



DISTRICT COURT

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May 16, 2008

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Re: *State v. Clinton J. Jackson* Cowlitz County District Court No. C00503839
State v. Randy L. Barto Cowlitz County District Court No. C00612094
State v. Philip S. Jones Cowlitz County District Court No. C00564774
State v. Thomas A. Davidson Cowlitz County District Court No. C00596756
State v. Randolph E. Carter Cowlitz County District Court No. C00596958
State v. Andree D. Beneke Cowlitz County District Court No. 7Y5013736
State v. James H. Sanders Cowlitz County District Court No. 7Y5015753
State v. Charles B. Lamb Cowlitz County District Court No. C00610110

Counsel:

This is the court's ruling on the motions to suppress BAC results heard on February 28, 2008. For the reasons discussed below:

- The court suppresses all BAC results where the simulator solution worksheet was signed by both Ed Formoso and Ann Marie Gordon.
- The court denies the motions to suppress other BAC results.

**1. RCW 46.61.506(4) does not Impliedly Repeal RCW 46.61.506(3).
Rather, the Two Subsections Must be Read Together and Harmonized.**

To begin, the court must resolve a fundamental disagreement between the parties over the foundation for admitting BAC results.

State law defines the per se crimes of DUI, Physical Control, and Minor Driving after Consuming in terms of a person's "alcohol concentration . . . as shown by analysis of the person's breath or blood made under RCW 46.61.506." See RCW 46.61.502, 503, and 504.

RCW 46.61.506(3) has for many years been the key to admitting BAC results. Its pertinent part states as follows: "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."

In 2004 the legislature added subsection (4) to this statute. Specifically, subsection (4)(a) says this:

A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

- (i) The person who performed the test was authorized to perform such test by the state toxicologist;
- (ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;
- (iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;
- (iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;
- (v) The internal standard test resulted in the message "verified";
- (vi) The two breath samples agree to within plus or minus ten

percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

City of Fircrest v. Jensen, 158 Wn.2d 384 (2006), upheld the constitutionality of the 2004 amendment. But it did not address the relationship between an “admissible” test under subsection (4) and a “valid” test under subsection (3).

The State argues that admission of BAC results is now governed exclusively by subsection 4(a). Subsection (3), it says, only covered the actual administration of the test in the BAC room anyway, and at most it now represents merely a “best practice” standard that government workers are encouraged but not required to meet. Defendants argue that since subsection (3) is still on the books, test results must satisfy the methods prescribed by the state toxicologist.

If the state is correct, one wonders why the legislature didn’t just repeal subsection (3). It chose not to do so, but rather to graft the language of subsection (4) onto the long-existing foundation of BAC admissibility in Washington. The state’s argument assumes the 2004 amendment impliedly repealed subsection (3). Repeal by implication is of course “strongly disfavored.” *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439 (1993). The two statutory provisions are *in pari materia*, and must be construed together and harmonized if possible. *Monroe v. Soliz*, 132 Wn.2d 414 (1997).

Indeed, the state’s interpretation could lead to alarming results. Subsection (4)(a) requires the test to be “performed by any instrument approved by the state toxicologist.” Nothing in that subsection, however, requires that the instrument pass either an initial or ongoing quality assurance test. Provisions for certifying the instrument come from the methods approved by the toxicologist under subsection (3). What if the state offers a BAC result at trial but admits that the instrument was never certified, or even failed its certification? Under the state’s argument, this failure to meet a “best practice” standard would go to the weight of the result but not its admissibility.

Likewise, subsection (4)(a)(vii) requires a prima facie showing that “the simulator external standard result did lie between .072 to .088 inclusive.” But there’s no requirement that the simulator solution be prepared or tested in any particular way, or analyzed by a person with any particular credentials. Those requirements for preparation and testing all stem, again, from subsection (3) and the toxicologist’s methods approved under that subsection. What if the state’s evidence at trial is that the solution was never tested at the toxicology lab? Or that it was tested by a secretary, a custodian, a 5th-grade student on a field trip? Or that it failed the test? Or that it had expired? By the state’s interpretation, these defects wouldn’t matter, because the toxicologist’s standards under subsection (3) are merely aspirational, not mandatory.

The State Toxicologist seems intent, even after the 2004 amendment, on having the breath test protocols followed. WAC 448-16-070, adopted after passage of the 2004 law, provides for protocols “required in the administration of the breath test program.” Those protocols will be “signified by a signed statement attached to each protocol.” Indeed, the record contains many protocols adopted after the 2004 amendment, which the toxicologist approved “by my authority outlined in RCW 46.61.506.” King County Exhibits 20, 22, 91, 92, 96, etc.

It’s possible the state’s argument correctly reflects the subjective intent of legislators voting for subsection (4). However, the court must decide the issue based on the language chosen and recognized standards of statutory interpretation. If the legislature wishes to repeal subsection (3), it can do so explicitly. Since it did not do so, the court must construe the two subsections together. Accordingly, I conclude the state must make a prima facie showing of compliance with the methods approved by the toxicologist under subsection (3), except to the extent of an actual conflict with the standards of subsection (4). Specifically, the state must make a prima facie showing of compliance with the toxicologist’s protocols for the preparation and testing of the simulator solution.

2. Ed Formoso Violated the Toxicologist’s Protocols by Performing Two Sets of Tests on Simulator Solutions. The Remedy is Suppression of BAC Results.

(a) The Protocol: Each Analyst Performs One Set of Tests. The toxicologist adopted a protocol for testing simulator solutions. It provides, in part: “An individual with a valid Blood Analyst Permit, authorized by the State Toxicologist, analyzes five separate aliquots of the simulator solution, by headspace gas chromatography.” King County Exhibits 91, 93, 94.

(b) The Violation: Ed Formoso Analyzed 10 Aliquots and Performed Two Sets of Tests. As we all know now, for an extended time Ed Formoso analyzed 10 aliquots of solutions and therefore performed *two* sets of tests on a single solution. He recorded one test under his name and the other under Ann Marie Gordon’s name.

Four cases covered by these motions involve double-testing by Formoso. Looking back at the chromatograms, it’s fairly easy to track what he did. Each analyst has an individual format for identifying himself or herself in the upper right corner of the chromatogram. In the earliest case involved here, Formoso did show that he was doing the tests recorded under Gordon’s name. Thus, in solution 5016, Formoso’s identification for “his” data is:

05016
ED FORMOSO

His identification for the “Gordon” data is:

05016 – AMG
ED FORMOSO

However, the headings in later chromatograms mask Formoso’s involvement. E.g., “06030 – EF” and “06030 – AG” for solution 06030.

He always did the tests on the same day. For solutions 05016 and 06030 he used two different instruments and conducted the tests concurrently. For solutions 06048 and 07007 he used the same instrument, conducting the “EF” tests first and then the “AG” tests.

When he goofed, he did it for both “his” and “her” data – the State Patrol’s review of solution 05016 notes “No control value page for Ed Formoso” and “No control value page for Ann Gordon.” When he made a typo, that too carried over to both sets of data – the “06048 – EF” and “06048 – AG” chromatograms all say “SIMUALTOR (sic) SOLUTION” in the heading.

Formoso’s conducting two sets of tests per solution is a clear violation of protocol, which limits each analyst to one.

(c) The State’s Response: “Data is Data”. The record is replete with errors discovered within the toxicologist’s lab over the last several months. The State undertook a laborious after-the-fact process to correct many of those mistakes. However, it has done nothing to try to correct the violation caused by Formoso’s double testing. Indeed, it argues that there’s nothing to correct, since Formoso had a blood analyst permit and “data is data.”

In fairness to the State, it’s not clear what it could do to counteract Formoso’s violation. Discard “EF’s” data and recalculate? Discard “AG’s” data and recalculate? The record lacks a principled scientific rationale for discarding one set of data over another.

Additionally, the record shows that variability among analysts can affect the final results. As summarized by the defense:

One of the sources of variation in this process, and it may be a significant source, are differences that exist between analysts. That is, based on the way they perform these measurements, different analysts may consistently come up with data exhibiting different characteristics from one another. This is known as interoperator variability. If an analyst with a particular trait includes more of his test data in the worksheet than do other analysts, the final result of computations performed with this data will be skewed proportionately.

This appears to be the case with Ed Formoso. Of the 35 certifications performed by Formoso for himself and Gordon over the past 3 years, the combined CV of “their” data in 32 of those certifications was less than that reported by all of the analysts together. That’s 91% of the time. This is statistically significant (i.e. not likely the result of chance) and an indication that this particular aspect of Formoso’s data is having twice the impact (since he is testing for two) of any other analyst’s data. Solutions 06048 and 06049 exemplify this pattern clearly. In these solutions, not only is the CV significantly lower than what it is for the group as a whole, but the 10 values generated by Formoso in each are much higher than those found in the rest of the group. These two solutions are clear examples of a possibly measurable interoperator effect.

Defense memorandum at 29-30 (footnotes omitted).

Formoso’s protocol violations therefore cannot be considered inconsequential.

(d) The Remedy: Suppression. As noted above, RCW 46.61.506(3) defines valid tests as those “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.” A test not meeting those standards is not valid. Tests using a simulator solution on which Ed Formoso did double-testing violate the toxicologist’s standards and are invalid.

Had the State been able to show that the violation was harmless, and had the violation been isolated and innocent, perhaps suppression would not be necessary. However, the state has not shown the violation was harmless. Nor was the violation isolated -- Formoso’s double-testing covered many solutions over multiple years. Nor was the violation innocent – it contravened the protocol itself and Dr. Logan’s specific instructions; it involved the two supervisory-level employees most responsible for the day-to-day operations of the lab; it was deliberate; it involved false swearing; it was fraudulent.

Accordingly, BAC tests are suppressed where they used a simulator solution with a worksheet signed by both Ed Formoso and Ann Marie Gordon. In the case of Clinton J. Jackson, the charge under RCW 46.61.503 is accordingly dismissed. For the following defendants, the cases will be reset for trial without the suppressed evidence: Randy L. Barto, Philip S. Jones, Thomas A. Davidson, and Randolph E. Carter.

3. The Defendants’ Other Arguments Do Not Require Suppression of BAC Results

The remaining tests used simulator solutions 07010 or 07028.

After the problems with Gordon and Formoso came to light, the toxicology laboratory conducted an extensive review of its solution certifications and procedures. The results are embarrassing – software errors, mis-dated certifications, office staff preparing declarations that the toxicologists signed with no review for accuracy, etc. Additionally, disclosures of lab methods have raised defense challenges over issues such as outliers and weighted means.

Some of the lab errors are amenable to after-the-fact correction. These include the software errors that excluded a portion of the fourth analyst's data, and all data from analysts 13-16. The worksheet for 07010 incorrectly reported Estuardo Miranda's second result as .102 instead of .103. The same worksheet has the wrong dates for Asa Louis's and Amanda Black's testing – Louis's was April 25, 2007 instead of April 26, 2007, and Black's was April 27, 2007 instead of May 3, 2007.

The work done by Mr. Gullberg and Mr. Denton adequately shows that when these errors are corrected, the solutions still satisfy the standards of the State Toxicologist.

The toxicologist's policies on outliers and weighted means certainly provide grounds to challenge the reliability of BAC tests. However, those policies do not violate any statute, regulation, or protocol. Nor do the defense arguments rise to the level that the court could exclude the tests under ER 702 as not being helpful to the jury.

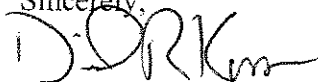
Therefore, the court denies the motion to suppress BAC results in the cases of the following defendants: Andree D. Beneke, James H. Sanders, and Charles B. Lamb. These cases will be reset for trial.

Challenges concerning the ISTD value will be addressed on a case-by-case basis.

4. Conclusion

This constitutes the Court's findings and conclusions for the motions. No further action by counsel is necessary.

Sincerely,



David R. Koss
District Court Judge