

# DOUGLAS COUNTY DISTRICT COURT

Douglas County, State of Washington  
Judith L. McCauley, Judge

July 14, 2008

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Re: State v. Schuh C515964

Gentlemen:

The motion to suppress the breath test in the above case and the joined cases presents the following undisputed facts:

1. Brian Capron, is a state toxicologist who tested the simulator solution in batch number 07045 on October 18, 2007.
2. In his test of 07045 the ISTD on the blank sample was 784.
3. The laboratory's Standard Operating Procedure states the ISTD area must be at least 900. (Head Space GC Protocol Section K Paragraph 2)
4. Mr. Capron could not remember whether he did not notice the reading was below 900 or he used his judgment that the other controls were fine and accepted the run.
5. The test results prepared by Mr. Capron were included with the test results from 13 other toxicologists to prepare the Solution Certification Database for solution 07045.

**The issue before the court is whether the breath test should be suppressed based on the failure to comply with the protocols (not WAC regulations) adopted by the State Toxicologist.**

**The applicable statute is RCW 46.61.506. This statute was amended by the legislature in 2004 in SHB 3055. The amendment was upheld by the Supreme Court in *City of Fircrest v. Jensen*, 158 Wn. 2d 384 (2006).**

**The court held in *Fircrest* at page 399:**

“The foundational requirements to establish the admissibility of breath tests were first established in *Baker*. Since *Baker*, the State has always had the initial burden to satisfy the foundational requirements. Once the results are admitted, the defendant may introduce evidence attacking their accuracy or reliability..... Similarly, SHB 3055 sets forth the requirements the State must establish, including the four modified *Baker* requirements, before the BAC test results may be admitted. Once the State makes a prima facie showing of admissibility and the court admits the evidence, the defendant may introduce evidence attacking the reliability or accuracy of the test. SHB 3055 does not alter the burden of the State in DUI cases, it is merely codifying it.”

**The court also found that the statute did not state the breath test must be admitted if a prima facie burden is met. Only that the tests are admissible. The Supreme Court found that the trial court had the discretion to determine admissibility under the rules of evidence. *Fircrest* at page 384.**

**The State argues that the Toxicologist’s protocols should not be considered the same as WAC regulations. The Court of Appeals has held in *State v. Mee Hui Kim* 134 Wn. App. 27 (2006),**

“ ....While the WAC regulations specify the general manner for conducting tests, the regulations do not describe every step of the procedure necessary to perform tests. As the Court held in *Schulze*, compliance with the regulations in chapter 448-14 WAC 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 167. In addition, the defense is always entitled to challenge the accuracy of the test results by presenting evidence that the test did not comply with the laboratory's internal written policies or procedures...”

**The Court of Appeals did note that the defendant in *Mee Hui Kim* was given the option of renewing the motion to suppress: “ Because Gordon testified that the Logbook was available at the WSTL, the court said that it would allow Kim the opportunity to renew her objection to the admissibility of the test results.” Footnote 7 indicated that the record did not show that the defendant renewed**

the motion. This notation in the case seems to imply that the decision would have been different if the Logbook showed a failure to follow procedure.

What is troubling to the court in this case is the continued attitude of the state lab to disregard adopted procedure. In October of 2007 the problems with following its own procedure had already been in the courts for several months. Most of the toxicologists had already testified about problems with other solutions and were aware that the courts were concerned about procedures within the State Crime Lab. In his deposition, Mr. Capron testified that he either did not note that the reading was under 900 or if he did note the reading he used his judgment that other readings looked fine and he just went with it.

The courts and the legislature have made it clear that it is the State Toxicologist's responsibility to establish the procedure regarding preparation of solutions and maintenance of the BAC machines. The courts have also required that the State Lab comply with the adopted procedures and if they do their test results are admissible.

To allow the admission of the test result on solution 07045 which failed to comply with adopted procedure would result in unfair prejudice to the defendants. Therefore the test results in this case and the joined cases are suppressed.

Sincerely,



JUDITH L. McCAULEY  
District Court Judge

cc: Collier (C532913, C664228)  
Sellers (CR 9379, CR 9207, C538150)  
Zanol (CR 9133)