist. *The state toxicologist shall review, approve, and authorize such protocols of procedures and methods (of his own promulgation or submitted to him by outside agencies or individuals) required in the administration of the breath test program. Such review, approval, and authorization will be so signified by a signed statement attached to each protocol, and kept on file in the office of the state toxicologist. These protocols will be updated as necessary to maintain the quality of the breath test program in light of new findings in the scientific literature or from peer discussion, or the availability of superior equipment or services. Information concerning currently approved protocols can be obtained on application to the office of the state toxicologist.*

7. POLICY AND PROCEDURE MANUAL/QAP (I).

- "C. Perform steps D-M below for each of the four solution levels (0.04, 0.08, 0.10, 0.15).
- D. Fill simulator jar with certified ethanol solution prepared and tested at the State Toxicology Laboratory. Attach jar to simulator and turn on simulator.
- E. Set alcohol display to "ON"
- F. Set the supervisory test option for ten tests.
- G. Set keyboard and data collection to "OFF".
- H. Simulator check to "OFF".
- I. Sample Check to "OFF".

- J. Verify that the simulators used have thermometers which have been certified according to the Simulator Thermometer Certification Policy and Protocol within one year. Verify that the thermometer indicates that the temperature of the simulator solution is 34 degrees plus or minus 0.02 degrees centigrade. Initial the front side of the Breath Test Document.

O. Interferant Detector Test.

1. Add approximately 0.5 ml of acetone to the same 0.08 g/210 L. solution used in Steps C through J above. The acetone is to be added after the ten supervisory tests have been completed.
2. Verify the simulator thermometer indicates the temperature is 34 degrees plus or minus 0.02 degrees centigrade, and conduct one supervisory test.
3. Verify that the instrument displays "INTERFERENCE DETECTED".
4. Push copy key and retain printout copy."

III. ISSUE PRESENTED:

Does the failure to precisely follow the steps outlined in the Policy and Procedure Manual in the conducting of the Quality Assurance Test invalidate the "certification" of the BAC Verifier DataMaster machine and make the results of any test inadmissible in court, particularly in view of the concession [for purposes of this hearing] that the procedure utilized by the King County Breath Test Section was scientifically sound?

IV. MEMORANDUM OPINION:

The Washington State Legislature directed the Washington State Toxicologist to approve methods for testing blood and breath samples used in DUI prosecutions in RCW 46.61.506 (3), cited above. Pursuant to this mandate, the State Toxicologist enacted chapter 448-13 of the Washington Administrative Code governing the administration of the evidential breath test program. WAC 448-13-020, the Toxicologist named the BAC Verifier DataMaster as "the only breath test instrument approved by the state toxicologist as a device for the measurement of alcohol in a person's breath." The succeeding WACs set up the process and procedure by which the machine is to be maintained, qualified and certified.

Defendant Sackett challenges the admissibility of the breath test results on the grounds that the machine was not validity certified for use as an evidential breath testing device pursuant to the Washington Administrative Code because the breath test technicians in King County did not precisely follow the steps and procedures outlined by the State Toxicologist as part of the Quality Assurance Procedure. The State responds that the deviation which occurred was insignificant and that the procedure actually followed was scientifically sound---test results were not affected in the slightest by such deviation. Specifically at issue, then, is whether the Policy and Procedures Manual, and its directives, have the force of law and become binding upon the technicians as a absolutely required method of certifying the DataMaster machines.

As stated in this Court's Thermometer ruling:

"It is conceded by both parties that the issue before the court is NOT the scientific "correctness" of the individual defendant's BAC test result, but, rather, the admissibility of such test result under the WACs. There is no

suggestion that the “inaccuracy” in the simulator solution thermometer in any way affects the subject sample.” [*State v. Mitchell*, King County District Court #C-0378716, April 13, 2001].

The same would appear to apply to the case at bar---State’s witnesses would testify that the procedure utilized by the Breath Testing Section in King County was scientifically sound. Stipulated Findings #7.

WAC 448-13-050, 448-13-060, 448-13-110, and 448-13-130 set up an inherent internal conflict when faced with this challenge. WAC 448-13-050 provides that “any test not performed according to the following protocol is not a valid test.” “Compliance with each step outlined is “determined from an inspection of the breath test document”. WAC 448-13-060 provided that a test will be completely certified if WAC 448-13-040 and –050 are followed, and the listed criteria for precision and accuracy are met---*as determined solely from the breath test document*. Contrast that with WAC 448-13-110 which sets up the Quality Assurance Program and provides that the QAP will follow the “protocol currently approved and authorized by the state toxicologist.” WAC 448-13-130 then establishes the authority of the State Toxicologist to review, approve, and authorize such “protocols of procedures and methods *required* in the administration of the breath test program.” The language of WAC 448-13-110 which provides that the protocol which *shall* be followed for quality assurance is instructive—it is impossible to read these provisions to ignore the precise requirements set forth therein. It is this Court’s feeling that one must construe all of these provisions together---that means, the Court submits, that the QAP is incorporated into the requirements of WAC 448-13-050 and –060.

Washington case law has consistently held that strict compliance with the Code is required as a prerequisite to admissibility of breath test results in this state. Although most of the earlier caselaw in this area involved the Breathalyzer machine, the principles of law they established apply equally to the DataMaster machine as well. See *State v. Baker*, 56 Wn.2d 860 (1960)(test suppressed when State failed to establish that 15-minute observation period occurred/14 minutes was not enough); *State v. Ryan*, 43 Wn.App. 488 (1986)(test suppressed when State failed to establish that the ampoule was certified as required by WAC, despite no effect on results); *State v. Watson*, 51 Wn.App. 947 (1988)(test suppressed based on State’s noncompliance with the administrative requirements for checking the Breathalyzer machine, notwithstanding that machine was checked nine days later and no obvious effect on test results); *State v. Garrett*, 80 Wn.App. 651 (1996)(blood test suppressed when State failed to establish anticoagulant present in sample tube as required by WACs, despite no effect on results); and *State v. Bosio*, 107 Wn.App. 462 (2001)(blood test suppressed when State failed to establish enzyme poison present as required by WACs, despite no effect on results). In each listed case, regardless of whether the breath or blood test was affected, the Court rejected admissibility of the test results unless the *procedures* required by WAC were followed to the letter.

In *State v. Wittenbarger*, 124 Wn.2d 467 (1994), the Court addressed application of *both* the WACs and the QAP, stating that, in order to be admissible, the State must follow the requirements of WAC 448-13-050, and –060, AND the QAP:

“In addition to the breath test protocol, the State Toxicologist has developed a quality assurance protocol (QAP) designed to ensure the DataMasters are maintained in proper working order on a regular basis. SEE WAV 448-13-110.”

The obvious import of this inclusion was to include the QAP as part of the process by which the DataMaster was certified.

In State v. Garrett, 80 Wn.App. 651 (1996), the Court of Appeals addressed a very similar situation involving the admissibility of a blood sample under WAC 448-14-020(3)(b) where, notwithstanding that the vial used to collect defendant's blood sample did not contain an anticoagulant, the state argued admissibility on the basis that it could present a prima facie case that the sample was free of adulteration. The Court rejected that proposition, holding:

"The language of WAC 448-14-020(3)(b) is mandatory. Therefore, because the vial used to collect [defendant's] blood sample did not contain an anticoagulant, the trial court properly vacated the conviction."

"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." [Citations omitted].

The Court is mindful of the ruling made in Smith v. Department of Licensing, 88 Wn.App. 875 (1997), wherein the Court held:

"Several WAC provisions relate to the use and proper functioning of the BAC equipment. One group of requirements deals with the proper administration of the test. See WAC 448-13-040, -050, -060, -150. Another set relates to the periodic testing of the machine by a qualified technician and to oversight of the simulator solution used in the machine. See WAC 448-13-110, -170, -080, and -160. Smith contends that a showing of compliance with the latter set of WACs is a foundational requirement for admission of breath test results.

"DOL showed compliance with the WACs related to the administration of the BAC test. The officiating trooper was a certified operator of the equipment. WAC 448-13-150. The trooper observed Smith for 15 minutes before administering the test and ascertained that the "simulator solution" was the correct temperature. WAC 448-13-040. The trooper took two separate air samples, followed the 10-step testing protocol set forth in WAC 448-13-050, and did not note any interference in the breath test. WAC 448-13-055. Finally, he determined that the criteria set forth in WAC 448-13-060 "for precision and accuracy, as determined solely from the breath test document," were met.

"Smith contends, however, that DOL had an obligation to introduce additional evidence related to the maintenance of the BAC equipment. See WAC 448-13-080 (the state toxicologist shall prepare "external standard simulator solutions" so that they will give a reading between .090 and .110 when tested); WAC 448-13-110 (state toxicologist to implement quality assurance program for the inspection, recalibration, and maintenance of every DataMaster machine at least once a year); WAC 448-13-160 (the state toxicologist shall certify persons to change the solutions used in the external standard simulators); and WAC 448-13-070 (state toxicologist to certify technicians to perform these inspections and maintenance). DOL contends that this showing was not necessary.

"Smith's argument ignores the clear language of WAC 448-13-060. The WAC provides, "A test shall be a valid test...if the requirements of WAC 448-13-040, 448-13-050[,] 448-13-055[,], and the criteria in WAC 448-13-060] are met." DOL produced evidence showing compliance with those requirements.

"Smith further ignores the following language at the end of WAC 448-13-060: "If these criteria are met, then these and no other factors are necessary to indicate the proper working order of the instrument..." Given this plain language, proof of

compliance with the additional WAC provisions is not a prerequisite to admission of the BAC test results. The trooper's sponsoring testimony was sufficient. As the Supreme Court emphasized in Wittenbarger: "When the [breath testing] protocols at issue here and existing Code provisions are followed, there is sufficient assurance of accuracy and reliability of the test results to allow for general admissibility of [BAC] test results ..." 124 Wn.2d at 489-90 (quoting State v. Straka, 116 Wn.2d 859, 870, 810 P.2d 888 (1991))."

Smith would appear to hold that only those WACs dealing with the proper administration of the test (WAC 448-13-040, -050, -060, and -150) are foundational requirements for admission of the BAC test results. That seems to fly in the face of all of the cited caselaw that requires strict compliance with all of the other WAC provisions.

In this regard, the State cited, by way of additional authorities submitted after the Court's hearing in this matter, State v. Kalakosky, 121 Wash.2d 525, 852 P.2d 1064 (1993) and State v. Cauthron, 120 Wash.2d 879, 846 P.2d 502 (1993). Specifically, the State quoted the following language:

"Alleged infirmities in the performance of a test usually go to the weight of the evidence, not to its admissibility. One commentator has pointed out that courts should not automatically exclude scientific evidence whenever the forensic analyst deviates from correct test protocol in any minor respect; rather the deviation would have to materially affect the test outcome to warrant exclusion. [Citations omitted]."

The difficulty, however, is that in the arena of breath testing protocols, we are dealing with a comprehensive statutory and administrative scheme rather than dealing with the simple admission of scientific evidence. Both Kalakosky and Cauthron are distinguishable. Nonetheless, the Court certainly understands the State's request that courts should not automatically exclude scientific evidence based on rather "minor" deviations in test protocols, but only when such deviations "materially affect the test outcome." The statutory scheme established here, however, sets up a different standard---one that requires strict compliance. This is especially true when the test result sets up a "per se" violation of the law.

The Court suggests that the State Toxicologist sets the standards that must be met---it is not up to the Court to craft some other set of rules if the standards are deemed inappropriate after the fact.

The Court finds that each DataMaster must meet all of the requirements of the quality assurance program as a foundational requirement for admissibility. The Quality Assurance Procedure is specifically set out in detail in the Policy and Procedures Manual, which, in turn, is specifically referenced in WAC 448-13-110 and -130. It is undisputed that the King County breath test technicians who administered the QAPs in King County did not precisely follow the required protocol---instead adding the acetone to a different solution, which was then used to complete the testing of the interferent detector. Failure to strictly comply with the State Toxicologist's written procedures means that the QAP has not been completed according to the legal requirements established by the State Toxicologist. As such, the State cannot lay a proper foundation for the BAC test results during the period of such noncompliance.

IV. CONCLUSIONS OF LAW:

Each DataMaster must meet all of the requirements of the quality assurance program as a foundational requirement for admissibility. The Quality Assurance Procedure is specifically set out in detail in the Policy and Procedures Manual, which, in turn, is specifically referenced in WAC 448-13-110 and -130. It is undisputed that the King County breath test technicians who administered the QAPs in King County did not precisely follow the required protocol--instead adding the acetone to a different solution, which was then used to complete the testing of the interferent detector. Failure to strictly comply with the State Toxicologist's written procedures means that the QAP has not been completed according to the legal requirements established by the State Toxicologist. As such, the State cannot lay a proper foundation for the BAC test results during the period of such noncompliance.

V. RULING:

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court now enters its Ruling/Order on Defendant's Motion to Suppress as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Suppress is granted. This Order will affect any BAC test conducted on or before the change in the Quality Assurance Procedures occurring on May 8, 2002, AND until a new Quality Assurance Procedure is conducted on a particular machine consistent with the new protocols adopted May 8, 2002.

DONE IN OPEN COURT this 25th day of September, 2002.

**JUDGE ROBERT E. McBETH
KING COUNTY DISTRICT COURT**